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Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem

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NOTE

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I. INTRODUCTION

Today's tenant usually has no guarantee that the premises he rents are habitable, or that repairs will be made as they become necessary. In most jurisdictions, if his premises become unfit to live in, the tenant's only legal recourse is to abandon them, and this is hardly an adequate alternative in these times of severe housing shortages.

Much of the tenant's plight is a direct result of the outmoded law that governs the landlord-tenant relationship. This law was originally formulated in 16th century England to govern the conveyance of agrarian estates for years. Its only practical effect for the tenant was to protect him against interference from the lessor with his right to possession and enjoyment, and to set minimal requirements for the use and subsequent disposition of the land. The principles composing the bulk of landlord-tenant law remain virtually unchanged today, although the needs of today's tenant bear no resemblance to those of his feudal counterpart. This Note will examine the common law of landlord-tenant, the statutory inroads into the common law, and some recent cases that have radically altered the common law.

II. COMMON LAW

Although landlord-tenant law has been largely formulated on principles of real property, originally the lessee's rights were contractual.[1] Prior to the 16th century, an English lessee's property interest was labeled personal rather than real.[2] He was given scant protection in the enjoyment of his property and was afforded no remedy against ejectors. The lessee had possession but not seisen, and his interest descended as personal property to his heirs. By the 16th century, however, the lease had been recognized as a real property conveyance and afforded the lessee rights superior to those he had in contract. He was able to retain possession against ejection,

[1] 1 AMERICAN LAW OF PROPERTY § 3.11, at 202 (A.J. Casner ed. 1952).

[2] *Id.* § 3.1, at 176. Real property classification was limited to estates in fee and estates for life.

thus protecting his property interest from interference by third persons. This remedy gave him a possessory interest in the land; the lessee for years possessed the same rights against ejectors as the owner of any other estate in land.[3] In America, the lease was also treated as a conveyance of land, and thus the courts adopted real property principles to settle conflicting interests between lessor and lessee.[4]

Initially, lessees were interested in the use of land for agricultural purposes. Lease agreements provided that in exchange for the right to use the land, the tenant was obliged to pay rent.[5] If he defaulted in his rent obligation, he relinquished possession. Subsequently, lessees became more and more interested in the use of buildings on the land than in use of the land itself. As a consequence of this new development, the parties began to exchange convenants that placed limitations on use of the land and the tenant's right to transfer, and governed the time and manner of paying rent. Also exchanged were covenants allocating responsibility for the repair of defects in the property and establishing liabilities for the failure to comply with any covenant. An instrument containing covenants of this sort was more than just a grant of an estate in land that could be adequately governed by property law;[6] it required an application of contract law. Thus, landlord-tenant law became a "hermaphrodite" or combination of property and contract law.[7] The courts, however, still considered the land of primary importance; the covenants or contractual agreements specifying rights and duties were merely incidental to the interest in land. The courts considered these covenants so incidental that they held them independent of the land.[8] Thus, a tenant could not refuse to pay rent because of a

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[3] Yet the lessee's interests continued to be labeled personal property, a chattel real. This was primarily because of the desire to continue to apply rules of testamentary and intestate succession to his interests in the land. *See* Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960).

[4] *Id.* at 1280.

[5] Quinn & Phillips, *Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227-28 (1969).

[6] Lesar, *supra* note 3, at 1281.

[7] 3 G. THOMPSON, REAL PROPERTY § 1110, at 377 (J. Grimes repl. ed. 1959).

[8] *See, e.g.*, Stewart v. Childs Co., 86 N.J.L. 648, 92 A. 392 (Ct. Err. & App. 1914). These independent covenants have been likened to a two level relationship. The first or basic level entitled the tenant to possession in return for rent. The second or less important level entitled the tenant to services from the landlord. Covenants on the first level were not reciprocal with covenants on the second level. The tenant had to pay the full rent as long as he possessed the premises (level one), even though the landlord failed miserably in the delivery of services (level two). Quinn & Phillips, *supra* note 5, at 233-34.

landlord's failure to repair.[9] The emphasis on the land itself had entrenched landlord-tenant law in rigid property law concepts.

Since the lessee was a purchaser of an estate in land, he was subject to the strict property rule of caveat emptor — let the buyer beware. Under the rule of caveat emptor, the lessor did not warrant that property was fit for occupation or suitable for the purpose leased.[10] The lessee was obliged to thoroughly inspect the premises before accepting them. If he had no opportunity to inspect, he was expected to secure an express warranty of their habitability from the lessor before entering into the lease. If he failed to do so, he had no right to terminate the lease because of the unsatisfactory condition of the premises.

The crippling effect that caveat emptor often had on tenants gave rise to several exceptions to the rule. The first was known as the "furnished house" rule. This rule applied to the leasing of furnished premises for a short term when the tenant required immediate occupancy. The lessor in such a case was held to have given an implied warranty that the leased premises were suitable for occupancy at the time the lease was executed.[11] A second deviation from the rule of caveat emptor occurred when the lessee was restricted to a particular use of the premises and had accepted the lease before the premises were completely constructed or altered. Here again, the courts held that the lessor had warranted the fitness of the premises for the leased purpose.[12] A third exception required the lessor to disclose any known latent defects not generally discoverable by the lessee.[13] The courts' reasoning behind all of these exceptions was that the tenant lacked sufficient opportunity to inspect the property at the time he entered into the lease.[14]

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[9] Another rationale offered for this early development was that property law concepts were fixed before the courts had developed the concept of mutual dependency in contracts. 6 S. WILLISTON, CONTRACTS § 890, at 587-88 (3d ed. W. Jaeger 1962). *See also* 3 G. THOMPSON, *supra* note 7, at 377.

[10] 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952).

[11] *See, e.g.*, Smith v. Marrable, 11 M. & W. 6, 152 Eng. Rep. 693 (Ex. 1843). The principal American case is Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892) (uninhabitable beach house for one season). The exception was strictly limited to the condition of the premises at the beginning of the lease; it did not cover defects arising thereafter. Davenport v. Squibb, 300 Mass. 629, 70 N.E.2d 793 (1947).

[12] *See, e.g.*, Woolford v. Electric Appliances, 24 Cal. App. 2d 385, 75 P.2d 112 (Dist. Ct. App. 1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930).

[13] *See, e.g.*, Minor v. Sharon, 112 Mass. 477 (1873); Ryan v. State, 192 Misc. 408, 77 N.Y.S.2d 764 (Ct. Cl. 1948).

[14] *See, e.g.*, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). *See also* Skil-

Generally, the lessor was under no obligation to make property repairs.[15] In fact, the tenant was required to make any minor repairs, this obligation stemming from his duty to return the premises in substantially the same condition as he received them.[16] The repairs had to be made at the tenant's own expense, and failure to repair left him liable to the lessor for damages. The tenant was under no obligation, however, to correct defects existing at the commencement of the lease, and was generally not required to rebuild or restore a building destroyed by fire or other casualty.[17]

There were also exceptions to the landlord's immunity in the area of property repair. The landlord was responsible for maintaining the ways and appurtenances common to the tenants.[18] These areas were under the landlord's "control," and since no one tenant was responsible for their maintenance (each having access to them), the courts reasoned that the landlord was answerable for their safety and usability. A second exception provided that the landlord was responsible for preserving land set aside for public use.[19] And of course the landlord was responsible for making repairs whenever he had expressly covenanted to do so. But even then, his duty to repair was subject to a condition precedent that the tenant notify him of the need for repair, for the lessor had no obligation to inspect the premises for defects once the lease was signed.[20]

The only covenant implied by the mere relationship of landlord and tenant was the covenant of quiet enjoyment.[21] This covenant provided that the landlord would not interfere with the tenant's right to possession. In return for paying rent, the tenant was protected from interference by the lessor, those in privity to the lessor, or anyone claiming paramount title to the lessor. If the lessor breached his covenant of quiet enjoyment, the tenant was entitled to

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lern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387, 393 (1967).

15 1 AMERICAN LAW OF PROPERTY § 3.78, at 346 (A.J. Casner ed. 1952).

16 *See, e.g.*, Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N.W. 738 (1899).

17 Such destruction, though, did not relieve the tenant of his obligation to pay rent for the remainder of the lease term. *See* Fowler v. Bott, 6 Mass. 64 (1809). *Contra*, Graves v. Berden, 26 N.Y. 498 (1863).

18 *See, e.g.*, Kay v. Cain, 154 F.2d 305 (D.C. Cir. 1946). The rule was later extended to operative fixtures. Gladden v. Walker & Dunlop, Inc., 168 F.2d 321 (D.C. Cir. 1948) (landlord responsible for lighting common ways and taking reasonable care of plumbing, heating, and electrical systems).

19 *See, e.g.*, Johnson v. Zemel, 109 N.J.L. 197, 160 A. 356 (Sup. Ct. 1932).

20 *See, e.g.*, Stumph v. Leland, 242 Mass. 168, 136 N.E. 399 (1922).

21 1 AMERICAN LAW OF PROPERTY § 3.47, at 271-72 (A.J. Casner ed. 1952).

exercise various remedies, such as actions for trespass and ejectment, and could recover damages.

The most severe violation of the tenant's possessory rights was eviction before the lease expired. Although any interference by the landlord with the tenant's possessory rights was a breach of the covenant of quiet enjoyment, the tenant could only terminate his lease and remaining rent obligation if he was evicted. In spite of a breach of quiet enjoyment, the tenant had to continue paying rent as long as he remained on the premises; he was not permitted to continue in possession and pay nothing for the use of the property.[22] The earliest cases required that there be an actual physical eviction, but courts eventually recognized that the landlord could make the living conditions so unbearable without actually evicting the tenant that the tenant would be forced to abandon the premises. In such a situation, the courts ruled that the tenant should have the same remedies he would have if he had been actually evicted. This became known as the doctrine of constructive eviction.[23]

Several factors had to be present before the doctrine of constructive eviction could be employed. In most of the early cases, it was necessary that the landlord have an intention either to evict the tenant or to deprive him of the enjoyment of his property.[24] There also had to be some act or omission by the landlord that actually interfered with the tenant's enjoyment. Courts were divided on the requisite extent of the act or omission,[25] but they agreed that in order for the tenant to claim a constructive eviction he had to abandon

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[22] *Id.* § 3.50, at 277-79.

[23] One of the earliest and most often cited cases was Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826). In an action for rent, the defendant argued that he was forced to abandon the premises because the landlord had leased rooms adjacent to his to tenants who used their holdings for immoral purposes and created disturbances that prevented him from sleeping. The court held that he could interpose the defense of ejectment even though he had not been physically evicted.

[24] *See, e.g.*, Stewart v. Childs Co., 86 N.J.L. 648, 92 A. 392 (Ct. Err. & App. 1914). The original intent requirement has been liberalized by later judicial decisions. *See* Gibbons v. Hoefeld, 299 Ill. 455, 132 N.E. 425 (1921) (vital fact is not intent, but the amount of interference with tenant's enjoyment); Laffey v. Woodhall, 256 Ill. App. 325 (1930) (intentional act sufficient even though no intention to evict); Hotel Marion Co. v. Walters, 77 Ore. 426, 150 P. 865 (1915) (intent immaterial); Buchanan v. Orange, 118 Va. 511, 88 S.E. 52 (1916) (intent imputed from fact that tenant was forced to leave).

[25] Some courts have allowed constructive eviction only when the landlord has carried out an act of a permanent character with the intention of depriving the tenant of his enjoyment. *See, e.g.*, Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938). Other courts have required that there be a willful refusal of the landlord to maintain the premises or such negligent performance as to render the premises unusable. *See, e.g.*, Gibbon v. Hoefeld, 299 Ill. 455, 132 N.E. 425 (1921); Hannan v. Harper, 189 Wis. 588, 208 N.W. 255 (1926).

the premises within a reasonable time after the conditions requiring his leaving arose.[26] Abandonment was required to prevent the tenant from remaining in possession without paying rent. It seemed illogical to the great majority of courts to allow a tenant to claim unhabitability while continuing to live on the premises.

But where a tenant was actually evicted from part of his premises through an act or omission of the landlord or his agent, some courts allowed him to continue to live in the habitable portion of the premises without paying rent.[27] The entire rent was abated on the theory that the landlord could not apportion his own wrong.[28] If the tenant was partially evicted by one holding paramont title, the rent was apportioned in accordance with the severity of the eviction.[29]

The obvious imbalance in the landlord-tenant relationship and the apparent judicial failure to keep pace with the changing economic and social structure brought many legislatures into the landlord-tenant area. The various legislative responses will be examined in the next section.

III. Statutory Development

Prior to the turn of the 20th century, most housing laws were concerned only with the preservation of buildings.[30] The first modern laws were enacted for the big cities and were described as an "exercise in paternalism."[31] These housing codes were aimed at limiting the spread of communicable diseases and preventing buildings, especially tenement houses, from falling into such disrepair that they became nuisances. They set up standards for building mainte-

[26] *See, e.g.*, Chelton Ave. Bldg. Corp. v. Mayer, 316 Pa. 228, 172 A. 675 (1934).

[27] *See, e.g.*, Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917); Christopher v. Austin, 11 N.Y. 216 (1854); Kusche v. Sabin, 6 N.Y.S.2d 771 (New Rochelle City Ct. 1938). *See also* Barash v. Pennsylvania Terminal Real Estate Corp., 31 App. Div. 2d 342, 298 N.Y.S.2d 153 (1969), where the court held that the landlord's breach of a covenant to provide air conditioning in the evenings and on weekends, thus rendering the premises unusable for those periods, constituted a partial eviction that would permit the tenant to remain on the premises without paying rent as long as the breach continued.

And at least one court has recognized the defense of partial *constructive* eviction. East Haven Associates, Inc. v. Gurian, 313 N.Y.S.2d 927 (New York City Civ. Ct. 1970).

[28] Judge Cardozo noted: "We are dealing now with an eviction which is actual and not constructive. If such an eviction, though partial only, is the act of the landlord, it suspends the entire rent because the landlord is not allowed to apportion his own wrong." 221 N.Y. at 373, 117 N.E. at 580.

[29] *See* Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917).

[30] Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1259 (1966).

[31] *Id.* at 1262.

nance and requirements for the installation and care of essential facilities such as heat, light, and water. Since health was the major impetus behind these statutes, the legislatures devised sanitation standards and even set occupancy quotas.[32]

The most common housing code sanction in this early period was the vacate order.[33] If a building was found unfit for occupancy or was in such disrepair that it constituted a danger to the community, the code enforcement agency would condemn the building and force the tenants to move out, thus terminating their leases. This procedure was only followed, however, when a favorable "vacancy ratio" existed.[34] When there were not a sufficient number of unoccupied houses available, vacated tenants would have been deprived of shelter.

The success of these municipal codes in protecting the health and welfare of the cities' inhabitants was a major reason why state legislatures adopted housing legislation during the years surrounding World War I. The enactment of state statutes was also influenced by increased immigration into the cities (spurred by rapid industrial growth), a concurrent slump in building construction, and most important, the laxity and neglect of landlords to house the recent immigrants in well-kept, sanitary dwellings.[35] Because of the serious housing shortages in this period, vacate orders were eliminated.[36] Instead, the code enforcers resorted to criminal prosecution of violators, resulting in fines and short-term jail sentences for landlords.

Today's housing laws are peculiar to the state or region in which they are located and cannot be discussed as a whole. There are, however, two recognized categories of statutes governing the subjects of habitability and repair. The most common is the New York-type or penal statute.[37] This type of statute attacks the housing problem from the public health and safety aspect, and applies primarily to multiple dwellings and tenement houses. These statutes generally state that "every tenement house and all parts thereof shall be kept in good repair; and the roof shall be kept as not to

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[32] *Id.* at 1260-62.

[33] *Id.* at 1261.

[34] *Id.*

[35] Feurstein & Shestack, *Landlord and Tenant — Statutory Duty to Repair*, 45 ILL. L. REV. 205, 208 (1950).

[36] Gribetz & Grad, *supra* note 30, at 1262.

[37] *See, e.g.*, CONN. GEN. STAT. ANN. § 19-343 (1958); IOWA CODE ANN. § 413.66 (1949); MASS. LAWS ANN. ch. 144, § 66 (1958); MICH. COMP. LAWS ANN. § 125.471 (1967); N.J. STAT. ANN tit. 55:13A-1 (Supp. 1971); N.Y. MULT. DWELL. LAW § 78 (McKinney 1946).

leak . . . ."[38] Violations of the provisions are punishable by fine or imprisonment.

New York State has been the leader in the statutory reform of landlord-tenant law. In a landmark decision, *Altz v. Leiberson*,[39] the New York Court of Appeals ruled that the New York Tenement House Law[40] altered the common law landlord-tenant relationship by imposing liability upon the owner of a tenement house for injury to a tenant caused by the owner's failure to make repairs.[41] In ensuing decisions, the New York courts extended the landlord's liability for failure to repair to such things as a defective window frame,[42] a procelain faucet,[43] and a gas range.[44] The New York statute has also been interpreted to alter the common law rule that the landlord is not liable in tort for patent defects. In fact, a tenant can remain in an apartment with actual knowledge of a defect and yet not be contributorily negligent as a matter of law.[45] But a landlord cannot be held liable unless he had either actual or constructive notice of the defect and thus an opportunity to repair it and avoid liability.[46]

A similar position has been taken by the New Jersey courts. In a leading decision, *Michaels v. Brookchester, Inc.*,[47] the Supreme Court of New Jersey held that the duty of a landlord to keep the premises in repair embraced not only common areas and parts of the building in the landlord's control, but all parts of the building.

The Michigan statute[48] has also been interpreted liberally. In

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[38] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 144, § 66 (1958).

[39] 233 N.Y. 16, 134 N.E. 703 (1922).

[40] Ch. 61, § 102 [1901] N.L. Laws (now N.Y. MULT. DWELL. LAW § 78 (McKinney 1946)).

[41] Judge Cardozo, speaking for the court, noted that "[t]he Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone." 233 N.Y. at 19, 134 N.E. at 704.

[42] Weiss v. Wallach, 256 App. Div. 354, 10 N.Y.S.2d 69 (1939).

[43] Tucker v. Wagner, 132 Misc. 402, 229 N.Y.S. 769 (Sup. Ct. 1928).

[44] Goldkopf v. Metropolitan Life Ins. Co., 149 Misc. 663, 268 N.Y.S. 126 (Sup. Ct. 1933).

[45] Weiss v. Wallach, 256 App. Div. 354, 10 N.Y.S.2d 69 (1939). The *Weiss* court warned:

> [I]f tenants could be forced out of rooms and apartments in tenement houses by the landlord's refusing to make repairs, by having visited upon them the rule of contributory negligence as a matter of law if they remained, it would in effect nullify to a large extent . . . the provisions of the Tenement House Law. *Id.* at 357-58, 10 N.Y.S.2d at 72.

[46] *See* Altz v. Leiberson, 233 N.Y. 16, 19, 134 N.E. 703, 704 (1922).

[47] 26 N.J. 379, 140 A.2d 199 (1958).

[48] MICH. COMP. LAWS ANN. § 125.471 (1967).

Annis v. Britton,[49] the Supreme Court of Michigan held that a landlord's failure to perform his statutory duties was negligence per se. The court said that the statutory obligation was "ultra contract" and that the housing act abrogated the common law. Even though the housing act was a penal statute, the court said that civil accountability could be exacted from the owner. And in *Crawford v. Palmer*,[50] a Michigan court of appeals held that there was no reason to distinguish between injuries to a tenant and injuries to his guest since the statute posed duties in favor of anyone lawfully on the premises.

Other states, however, interpret their New York-type statutes very strictly. The Iowa courts, for example, have concluded that the purpose of that state's housing code[51] is merely to promote the health, safety, and welfare of its citizens. In *Johnson v. Carter*,[52] the Supreme Court of Iowa said that there is a total absence of specific reference in either the body or the title of the statute or in its legislative history to indicate any intention to change the existing common law rules and impose civil liability upon the landlord for physical injuries suffered by the tenant as a result of the landlord's failure to keep the dwelling in repair; therefore, the only liability imposed by the statute is penal.

The Iowa interpretation was modeled largely upon the construction given the New York-type statute by the Massachusetts courts. The Massachusetts interpretation emphasizes that the statute does not expressly attempt to modify the relations between landlord and tenant as they existed at common law[53] and that it does not attempt to regulate or alter the contractual relations between the parties.[54] The statute imposes no duties on the landlord beyond what he contracts to provide or maintain.

The Connecticut Supreme Court of Errors, in *Chambers v. Lowe*,[55] has ruled that what the legislature had in mind in enacting the Connecticut housing code was merely the imposition of an obligation on the landlord to keep the *building* in repair, rather than the individual apartments within the building. Despite the specific lan-

[49] 232 Mich. 291, 205 N.W. 128 (1925).

[50] 7 Mich. App. 21, 151 N.W.2d 236 (1967).

[51] IOWA CODE ANN. § 413.66 (1949).

[52] 218 Iowa 587, 255 N.W. 864 (1934).

[53] Vallen v. Cullen, 238 Mass. 145, 130 N.E. 216 (1921).

[54] Palmigiani v. D'Angelo, 234 Mass. 434, 125 N.E. 592 (1920). The *Palmigiani* court said that the statute's content "should not be broadened, or a construction adopted by implication which would materially limit the rights of the parties to enter into such lawful contracts as they please." *Id.* at 436, 125 N.E. at 592.

[55] 117 Conn. 624, 169 A. 912 (1933).

guage of the statute that "each building used as a tenement . . . and *all parts thereof* shall be kept in good repair,"[56] the court limited the landlord's duty of repair to major structural defects and maintenance of hallways and operative fixtures — essentially the common law position. In order for the tenant to recover, the court added, the legislature would have to expressly change the common law rule and extend the landlord's obligation; this it had not done. The court adopted this narrow interpretation despite recognition that other states with statutes "very much like our own" had given these statutes much broader effect.[57]

The second recognized category of housing laws is the California-type, commonly known as "repair and deduct" statutes. Five states have this type of housing law.[58] These statutes contain two distinctly worded sections pertaining to landlord and tenant obligations. The first provides that a lessor must, in the absence of a contrary agreement, put his building in a habitable condition and repair all subsequent dilapidations that make it untenatable.[59] The second provides that if the landlord fails to repair a dilapidation within a reasonable time after receiving notice of its existence, the tenant can repair the violation and deduct the cost from his rent as long as the cost does not exceed 1 month's rent, or he can vacate the premises without incurring further obligations.[60]

In California, the statute is construed very strictly.[61] California courts have ruled that it does not impose an implied covenant of repair or habitability on the landlord.[62] They have concluded that the legislature clearly intended to limit the landlord's duty to the extent of the tenant's "privilege" to make repairs and deduct the cost from his rent.[63] The landlord has no duty to put the premises

[56] CONN. GEN. STAT. ANN. § 19-343 (1958) (emphasis added).

[57] 117 Conn. at 630, 169 A. at 914.

[58] CAL. CIV. CODE §§ 1941-42 (1954), *as amended*, (West Supp. 1971); MONT. REV. CODE ANN. § 42-201 (1947); N.D. CENT. CODE §§ 47-16-12 to -13 (1960); OKLA. STAT. ANN. tit. 41 §§ 31-32 (1954); S.D. CODE tit. 43, §§ 32-8, -9 (1967).

[59] *See, e.g.*, CAL. CIV. CODE § 1941 (West 1954).

[60] *See, e.g., id.* § 1942, *as amended*, (West Supp. 1971).

[61] *See* Feurstein & Shestack, *supra* note 35, at 207.

[62] *See, e.g.*, Grazer v. Flanagan, 35 Cal. App. 724, 170 P. 1076 (Dist. Ct. App. 1917).

[63] *E.g.*, Van Every v. Ogg, 59 Cal. 563 (1881). The *Van Every* court noted that prior to 1874, the statute provided:

> If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same itself, and *deduct the expense of such repairs from the rent, or otherwise recover it from the lessor. Id.* at 566 (emphasis added).

The court argued that the 1874 amendments (which put the statute into its present form, *see* text accompanying notes 59-60 *supra*) had removed both the lessee's right to make

in a condition fit for human habitation.[64] Both the tenant's rights and the landlord's obligations are purely statutory and are measured solely by the statutory provisions.[65]

A careful perusal of the cases, moreover, indicates that the tenant's remedy in the California statute is not a "privilege," but rather is a duty to repair defects and deduct the cost from the rent. One California decision makes it clear that if a tenant fails to avail himself of his statutory right to repair defects, he assumes the risk for any future personal injuries caused by that failure to repair.[66] Another court has held that a tenant's remaining on a premises in which there is a visible or patent defect that causes injury or death is evidence of contributory negligence.[67] And even if the landlord forbids the tenant to make repairs,[68] the courts have maintained that the tenant's failure to make the necessary repairs constitutes a waiver of his statutory rights to repair and deduct.[69]

Repair and deduct statutes are interpreted similarly in the other four states. In Oklahoma, as in California, the accepted interpretation excludes any imposition of implied warranties or covenants of suitability by the landlord beyond those existing at common law. The statutory remedy is exclusive and gives the tenant no right to an action for damages if the landlord fails to repair.[70] North Dakota courts have concluded that the main purpose of the repair and deduct

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repairs without limitation on expenditure and his right to otherwise recover from the landlord.

[64] *See* Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534 (Dist. Ct. App. 1929).

[65] The narrow interpretation by the courts that the statute imposes few if any additional obligations or liabilities upon the landlord seems to be contrary to the spirit evoked by the Commissioners to California Code section 1941. They thought that there was a clear inadequacy of personal rights of action for the tenant under the common law. The Commissioners added:

> This section changes the rule upon the subject to conform to that which, not withstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. CAL. CIV. CODE ANN. § 1941, at 514m (Pomeroy 1901).

[66] Sherrard v. Lidyoff, 108 Cal. App. 2d 325, 239 P.2d 28 (Dist. Ct. App. 1952).

[67] Nelson v. Meyers, 94 Cal. App. 66, 270 P. 719 (Dist. Ct. App. 1928). In *Nelson* the tenant was killed by carbon monoxide poisoning resulting from a defective pipe in a heater. The court, in refusing damages, stated that the landlord was not liable for injury from an unrepaired defect that was not latent, but was open and visible to any occupant.

[68] *See* Moroney v. Hellings, 110 Cal. 219, 42 P. 560 (1895). The *Moroney* court labeled the landlord's refusal to allow the tenant to make repairs meaningless, and said that the refusal could not modify the tenant's right under the Code.

[69] *See id.*

[70] *See, e.g.*, Alfe v. New York Life Ins. Co., 180 Okla. 87, 67 P.2d 947 (1937); Lyman v. Cowan, 167 Okla. 574, 31 P.2d 108 (1934).

statutes is to promote health, safety, and welfare, and that they were enacted merely to give tenants a right to enforce better housing conditions. The legislature had no intent to alter the common law relations of landlord and tenant.[71] Montana courts also echo the California construction of the statute. They hold that the tenant's remedy is exclusively within the text of the statute. The obligations of the landlord are limited to the extent of the "privilege" conferred upon the tenant. If a dilapidation occurs that will take more than the amount of 1 month's rent to repair, the tenant may not repair at the expense of the landlord. He may then be forced to move out since he has no right to damages under the statute.[72] In South Dakota, that a premises falls into disrepair and remains in disrepair even though the tenants have given notice to the landlord does not automatically entitle the tenant to vacate.[73] And the tenant's entire remedy is contained in the statute; if he fails to make repairs and deduct their cost from the rent, he cannot defend an action by the landlord on the ground that the dilapidations reduced the rental value of the property.[74]

Louisiana employs a slight variation of the repair and deduct statute.[75] Its statute is similar to the California-type, except that there is no limitation on the repair cost as long as it is reasonable.[76] The Louisiana statute is interpreted differently than the California-type statute, however, because it grew out of civil rather than common law.[77] Its provisions are interpreted to impose an obligation on the landlord to maintain the leased premises in a condition fit for the leased purpose.[78] The owner-lessor is held strictly liable for personal injuries sustained by tenants or others as a result of the de-

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[71] *See, e.g.*, Newman v. Sears Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

[72] *See, e.g.*, Lake v. Emigh, 118 Mo. 325, 167 P.2d 575 (1946); Bush v. Baker, 51 Mo. 326, 152 P. 750 (1915).

[73] *See, e.g.*, Arning v. Hartman Motor Co., 64 S.D. 524, 268 N.W. 698 (1956).

[74] *See, e.g.*, Armstrong v. Thompson, 62 S.D. 567, 255 N.W. 561 (1934).

[75] LA. CIV. CODE ANN. arts. 2693-94 (West 1952).

[76] *See* LA. CIV. CODE ANN. art. 2694 (West 1952).

[77] The civil law prescribes that the obligation to maintain the premises in repair falls upon the landlord. In marked contrast to the common law rules, the landlord under civil law is conclusively presumed to know of any defects that make the premises unsafe or uninhabitable. The landlord is absolutely liable for damage or injury caused by his failure to repair. Also, the civil law prohibits agreements between the lessor and lessee that shift the former's liability to the latter. *See generally* Note, *Liability of a Lessor Property Owner to Third Persons for Accidental Personal Injury Caused by Defective Premises*, 4 TUL. L. REV. 610 (1930).

[78] *See* Dehan v. Youree, 161 La. 806, 109 So. 498 (1926).

fective condition of the premises.[79] It is discretionary rather than obligatory for the tenant to make repairs and deduct the cost from his rent.[80] But if the tenant chooses to make repairs, he must do so within a reasonable time after he exercises his privilege of retaining rent.[81] The courts prefer that the tenant repair and deduct rather than attempt to cancel the lease.[82] Dissolution of the lease for failure to repair is granted only in extreme cases,[83] and usually only when the defect is structural.[84]

Georgia's landlord-tenant law expressly places the duty of repair on the landlord.[85] Because Georgia has adopted the civil law in the landlord tenant area,[86] its statute has been liberally interpreted. If the landlord fails to make repairs within a reasonable time after he receives notice, the tenant may make the repairs himself and deduct their reasonable costs from his rent.[87] Georgia's statute also expressly makes the landlord liable for personal injuries resulting from his failure to repair.[88]

The District of Columbia has a unique housing ordinance. Like the New York-type statute, it makes the landlord criminally liable for failure to repair, but it also specifically prohibits the leasing of uninhabitable premises. The statute expressly provides that "no person shall rent or offer to rent any habitation . . . unless such habitation and its furnishings are in a clean, safe, and sanitary condition."[89] In one of the first decisions to interpret this provision, *Whetzel v. Jess Fisher Management Co.*,[90] the Court of Appeals for the District of Columbia Circuit stated that, at the very least, it imposed an obligation upon the landlord to put the premises in a safe condition

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[79] *See, e.g.*, Breen v. Walters, 150 La. 578, 91 So. 50 (1922); King v. Allstate Ins. Co., 224 So. 2d 42 (La. Ct. App.), *cert. denied*, 254 La. 808, 227 So. 2d 144 (1969).

[80] *See* Brunies v. Police Jury, 237 La. 227, 110 So. 2d 732 (1959).

[81] *See* Leggio v. Manion, 172 So. 2d 748 (La. App. 1965).

[82] *See* Brunies v. Police Jury, 237 La. 227, 110 So. 2d 732 (1959).

[83] *See* Guillot v. Morgan, 165 So. 2d 330 (La. App. 1964).

[84] *See* Brunies v. Police Jury, 237 La. 227, 242-43, 110 So. 2d 732, 737 (1959).

[85] *See* GA. CODE ANN. § 61-111 (1933).

[86] *See* Mayer & Crane v. Morehead, 106 Ga. 434, 435 (1898). *See also* Lewis & Co. v. Chisolm, 68 Ga. 40, 46 (1881).

[87] *See* Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S.E. 928 (1909).

[88] GA. CODE ANN. § 61-112 provides in part:

> The landlord . . . is not responsible to third persons for damages resulting from negligence or illegal use of the premises by the tenant, but he is responsible to others for damages arising from defective construction or for damages from failure to keep premises in repair.

See Gledhill v. Harvey, 55 Ga. App. 322, 190 S.E. 61 (1937).

[89] D.C. Housing Regs. § 2501 (1955).

[90] 282 F.2d 943 (D.C. Cir. 1960).

prior to rental. Recently, the District of Columbia Court of Appeals, in *Brown v. Southall Realty Co.*,[91] held that a lease entered into in violation of the housing regulations is void.[92] The court concluded that to uphold the lease agreement in the face of the serious defects known to exist on the premises would be to flout the purposes for which the statute was enacted. Thus, the court applied the theory that a contract is illegal, and thus void, when made in violation of statutory prohibitions designed for police or regulatory purposes.[93]

IV. EVALUATION

In the absence of specific statutory provisions, the vast majority of courts still adhere to common law property principles in resolving landlord-tenant disputes. Although these common law concepts were proper in the setting in which they were fashioned — an agrarian society where the tenant's primary concern was the land itself — they are no longer adequate. Today, the tenant is paying not for the land, but for a small part of a multiple dwelling situated upon the land. He is concerned not with what benefits he can reap from the land, but rather with the maintenance of vital facilities in the building such as heat, water, lights, and plumbing. He is not self-

[91] 237 A.2d 834 (D.C. Mun. Ct. App. 1968).

[92] This holding was limited to violations occurring before or at the time the tenancy was created. Saunders v. First Nat'l Realty Corp., 245 A.2d 836, 837-38 (D.C. Ct. App. 1968), *rev'd on other grounds sub nom.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

In Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. Ct. App. 1969), the court held that substantial violations of the housing regulations will render a lease void even though the landlord had not received official notice of the violations from city housing inspectors.

[93] Most courts accept the idea that it is not the illegality of the contract but rather the illegality of the party's conduct in entering into or performing the contract that is the true ground for voiding it. *See, e.g.*, Tocci v. Lembo, 325 Mass. 707, 92 N.E.2d 254 (1950). One commentator, critical of the *Brown v. Southall Realty Co.* holding, maintains that the lease contract was not illegal per se, though the method of performance may have been illegal. He argues that the illegal performance must be serious or more than incidental to the total performance and that the repair defects in *Brown* were considerably less than serious. He is also disturbed that a tenant might remain in possession during the pending litigation without paying rent and that if the contract is found illegal, the landlord will be unable to obtain the withheld rent. Note, *The Failure of a Landlord to Comply with Housing Regulations as a Defense to Non-Payment of Rent*, 21 BAYLOR L. REV. 372 (1969). In Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970), the court responded to the problem of a tenant possessing the premises without paying rent pending litigation (usually arising out of a summary eviction for nonpayment of rent). The court concluded that prepayment of rent into the court as a method of protecting the landlord may be ordered when the tenant has either asked for a jury trial or asserted a defense based on violations of the housing code. The court emphasized, however, that such a policy is not favored and should be ordered only where the landlord demonstrates an obvious need for protection.

reliant like the agrarian lessee, for he depends almost entirely on the landlord to provide him with vital services. It is the landlord, not the tenant, who is best equipped to maintain the property.

In effect, there is no comparison between the modern tenant and the tenant for whom the common law rules were established; yet the rules for a modern lease are substantially the same as those governing the 16th century lease. These antiquated principles, coupled with a lack of available housing, have seriously disadvantaged the modern tenant. He has no implied warranty of habitability, no adequate opportunity to inspect the premises, and very little opportunity to refuse the lease if the premises are in disrepair. Express warranties by the landlord are rare in the customary form lease, and thus the landlord is usually not bound to repair defects arising after the commencement of the rental agreement. When confronted with unsuitable living conditions, the tenant's only remedy is to abandon his apartment under the theory of constructive eviction. Abandonment, however, is certainly no remedy in these times of serious housing shortages.

Fortunately, the abandonment rationale, which prohibits a tenant from remaining in possession under circumstances that supposedly justify his leaving,[94] has been rejected by some courts. In *Majen Realty Corp. v. Glotzer*,[95] the Municipal Court of the City of New York took judicial notice of the housing shortage and concluded that the abandonment requirement should prevail only where a market of available apartments exists. Where there are no living accommodations available, or where they are so scarce as to impel the legislature to declare a public emergency, the court held that the tenant may remain on the premises and offset the rent to the extent of the diminished services and facilities. Four years later, in *Johnson v. Pemberton*,[96] this same court said that it was "intolerable" that the tenant who remained in his apartment should be left without redress. The court pointed out: "Implicit in these once benign enactments and decisions was the presumption that there was [*sic*] always available other premises to which the tenant could move. The grim realities of the acute housing shortage reduce this time-worn presumption to sheer naivete . . . ."[97]

Such decisions, however, represent a distinct minority viewpoint.

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[94] *See* Chelton Ave. Bldg. Corp. v. Mayer, 316 Pa. 228, 172 A.675 (1934).

[95] 61 N.Y.S.2d 195 (New York City Mun. Ct. 1946).

[96] 197 Misc. 739, 97 N.Y.S.2d 153 (New York City Mun. Ct. 1950).

[97] *Id.* at 742-43, 97 N.Y.S.2d at 157.

With few exceptions, the tenant is burdened with the decision whether to resort to constructive eviction. If he remains in possession of the premises, a conclusive presumption arises that he has not been deprived of his beneficial use and enjoyment. But if he gambles and abandons, there is no presumption whatever that the premises are uninhabitable or unfit for use. The prospect of seeking new lodging while at the same time paying for the old if the court does not find a constructive eviction must indeed be a frightening one for the tenant who can barely afford the cost of slum housing.[98]

It is not difficult to conclude, then, that strict property law principles are plainly archaic and out of harmony when applied to the modern landlord-tenant relationship. Statutes have been enacted to reform these antiquated principles; but the narrow construction given these statutes by many courts has turned them into nothing more than codifications of the common law rules that spurred their enactment.

The California-type statute,[99] for example, is not what it appears to be on its face — a legislative imposition of maintenance and repair duties on the landlord and a source of remedy to the tenant. The repair and deduct remedy exists if the tenant employs it within the bounds of the statutory language, but effective use of the statute has been hindered by narrow judicial interpretation.[100] In addition, a severe drawback to a tenant's implementation of the statute is the landlord's statutory right to contract away his obligation.[101] Although leases are seldom used in the rental of slum property, rental agreements are often prevalent. A standard provision in such agreements is a waiver of the tenant's rights under the repair and deduct statute.[102] Thus, the slum tenant who reads and understands his rental agreement will almost certainly discover that he has waived any statutory rights he may have had.[103] The remedy is further

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[98] *See* Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461, 473.

[99] CAL. CIV. CODE §§ 1941-42 (1954), *as amended*, (Supp. 1971); *see* text accompanying notes 58-60 *supra*.

[100] *See* notes 61-74 *supra* & accompanying text.

[101] *E.g.*, CAL. CIV. CODE § 1941 (1954).

[102] Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970).

[103] *But cf.* Buchner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (App. Dep't Super. Ct. 1967), where the waiver of the landlord's statutory obligation to repair was construed by the court so that the tenant waived only her right in so far as her individual apartment was concerned; any attempted waiver of the landlord's statutory duty to maintain other portions of the building was invalid. The court ruled that the infestation

weakened by the statutory limitation of repair costs to 1 month's rent and the requirement that the dilapidation render the premises untenantable before the remedy can be invoked. Defects serious enough to render a premises "untenantable" will seldom be corrected by repairs totalling only 1 month's rent. The repair and deduct provisions, then, are usually of little, if any, value to tenants.

Strict interpretation and narrow language are not the only obstacle that hinder the effectiveness of housing legislation. The penal statutes that govern landlord-tenant relations in most states exert only a minor influence on living conditions. The first problem is that the landlord may attempt to avoid his liabilities and repair obligations under these statutes by inserting contrary covenants and exculpatory clauses in the lease. In most states with these New York-type statutes, exculpatory clauses are neither expressly approved nor prohibited;[104] thus their validity is left to the courts. These clauses have met with some success for the landlord.[105]

Some courts have upheld the validity of exculpatory clauses because of the public policy favoring freedom of contract.[106] But the rationale that exculpatory clauses are part of the bargaining process is largely undercut by the simple fact that in most instances the landlord commands a vastly superior "bargaining" position. In fact, there is usually little if any bargaining between landlord and tenant, particularly in these times of housing shortages and form leases.[107] Most tenants are forced either to sign or to move on to equally inferior housing.[108]

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of vermin was a violation of the landlord's statutory obligation to keep the building habitable.

[104] Massachusetts and New York, however, have passed statutory provisions making clauses exculpating landlords from liability for negligence in lease contracts void and unenforceable. MASS. ANN. LAWS ch. 186, § 15 (1958); N.Y. REAL PROP. LAW § 234 (McKinney Supp. 1971). The statutes were passed to prevent landlords from evading liability for failure to comply with statutory repair obligations. *See* Feurstein & Shestack, *supra* note 35, at 224-25.

[105] Courts have allowed exculpatory clauses exempting the landlord from personal injury liability. *See, e.g.*, McCarthy v. Isenberg Bros., Inc., 321 Mass. 170, 72 N.E.2d 422 (1947); Clark v. Ames, 267 Mass. 144, 165 N.E. 696 (1929); Canon v. Bresch, 307 Pa. 31, 160 A. 595 (1932).

[106] *See, e.g.*, Wright v. Sterling Land Co., 157 Pa. Super. 625, 43 A.2d 614 (1945); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Feurstein & Shestack, *supra* note 35, at 222.

[107] In times of housing shortages, the form lease becomes a lucid illustration of an adhesion contract, that is, an agreement in which one party's participation consists of his mere adherence, unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise. *See* Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197 (1963).

[108] In Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968), the Supreme Court of Pennslyvania, in reversing a trial court's ruling that a negligence action could not be

A second problem with the penal statutes is that no state legislature has prescribed standards delineating how the landlord is to carry out his duties under the housing code. Examination of the various statutes reveals that no inspection standards have been imposed upon the landlord; thus, imposition of standards is left to the courts. Similarly, the determination of the landlord's obligation to repair following notice of needed repair by the tenant (or in the absence of such notice) is also left to the courts' discretion.

The most serious problem with the penal statutes, however, has been ineffective enforcement. Criminal sanctions are the most prevalent form of housing code enforcement. Generally, the continued failure of a landlord to comply with the housing standards constitutes a misdemeanor, subjecting him to fine or imprisonment. Jail sentences, however, are rarely imposed and thus remain an empty threat.[109] Fines have not proven much more successful. In some states, the fines levied for housing code violations are so small that they merely establish a system of licensing, rather than constituting an effective deterrent.[110] The landlord often considers such fines a business expense, preferring to absorb the slight penalty rather than make extensive repairs.[111]

Inconsequential fines are usually not the result of inadequate code provisions, but rather of the rulings of courts sympathetic to the landlord.[112] The discretion of the courts on these matters is broad, and they are hesitant to impose harsh fines. One reason is that the codes impose absolute criminal liability on landlords for violations existing on their premises. Judges in criminal courts, who generally regard intent as a necessary element of any crime, are reluctant to impose criminal sanctions on a landlord who is without knowledge or merely negligent.[113] Several other reasons are given

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brought against a landlord for breach of an oral covenant to repair, noted the tenant's inferior "bargaining" position, stating:

> Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing shortage mandates that the . . . prospective tenant accede to the demands of the prospective landlord as to conditions of rental, which . . . with housing available, the average tenant would not and should not accept. *Id.* at 289-90, 243 A.2d at 398.

[109] Gribetz & Grad, *supra* note 30, at 1277.

[110] *See* Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 278 (1966).

[111] Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 319 (1965).

[112] Gribetz & Grad, *supra* note 30, at 1276.

[113] *Id.* at 1279-80.

for the courts' reluctance to impose harsh fines.[114] Many judges feel that a landlord should not be forced to make repairs that his tenants will soon destroy. Others feel it is unfair to single out a particular landlord for punishment when his building varies little from the neighborhood norm. Some judges are reluctant to impose offensive penalties on property owners for political reasons. Moreover, the courts are unsure of how severe the violation must be before punishment of the landlord becomes necessary. But practicality is probably the main reason underlying light penalties. A landlord faced with the alternative of making extensive repairs or suffering harsh penalties will often either raise the rent substantially or simply vacate the building, thus adding to the already severe housing shortage.[115]

But whatever the reasons, it is clear that traditional housing legislation and the outdated common law doctrines have been patently ineffective in assuring adequate housing for a large portion of our urban population. A stark illustration of this fact has been the continuing growth of slum housing in recent years. Recognition of these failures and recent manifestations of tenant discontent have induced a number of jurisdictions to enact legislation providing that a landlord's right to rent payments is contingent upon his obligation to maintain the leased premises in compliance with minimum standards of habitability. This legislation takes many forms (rent withholding, rent abatement, receiverships), but for convenience, it will be discussed under the general heading of statutory rent withholding.

V. Statutory Rent Withholding

Although most of the debate concerning the merits of rent withholding has occurred in recent years, the concept is not entirely new. A model rent withholding statute for New York was proposed by Lawrence Veiller as long ago as 1914.[116] A prototype of this stat-

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[114] *See* Note, *Enforcement of Housing Codes*, 78 HARV. L. REV. 801 (1965).

[115] The National Advisory Committee on Civil Disorders reports that New York's rigorous code enforcement has caused owners to board up and abandon over two thousand buildings rather than incur the expense of repairing them. REPORT BY THE NAT'L ADVISORY COMM. ON CIV. DISORDERS 427-33 (N.Y. Times ed. 1968). Rigorous enforcement, then, merely means a transfer for many low-income tenants from substandard housing to no housing at all.

[116] L. VEILLER, A MODEL HOUSING LAW 142 (1914). Article VI of section 142 provided:

> If any building hereafter constructed as or altered into a dwelling be occupied in whole or in part for human habitation in violation of the last section [which requires a certificate of compliance with sanitary, fire, and maintenance standards], during such unlawful occupation no rent shall be recoverable by the

ute has been in existence in New York since 1939,[117] and in England since 1957.[118] Moreover, rent withholding unsanctioned by law made its appearance in some American cities and some foreign countries at a relatively early date.[119] Today, many of the states have rent withholding statutes. These statutes fall essentially into two categories. Statutes in the first category allow rent withholding by public welfare departments; those in the second allow tenants themselves to withhold rent.

Statutes allowing rent withholding by public welfare departments have been enacted in Illinois,[120] Michigan,[121] and New York[122] because of the realization by these states that through their welfare payments they were in effect subsidizing a great deal of slum housing.[123] The New York and Illinois statutes provide that when the condition of a building in which a welfare recipient resides does not comply with the housing regulations and endangers the health and safety of its occupants, the welfare department may withhold rent from the landlord until the premises are repaired.[124] The Michigan statute provides that rent may be withheld only if such a condition exists within the recipient's own dwelling, but the condition need not be serious or a threat to health and safety.[125] All three statutes purport to protect the tenant by providing that the landlord may not maintain an action for rent or for possession based on nonpayment of rent while rent is being withheld.[126] They also protect the landlord against unjustified rent withholding by requiring that the existence of any code violations be certified by the local housing authorities before rent is withheld, and that notice of their existence

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owner or [lessor] of such premises for said period, and no action or special proceeding shall be maintained therefor or for possession of such premises for nonpayment of rent.

117 Ch. 661, § 1446-a [1939] N.Y. Laws (now N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1971)).

118 Housing Act of 1957, 5 & 6 Eliz. 2, c. 56, §§ 9-10, at 290.

119 *See* Note, *supra* note 111, at 323 nn.89-90.

120 ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1971). Prior to the enactment of this statute in 1967, the Cook County Department of Public Aid had implemented a rent withholding program in an effort to end state subsidization of substandard housing. *See* Note, *Withholding of Rent: New Weapon Added to Arsenal for War on Landlords*, 21 J. HOUSING 67 (1964).

121 MICH. COMP. LAWS ANN. § 400.14(c) (Supp. 1970).

122 N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966).

123 *See* Note, *supra* note 120.

124 ILL. STAT. ANN. ch. 23, § 11-23 (Smith-Hurd Supp. 1971); N.Y. SOC. WELFARE LAW § 143-b(2) (McKinney 1966).

125 MICH. COMP. LAWS ANN. § 400.14(c) (Supp. 1970).

126 *E.g.*, N.Y. SOC. WELFARE LAW § 143-b(5) (McKinney 1966).

be given to the landlord.[127] There is a further provision that rent may not be withheld if the violations are the product of negligent or willful conduct of the tenant or someone under his control.[128]

Despite early doubts about the constitutionality of these statutes,[129] the courts have subsequently held that they do not result in a taking of property without due process of law,[130] a denial of equal protection,[131] or an impairment of contract rights.[132] They have been upheld as a valid exercise of state police power on the theory that their purpose is not only to protect the health and safety of welfare recipients, but also to eradicate slums.[133]

Although the purpose of these statutes has been praised by most commentators, they have been subjected to several criticisms. One major criticism is that the statutes allow welfare tenants no control over the rent withholding process.[134] As a practical matter, this criticism seems warranted. Lack of control by tenants may not only injure them economically, but it is also likely to have a deleterious effect on their self-image. For example, there have been reports that in some instances rent has been withheld by the welfare department over the objection of the welfare recipient.[135] And because the decision to withhold rent is made without consulting the tenant, a situation may be created where tenants will be coerced by landlords into paying rent out of their own pockets while the welfare department is withholding rent.[136] Although this situation is likely to arise in only a small number of cases, when it does arise, welfare tenants can only be expected to react with hostility and distrust to

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127 *E.g.*, ILL. STAT. ANN. ch. 23, § 11-23 (Smith-Hurd Supp. 1971).

128 *E.g.*, *id.*; *see* Caravetto v. Springfield, 54 Misc. 2d 759, 283 N.Y.S.2d 298 (Suffolk County Dist. Ct. 1967).

129 *See, e.g.*, Trozze v. Drooney, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghampton City Ct. 1962) (court held that the statute would destroy a landlord's contract rights in violation of the fifth and 14th amendments to the United States Constitution).

130 *See, e.g.*, Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S.2d 859 (New York City Civ. Ct.), *appeal dismissed*, 13 N.Y.2d 1123, 196 N.E.2d 555, 247 N.Y.S.2d 122 (1963).

131 *See, e.g.*, Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967).

132 *See, e.g.*, *id.*

133 *See, e.g.*, Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S.2d 859 (New York City Civ. Ct.), *appeal dismissed*, 13 N.Y.2d 1123, 196 N.E.2d 555, 247 N.Y.S.2d 122 (1963).

134 Note, *Rent Withholding for Public Welfare Recipient: An Empirical Study of the Illinois Statute*, 37 U. CHI. L. REV. 798, 810 (1970). *See also* Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 587 (1969).

135 *See* Note, *supra* note 134, at 810.

136 *Id.*

such "malignant" paternalism. To these welfare tenants, it must seem ironic for welfare officials to claim that their major purpose is to afford recipients an opportunity to achieve some measure of self respect, while denying them all control over a process which may have a major impact on their lives.[137]

A further criticism of these statutes is that they fail to adequately protect the welfare tenant from eviction.[138] Although the statutes provide that an official inspection report of the housing authorities is prima facie evidence that housing code violations exist on the welfare tenant's premises, they do not provide that this report is prima facie evidence that the violations are sufficient to justify the withholding of rent.[139] Although the welfare department is invested with broad discretion in determining whether rent withholding is justified, the ultimate determination of this issue is made by the courts.[140] Thus, a welfare tenant with no control over the decision to withhold rent may be evicted if the court determines that the welfare department was not justified in withholding rent.[141] Moreover, even though the tenant is protected against eviction while rent is being withheld, in most jurisdictions there is no guarantee that he will not be retaliated against when the withholding process has ceased.[142]

In spite of these shortcomings, enactment of such statutes may be effective in coercing landlords to improve the conditions of welfare recipients' dwellings. In fact, there have been reports that incidence of landlord compliance with housing standards has increased as a result of rent withholding by welfare departments.[143] It must not be overlooked, however, that landlords are unlikely to make repairs if the cost of such repairs exceeds the rent withheld.[144] And even when compliance is achieved, it is likely to be long after the rent withholding process began and at the likely cost of concurrent rent increases. A further possibility, of course, is that by singling out welfare tenants for special treatment, these statutes may increase

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137 *Id.* at 811-12.

138 *Id.* at 820.

139 *Id.*; *see, e.g.*, ILL. STAT. ANN. ch. 23, § 11-23 (Smith-Hurd Supp. 1971).

140 Note, *supra* note 134, at 820.

141 *Id.* This study, however, did not find evictions a serious problem. *But see* Kuperburg v. Rivera, 149 N.Y.L.J. 17 (New York County Civ. Ct. 1963).

142 *See* Simmons, *supra* note 134, at 588. *See also* text accompanying notes 230-52 *infra.*

143 *See, e.g.*, Note, *supra* note 134, at 840. *See also* Simmons, *supra* note 134, at 592-93.

144 Note, *supra* note 134, at 843.

landlord discrimination against such tenants, making it even more difficult for them to secure adequate housing.[145]

Some states have enacted legislation providing that if any tenant's premises are in substantial violation of the housing regulations or local health laws, the tenant himself may withhold rent until the violations are removed.[146] As with the public withholding statutes, most of these statutes allow rent withholding only if notice is given to the landlord while the tenant is not in arrears in rent payments and only after the landlord has been given reasonable time to rectify the violations.[147] In addition, existence of the violations must be certified by the local health or housing authorities, and it must be demonstrated that they were not caused by the tenant or anyone under his control.[148] Most of these statutes provide further that the tenant must pay the withheld rent into an escrow account or to a clerk of courts.[149] This payment is a prerequisite to interposing the defense of building code violations in a landlord's action for rent or for possession based on nonpayment of rent.[150]

Although it is too early to determine the impact these statutes will have on the quality of housing, it seems that several factors militate against their potential effectiveness. First, since the statutes rely on tenant initiative for their enforcement, there is no guarantee that they will be uniformly enforced. An absence of uniform enforcement will detract from the coercive impact of a statute

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145 *Id.* at 847. *See also* Simmons, *supra* note 134, at 592-93.

146 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127(F) (1971); MICH. COMP. LAWS ANN. §§ 125.530-.534 (Supp. 1969); N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney Supp. 1971); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1971); R.I. GEN. LAWS ANN. 45-24.2-11 (1971). These statutes seem to modify the constructive eviction doctrine in that the tenant is not required to abandon his premises in order to cease paying rent. *See* Angevine & Taube, *Enforcement of Public Health Laws — Some New Techniques*, 52 MASS. L.Q. 205 (1967).

The courts have held that these statutes are a valid exercise of the state police power and that they do not permit the taking of property without due process of law. *See, e.g.*, Emray Realty Corp. v. De Stefano, 5 Misc. 2d 352, 160 N.Y.S.2d 433 (Sup. Ct. 1957).

147 *See, e.g.*, N.Y. REAL PROP. ACTIONS LAW § 755(1) (McKinney Supp. 1971); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1971).

148 *See, e.g.*, N.Y. REAL PROP. ACTIONS LAW § 755(1)(c) (McKinney Supp. 1971).

149 *See, e.g.*, PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1971).

150 Most of the statutes provide that where rent is being paid into court, the tenant may not be evicted for nonpayment of rent. *See, e.g.*, MICH. COMP. LAWS ANN. § 125.530(3), (5) (Supp. 1971). The Pennsylvania statute, however, provides that while rent is being deposited, the tenant may not be evicted for any reason. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1971).

Some of the statutes provide further protection to the tenant while rent is being withheld. For example, the Pennsylvania statute provides that if the landlord refuses to furnish essential services in retaliation for a tenant's withholding of rent, the cost of such services may be paid by the administrator out of the withheld rent. *Id.*

because individual landlords will be less apprehensive of the possibility that the statute will be invoked against them. A second shortcoming of these statutes is their inclusion of a provision entitling landlords to all of the withheld rent after the violations have been corrected.[151] Since this provision sets no time limit within which the repairs must be made, landlords not in immediate need of rent payments are likely to delay repairs for unreasonable lengths of time.[152] The Pennsylvania statute attempts to solve this problem by providing that if the violations are not corrected within 6 months after notice to the landlord, the rent deposited in escrow will revert to the tenant.[153]

A solution to the problem of landlord delay in making repairs might be accomplished by the enactment of pure rent abatement statutes.[154] The only such statute in existence is section 302-a of the New York Multiple Dwelling Law.[155] This statute authorizes the city department of buildings, after public hearings, to promulgate a list of "rent impairing" violations.[156] Thereafter, if the department determines that such violations exist on a premises, it must provide notice of such fact to the landlord. If the landlord fails to correct the violations within 6 months after such notice, "then for the period that such violation remains uncorrected after expiration of said six months, no rent shall be received by the owner."[157] If the landlord brings an action for rent or for possession based on nonpayment of rent, the tenant will be permitted to use section 302-a as a defense if he has deposited the rent due with the court. At trial, the tenant must specifically prove that the alleged violations existed on his premises during the period that rent was abated.[158] If he is success-

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[151] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127(F) (Supp. 1971).

[152] *See* Angevine & Taube, *supra* note 146, at 230.

[153] PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1971).

[154] *See* Angevine & Taube, *supra* note 146, at 230.

[155] N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1971). When originally enacted in 1965, this statute applied only to cities with two million or more people: that is, New York City. A 1968 amendment, however, made the law applicable to all New York municipalities with populations of over four hundred thousand.

[156] *Id.* § 302-a(2)(b). A "rent impairing" violation is defined as "a condition in a multiple dwelling which, in the opinion of the department, constitutes, or if not promptly corrected, will constitute a fire hazard or a serious threat to the life, health or safety of occupants thereof." *Id.* § 302-a(2)(a). An initial challenge to a list of "rent impairing" violations promulgated by the New York City Department of Buildings was unsuccessful. *See* Ten West 28th St. Realty Corp. v. Moerdler, 52 Misc. 2d 109, 275 N.Y.S.2d 144 (Sup. Ct. 1966).

[157] N.Y. MULT. DWELL. LAW § 302-a(3)(a) (McKinney Supp. 1971).

[158] *See* Buddwest & Saxony Properties, Inc. v. Layton, 62 Misc. 2d 171, 308 N.Y.S.2d 208 (Yonkers City Ct. 1970), where the court held that a health inspector's testimony

ful in his proof and the court concludes that the violations had not been remedied prior to the withholding of rent, the landlord will be deprived of his rent. But if the court concludes that the violations were caused by the negligent or willful conduct of the tenant or someone under his control, that the tenant prevented correction of the violations, or that the tenant raised the defense in bad faith, the court may restore the rent to the landlord and impose costs not exceeding $100 on the tenant.[159]

The New York rent abatement statute is superior to the simple rent withholding statutes because it provides that the rent withholding process begins only after the landlord has been given adequate time in which to repair, and that once rent withholding begins, the landlord prima facie loses his right to the withheld rent. As it presently stands, however, the statute has several defects. One problem arises because rent abatement is allowed only when the tenant's premises contain very serious violations and the tenant has to wait 6 months before beginning to abate rent. Thus, the tenant is forced to risk living on premises that may be highly detrimental to his health and safety for an unreasonable length of time. But the major fault with this statute, as with all other rent withholding statutes, is that it makes no provision for repairing the tenant's premises after the rent withholding process comes into effect. Thus, if the landlord is not coerced into making repairs, the likelihood is that the premises will never be repaired. In an effort to avoid this possibility, some states have enacted receivership statutes.

Generally, receivership statutes provide that if a property owner fails to abate a condition on his premises that is harmful to the health and safety of its occupants after receiving adequate notice of the existence of such condition, a receiver may be appointed for the property.[160] The receiver has the function of collecting the rent and other income from the property and using it to abate the nuisance.[161] Some of the statutes also provide that if such income is not sufficient

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that the condition of the bathroom in the tenant's apartment was potentially dangerous was insufficient to warrant a stay of proceedings in an action to dispossess the tenant for nonpayment of rent.

[159] N.Y. MULT. DWELL. LAW § 302-a(3)(e) (McKinney Supp. 1971).

[160] CONN. GEN. STAT. ANN. § 19-347 (1965); ILL ANN. STAT. ch. 24, § 11-32.2 (Supp. 1970); IND. ANN. STAT. § 48-6144 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 111, § 127H(d) (1971); MICH. COMP. LAWS ANN. § 125.535 (Supp. 1971); N.J. STAT. ANN. §§ 40:48-2.12h, .12i (1967); *id.* § 2A:42-79 (Supp. 1971); N.Y. MULT. DWELL. LAW § 309(5) (McKinney Supp. 1971).

[161] *See, e.g.*, N.Y. MULT. DWELL. LAW § 309(5)(c)(3), (d)(1) (McKinney Supp. 1971). Some statutes provide that if the nuisance cannot be abated, the receiver has the power to demolish the building. *See, e.g.*, IND. ANN. STAT. § 48-6144 (Supp. 1971).

to abate the nuisance, the receiver may borrow the necessary funds, and the creditor receives a lien on the property.[162]

Receivership statutes have been held a valid exercise of the state police power on the theory that their purpose is to eliminate slums and remove conditions detrimental to the health and safety of the community.[163] But the receiver must proceed with reasonable speed; an unreasonable delay in correction and removal of the nuisance may constitute a deprivation of property without due process of law.[164]

Receivership statutes are commendable because they take the crucial decision of whether to repair out of the hands of obstinate landlords and place it in the hands of someone whose sole concern is getting the premises repaired,[165] and because they are directed against offending buildings rather than offending landlords.[166] Most of these statutes, however, limit the right to initiate receivership proceedings to public officials, and then only when the condition of a building constitutes a danger to the health and safety of its occupants. This seriously limits their potential. Moreover, when the city itself assumes the burden of making repairs, unless measures are taken to force landlords whose premises have gone into receivership to compensate for costs of repairs above the income derived from the property,[167] administration of the program may lead to a severe drain on the fiscal resources of cities and states.[168]

In view of the foregoing, it is reasonable to conclude that even the latest legislative efforts to reduce the plight of the modern urban tenant are unsatisfactory. Clearly, more creative and realistic legislative action is needed. If such action is not forthcoming, the burden of protecting the modern urban tenant will rest on the judi-

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[162] *See, e.g.*, IND. ANN. STAT. § 48-6144 (Supp. 1971); N.Y. MULT. DWELL. LAW § 309(5)(1)(d) (McKinney Supp. 1971).

[163] *See, e.g., In re* 1531 Brook Ave., Borough of Bronx, City of New York, 38 Misc. 2d 589, 236 N.Y.S.2d 833 (Sup. Ct. 1962).

[164] *See, e.g., In re* Block 771, Lot 28, Borough of Manhatten, City of New York, 46 Misc. 2d 616, 260 N.Y.S.2d 358 (Sup. Ct. 1965) (dictum).

[165] *See* Blum & Dunham, *Slumlordism as a Tort — A Dissenting View*, 66 MICH. L. REV. 451, 462 (1968).

[166] Receivership proceedings are in rem; thus there is no need to personally serve process on the landlord.

[167] When the city makes improvements on private property because the owner refuses to do so, it is justified in imposing a fee on such owners. *See* Walsh, *Slum Housing: The Legal Remedies of Connecticut Towns and Tenants*, 40 CONN. BAR J. 539, 553 (1966). *See also* N.Y. MULT. DWELL. LAW § 309(5)(d)(3) (McKinney Supp. 1971).

[168] *See* Gribetz & Grad, *supra* note 30, at 1273-74. New York City was forced to abandon the receivership remedy, despite its early successes, because of rising costs. *See* F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS, RESEARCH REPORT NO. 14, at 46-47 (National Commission on Urban Problems ed. 1968).

ciary. Whether such a burden will be assumed by our courts remains unanswered. The next section will examine some of the most recent judicial developments in the landlord-tenant area.

VI. Recent Developments

Today's courts are faced with the task of shifting away from common law principles and rearranging landlord-tenant law to meet the needs of a complex urban society. The Supreme Court of New Jersey, in *Marini v. Ireland*,[169] and the United States Court of Appeals for the District of Columbia Circuit, in *Javins v. First National Realty Corp.*,[170] have made such a departure from common law notions.

In *Marini*, the tenant had a 1-year written lease that provided for a covenant of quiet enjoyment, but did not include an express covenant to repair. During the term of the lease, the tenant discovered that the toilet was cracked and that it leaked. After repeated but unsuccessful, attempts to inform the landlord of the defect, the tenant had the toilet repaired by a plumber and offset the cost of repair from the following month's rent. The landlord challenged the offset and demanded the outstanding rent. When his demand was not met, he instituted a summary dispossess action for nonpayment of rent. The landlord's position was that he had no obligation to repair, and thus the tenant had no right to offset repair costs against the rent. The court rejected the landlord's contention, reasoning that the landlord should be held to an implied covenant that there were no latent defects in facilities vital to the residential use of the premises and that these facilities would remain in a usable condition for the duration of the lease. The court held that because the landlord had failed to repair vital facilities, the tenant was entitled to make the repairs and deduct their costs from future rent payments.

In *Javins*, the landlord sought to evict the tenant for nonpayment of rent. The tenant tried to defend by alleging that numerous housing code violations had arisen on his premises after commencement of the tenancy.[171] The trial court denied the defense and entered judgment for the landlord. An intermediate court of appeals affirmed, rejecting the tenant's contention that the landlord was con-

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169 56 N.J. 130, 265 A.2d 526 (1970).

170 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

171 If the housing code violations had existed prior to the commencement of the tenancy, the lease may have been declared void. *See* Brown v. Southall Realty Corp., 237 A.2d 834 (D.C. Ct. App. 1968); text accompanying notes 89-93 *supra*.

tractually bound to maintain the premises in compliance with the housing regulations.[172] The United States Court of Appeals for the District of Columbia Circuit reversed, holding that

> a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by these Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.[173]

The *Marini* and *Javins* courts arrived at their decisions by concluding that:

1. Urban lease obligations are contractual, and should be treated as any other contracts.
2. The landlord should be held to an implied warranty of habitability and repair for the term of the lease.
3. The remedy of constructive eviction is inadequate to meet the needs of an urban tenant.

In order to appreciate the full significance of these two decisions, it is necessary to examine the development behind each of these conclusions.

A. *Urban Lease Obligations Are Contractual*

That the modern lease is both a conveyance and a contract is not a new concept. Although the vast majority of courts have applied real property rules to the lease, there were some exceptions from which *Marini* and *Javins* eventually emerged. As early as the 19th century, several cases identified in the lease the most basic of contract principles — consideration. A Massachusetts court in 1870, in granting constructive eviction to a tenant, discussed how the eviction of a tenant from the premises was a bar to any demand for rent because it deprived the tenant of the entire consideration for which the rent was paid.[174] Nine years later, the Supreme Court of Michi-

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[172] Saunders v. First National Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968), *rev'd sub nom.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[173] 428 F.2d at 1072-73. The *Javins* court would also allow an action for specific performance of the landlord's implied warranty of habitability. *Id.* at 1082 n.61.

A later decision by the District of Columbia circuit seems to imply that the tenant may use the withheld rent for purposes of repair. Bell v. Tsintsolas Realty Co., 430 F.2d 474, 484 (D.C. Cir. 1970).

After *Javins*, the Housing Regulations for the District of Columbia were amended to specifically provide for a warranty of habitability in leases of urban dwellings. *See* D.C. REGISTER § 2962.2 (June 29 1970).

[174] Royce v. Guggenheim, 106 Mass. 201 (1870). *See, e.g.*, Westland Housing Corp. v. Scott, 312 Mass. 375, 382, 44 N.E.2d 959, 963 (1942), where the court decided

gan held that when the lessor rents his house with a distinct understanding that it is in good condition, this understanding becomes a part of the consideration.[175] If the premises are found uninhabitable, the consideration fails, and the lessee is justified in leaving and refusing to pay further rent. In *Bostwick v. Losey*,[176] another 19th century case by the same court, the lease was for a sawmill and contained a covenant of repair by the landlord. Upon failure of the landlord to keep up the repairs, the mill became useless and the lessees abandoned it. Ruling on the landlord's suit for nonpayment of rent, the court said that because the mill was rendered useless by the lessor's failure to repair, the consideration for the lease had failed and the tenants could leave. The court also said that the tenants could recover damages for the landlord's failure to repair because they had the right to hold him to the ordinary liabilities of a party failing to perform an agreement. The court could "see no difference . . . between this and any other contract."[177]

A few courts have expressly applied contract principles to landlord and tenant covenants to repair and to pay rent. In *Brady v. Brady*,[178] the Maryland Court of Appeals held that a lessor's express covenant to pay any expenses necessary for repairs was mutual with and dependent upon the lessee's covenant to pay rent. A Texas court of civil appeals, in *Ingram v. Fred*,[179] allowed the lessee of a building to vacate the premises and refuse to pay rent upon failure of the landlord to perform his covenant to keep the roof in repair. The court said:

> [I]f there be any principle of public policy . . . which would exempt a lease contract from the operation of the general rule of mutuality of covenants applicable in the construction of other contracts . . . such an exception in favor of a landlord and against the tenant, which, so far as we can perceive, is purely arbitrary and without any

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that the defense of eviction, either actual or constructive, was a defense sounding in contract, based upon a failure of consideration or a breach of a lease covenant so material as to excuse the tenant from performing. *See also* Amsterdam Realty Co. v. Johnson, 115 Conn. 243, 161 A. 339 (1932), where the court declared that the rent was suspended by a constructive eviction because it was unjust to permit a landlord to collect rent while, by his own act, he deprived the tenant of possession. The court said that constructive eviction arose when the landlord's actions rendered the premises untenantable, thereby resulting in a failure of consideration for the tenant's promise to pay.

[175] Tyler v. Disbrow, 40 Mich. 415 (1879).

[176] 67 Mich. 554, 35 N.W. 246 (1887).

[177] *Id.* at 558, 35 N.W. at 248.

[178] 140 Md. 403, 117 A. 882 (1922).

[179] 210 S.W. 298 (Tex. Civ. App. 1919).

> reasonable or equitable basis, is incompatible with the spirit and genius of our institutions and should not be allowed.[180]

In *Higgins v. Whiting*,[181] the Supreme Court of New Jersey applied this same reasoning to declare that the tenant's covenant to pay rent and the landlord's covenant to heat were mutually dependent promises. Thus, the landlord's failure to furnish heat was a good defense to an action for rent. The above decisions show that some courts have felt not only that possession of a habitable premises is the consideration for which rent is paid, but also that the doctrine of mutuality applies to the landlord's covenant to repair or provide services.

Of the many factors influencing the courts to regard the lease as a contract, policy considerations stand in the forefront. The courts applying contract principles to leases acknowledge that the modern short-term lease is more aptly characterized as a service contract to furnish lodging than as a conveyance of property.[182] As one commentator has pointed out:

> The landlord's duties no longer end when he delivers possession to the tenant. He now provides many services related to the care and maintenance of the building, and for the tenant's comfort and convenience.
>
> These services are of the type usually purchased by contract. The amount of rent payed is adjusted with regard to the amount of these services. The modern lease more closely resembles a contract for the purchase of space and services than it does the purchase of an interest in land.[183]

As the *Javins* court found, when the city dweller, rich or poor, seeks shelter today, he seeks a "well known package of goods," including not only walls and a ceiling, but also adequate heat, light, and ventilation, serviceable plumbing facilities, proper sanitation, and proper maintenance.[184] Real property concepts are not as well equipped as contract principles to govern in this exchange of services for rent.

B. *Landlords Should Be Held to an Implied Warranty of Habitability and Repair*

With respect to the landlord's immunity from any liabilities aris-

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[180] *Id.* at 300.

[181] 102 N.J.L. 279, 131 A. 879 (1926).

[182] *See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). *See also* Note, *Duty of Maintenance of Multiple Dwellings in California*, 18 STAN. L. REV. 1397 (1966).

[183] Note, *The California Lease — Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952).

[184] 428 F.2d at 1074.

ing out of his leasing uninhabitable premises to unwary tenants, it has been recognized that the doctrine of caveat emptor is an "anachronism" as applied to modern leases.[185] In a famous dissent in the case of *Bowles v. Mahoney*,[186] Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit echoed this sentiment when he said:

> [The common law of landlord-tenant] is an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to "the felt necessities of [our] time." I would therefore discard it and cast the presumptive burden of liability upon the landlord. This I think, is the command of the realities and mores of our day.[187]

But despite the zealousness of some individual judges and the willingness of several courts to recognize the lease as a contract, few courts have approved of holding the landlord to an implied warranty of habitability and repair. Some courts, however, have found implied covenants of habitability or repair based on extrinsic circumstances.

Two courts have found implied covenants of repair evidenced by provisions in the lease. In *Ingram v. Fred*,[188] the court held that although the lease did not expressly bind the landlord to repair the roof of the building, the obligation of the landlord was clearly implied from the terms of the lease itself. The court felt that the tenant's express obligation in the lease to inform the landlord if the building leaked, coupled with the stipulation that the landlord should have reasonable time to repair the building, clearly imparted an understanding between the parties that the landlord would make repairs after receiving the required notice; otherwise, the clause in the lease would serve no purpose. In *Michaels v. Brookchester*,[189] the tenant was injured because of a defective cabinet door in his apartment, which the landlord had promised to repair after being notified. The Supreme Court of New Jersey held the landlord liable for the tenant's injuries resulting from the landlord's failure to repair, even though the lease contained no express promise to repair. The

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[185] Skillern, *supra* note 14, at 387. The author feels that caveat emptor should only continue to control those cases in which the uninhabitability is the result of a foreseeable defect caused by one other than the lessor. *Id.* at 389.

[186] 202 F.2d 320, 325 (D.C. Cir. 1952). In *Bowles*, the majority applied strict common law property rules to hold that where a landlord had not agreed to repair and was not guilty of fraud in failing to disclose certain defects, the tenant had taken the premises as they were and assumed the risk of subsequent injury to third persons.

[187] *Id.*

[188] 210 S.W. 298 (Tex. Civ. App. 1919).

[189] 26 N.J. 379, 140 A.2d 199 (1958).

court found an obligation to repair implied from a clause in the lease providing that there would be no abatement or diminution of rent because of a failure to make repairs on the premises after execution of the lease. The court reasoned that this clause seemed unnecessary if the repairs contemplated were to be made by the tenant, and that reasonable men might well conclude that the landlord assumed responsibility for such repairs.

The Supreme Court of Wisconsin, in *Pines v. Perssion*,[190] found an implied covenant of habitability necessary in order for the lease to be consistent with the housing laws. The case involved the leasing of a one family home to a group of college students. When the students moved in, they found the premises uninhabitable, and after an unsuccessful attempt to repair the premises themselves, they moved out and brought suit to recover their deposit. Although the students had inspected the house before renting it, the court pointed out that they had no way of knowing that the plumbing, heating, and wiring were defective. The situation clearly fell into one of the recognized exceptions to the general rule of no implied warranties of habitability (the "furnished house rule"),[191] but the court nonetheless noted that new legislation rendered the old rule of caveat emptor obsolete:

> Legislation and administrative rules . . . building codes and health regulations, all impose certain duties on a property owner with respect to the condtion of his premises. Thus, the legislature has made a policy judgment — that it is socially (and politically) desirable to impose these duties on a property owner . . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.[192]

Until very recently, however, courts refused to impose a warranty of habitability unless extrinsic circumstances were present.[193] *Lemle v. Breeden*[194] was one of the first decisions to find an implied war-

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[190] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[191] *See* note 11 *supra* & accompanying text.

[192] 14 Wis. 2d at 595-96, 111 N.W.2d at 412-13. The court then added that the need and social desirability of adequate housing is too important to be rebuffed by that "obnoxious legal cliche, caveat emptor." *Id.* at 596, 111 N.W.2d at 413.

[193] An exception was Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931), where an implied warranty of habitability was held to exist in a lease of an apartment infested with bedbugs. The court acknowledged that at common law the landlord had no implied duty to wage war on vermin. "But," the court said, "such rule . . . is not inflexible, but to some degree elastic, and must be construed to meet conditions unknown at common law. There is much in and about such an apartment building far beyond the control of a tenant in one of these apartments." *Id.* at 429, 239 N.W. at 149.

[194] 51 Hawaii 426, 462 P.2d 470 (1969).

ranty of habitability in the mere contractual relationship of an urban landlord and tenant. In *Lemle*,[195] the Supreme Court of Hawaii affirmed a lower court's decision that the landlord's leasing a dwelling that was not in a habitable condition was a breach of his implied warranty of habitability and fitness for use intended. The court said that application of such an implied warranty recognizes the circumstances of today's lease transactions. The lessee generally does not have as much knowledge of the condition of the premises as the lessor. The lessor is in a better position to know of latent defects that might go unnoticed by the tenant. The tenant cannot be expected to know about the plumbing and wiring and should not be expected to hire an expert to advise him. The court concluded that under these circumstances an implied warranty of habitability and fitness is a "just and necessary implication."[196]

The Supreme Court of New Jersey, in *Marini v. Ireland*,[197] carried this idea forward another step in holding that the landlord was not only held to an implied covenant against latent defects in facilities vital to the residential use of the premises, but that he was also required to keep those facilities in usable condition for the duration of the lease.[198] The court said:

> In determining, under contract law, what covenants are implied, the object which the parties had in view and intended to be accomplished, is of primary importance. The subject matter and circumstances of the letting give at least as clear a clue to the natural intentions of the parties as do the written words.[199]

Applying this formula to the leasing agreement, the *Marini* court

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[195] In *Lemle*, the leased house (unfurnished) was infested with rats. Attempts by the lessor to alleviate the problem were only partially successful. The tenants abandoned the premises after notifying the lessor's agent of such intention, and demanded the return of the money they had paid in advance for rent. In a suit to recover this deposit, the trial court ruled that there was an implied warranty of habitability and fitness in the lease and the lessor's breach of warranty was a constructive eviction, entitling the tenant to a substantial rebate of the deposit. The supreme court specifically rejected the constructive eviction theory, concluding that leases should be treated as contractual relationships with an implied warranty of habitability and fitness.

[196] 51 Hawaii at 433, 462 P.2d at 474.

[197] 56 N.J. 130, 265 A.2d 526 (1970).

[198] *See* Garcia v. Freeland Realty, Inc. 63 Misc. 2d 937, 314 N.Y.S.2d 215 (New York City Civ. Ct. 1970), where the court, taking judicial notice that peeling paint was dangerous to small children, allowed the tenant to paint the apartment and to recover for the value of labor and material from the landlord. The court reasoned that if the tenant's children had been harmed as a result of ingesting the peeling paint, the landlord would have been liable in tort. Since the tenant prevented a possible tort by painting the walls, he should be reimbursed by the person against whom the tort action would have accrued.

[199] 56 N.J. at 143, 265 A.2d at 533.

concluded that because the landlord had restricted the premises to use only as a dwelling, he had impliedly represented to the tenant that the premises were fit for that purpose. And as part of this representation, the landlord had agreed to repair subsequent damage to vital facilities.

In discussing the need for implied warranties of habitability, some courts have analogized to implied warranties of fitness and use found by the courts in sales cases in order to protect the legitimate expectations of the buyer of goods.[200] The merchant is held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are of reasonable quality;[201] or if the merchant knows that the goods are required for a specific purpose and that the buyer is relying on the merchant's skill in furnishing the goods, he is held to warrant that they are fit for that purpose.[202] Various reasons have been offered for this trend: By holding out his product to the consumer, the seller represents that it can be safely used for its intended purpose; the seller or manufacturer has superior knowledge of the product and is in a better position to alleviate any problems with it; the seller is better able to bear the brunt of any loss; and the public reliance on the fitness of consumer goods requires that a warranty be implied in the interests of consumer protection and public safety.[203] These implied warranties have become part of the statutory law of the states through their adoption of the Uniform Commercial Code.[204]

All the requisites for the extension of the doctrine seem present in the landlord-tenant relationship. The tenant seeks shelter, and the landlord can be viewed as a "seller" of housing who represents to the tenant that the leased premises are fit for the particular purpose of residential living. The tenant should be assured that the dwelling will be habitable and that the landlord will provide essential services. This, as much as the shelter itself, is what the tenant expects for

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[200] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-77 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Hawaii 426, 432, 462 P.2d 470, 473-74 (1969).

[201] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[202] *See, e.g.*, Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961). For a discussion of these implied warranties and their relationship to real property, see Note, *Products Liability at the Threshold of Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970).

[203] *See generally* Jaeger, *Warranties of Merchantability and Fitness for Use*, 10 RUTGERS L. REV. 493 (1962).

[204] *See* UNIFORM COMMERCIAL CODE §§ 2-314, -315.

his payment of rent. It is unrealistic to think that the tenant can make any meaningful inspection prior to the leasing, especially any inspection of the central facilities such as furnaces, plumbing, and electrical wiring. The landlord is in a better position to know of the defects existing in the apartment, and he should be aware of the building code requirements. He is best able to absorb the costs of repairs because he can adjust his rent charges accordingly. The landlord is also in a bargaining position far superior to the tenant's; use of the form lease coupled with the housing shortage makes the lease a contract of adhesion. And much like the need to protect the consumer and the general public from faulty and dangerous goods, there is a need to protect the public from the detriments of ill health and urban blight fostered by dilapidated and unsafe housing.

C. *Constructive Eviction Is an Inadequate Remedy*

Constructive eviction, although long recognized as the most satisfactory remedy that courts had created for the tenant, has been criticized as being an insufficient remedy for the modern tenant. Courts cannot agree on what condition the premises must be in before the tenant has been constructively evicted or what intent, if any, the landlord must possess.[205] The greatest drawback of this remedy for today's tenant, however, is the abandonment requirement.[206] Some courts have already sought alternatives to the abandonment requirement. Some have allowed a remedy of constructive eviction in equity without forcing abandonment.[207] And one court has found partial constructive eviction, allowing the tenant to remain in at least part of the premises.[208] Other decisions, such as *Lemle v. Breeden*,[209] have identified constructive eviction as the judicial fiction it is. The *Lemle* court reasoned that the doctrine of constructive eviction no longer served its purpose when the more flexible concept of implied warranty of habitability was available. Further, the court noted that to search for gaps and exceptions in the doctrine of constructive eviction was to perpetuate further judicial fiction where preferable alternatives existed.

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205 *See* notes 24-25 *supra* & accompanying text.

206 *See* text accompanying note 26 *supra.*

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

208 East Haven Associates, Inc. v. Gurian, 313 N.Y.S.2d 927 (New York City Civ. Ct. 1970).

209 50 Hawaii 426, 462 P.2d 470 (1969).

The *Marini* and *Javins* decisions have clearly affirmed the position that a modern urban tenant has a right to a habitable dwelling for the duration of his tenancy. Although this is a very desirable step which should be adopted by courts in other jurisdictions, it will have significant impact on the quality of tenants' lives only if they are provided with adequate remedies to enforce their warranties. In this respect, it seems that the *Marini* remedy of repair and deduct is preferable to the *Javins* remedy of rent withholding and rent abatement.

1. *The Javins Remedy.*—In essence, *Javins* would permit a tenant to withhold rent payments from the landlord if his premises are not maintained in compliance with the housing regulations. If the landlord brings an action to evict for nonpayment of rent, the tenant is allowed to introduce evidence of building code violations as a defense. After such a defense has been interposed, the trier of facts must determine "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach."[210] If it determines that there was a total breach of the implied warranty of habitability, the tenant's entire rental obligation is extinguished, and he is entitled to remain in possession of the premises. If there has been only a partial breach, the tenant will retain possession and his rent payments will be scaled in accordance with the severity of the breach. If there has been no breach, no part of the rental obligation is extinguished, and "a judgment for possession may issue forthwith."[211]

The rent withholding and rent abatement remedy of *Javins* is inadequate for several reasons. First, the remedy of rent withholding and rent abatement does not insure that rent withheld from landlords will be employed for the purpose of correcting housing code violations. Although the remedy may benefit tenants economically because they can do as they please with the withheld rent, they are likely to be adversely affected in the long run. Clearly, courts must determine whether the purpose of granting certain remedies to tenants vis-à-vis the landlord is to punish the latter and benefit the former economically, or to assure that there will be an adequate supply of habitable dwellings. If the latter is the desired end, rent withholding and rent abatement alone is likely to be ineffective. As a matter of fact, this remedy alone may be inimical to this end because tak-

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[210] 428 F.2d at 1082-83.

[211] *Id.* at 1083.

ing part of the landlord's revenue decreases the likelihood that he will have adequate resources to make repairs.[212]

A further problem with the *Javins* remedy is that its use may have a detrimental effect on landlord-tenant relations. By allowing a tenant to withhold rent as soon as he believes that housing code violations exist on his premises, *Javins* would seem to set the stage for straining what are already forced landlord-tenant relations. A landlord intimidated by the withholding of rent is likely to respond in an uncooperative manner, thus making judicial resolution of landlord-tenant conflicts the inevitable next step. This difficulty may be somewhat obviated if the tenant is allowed to withhold rent only if he, while not in arrears in rent payments, gives notice to the landlord or to anyone to whom he usually pays his rent that certain housing code violations exist on his premises, and that if such violations are not corrected, he will cease paying rent.[213] Such a requirement would not only tend to maintain more amicable landlord-tenant relations, but, because some landlords may correct violations when advised of their existence, it may also result in frequent resolution of landlord-tenant conflicts without further overburdening the judiciary.

Another shortcoming of *Javins* is its failure to indicate clearly when the rent withholding and rent abatement remedy comes into effect. The opinion offers little guidance concerning what conditions constitute a breach of the implied covenant of habitability.[214] Thus, invocation of the remedy is very risky. According to *Javins*, if a tenant withholds rent with the honest belief that the condition of his premises justifies it, but the trier of facts subsequently rules that the conditions do not justify it, the tenant will be evicted.[215]

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[212] *See* Farrell v. Drew, 19 N.Y.2d 486, 496, 227 N.E.2d 824, 828, 281 N.Y.S.2d 1, 7 (1967) (Van Voorhis, J., dissenting).

[213] A notice requirement is only reasonable. A landlord, especially if he has multiple interests, cannot be expected to know the condition of a tenant's premises at all times.

[214] Housing regulations, at most, set a very vague standard. At least one court has refused to adopt the *Javins* approach for this reason. Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). The *Hood* court stated:

> The ordinances which defendant claims were violated in this case contain such phrases as "reasonably good state of repairs"; "clean and sanitary"; "adequately"; "reasonably good working conditions"; and other general terms which leave a great deal of discretion to those enforcing the code. In addition, there are no standards for differentiating consequential and inconsequential violations. Thus the common council has indicated an intent that the housing code be enforced administratively and not by terms implied in a lease. *Id.* at 181-82, 174 N.W.2d at 532-33.

[215] 428 F.2d at 1083.

If, however, the trier of facts determines that conditions justified rent abatement of a very insignificant amount, the tenant may retain possession and pay the slightly reduced rent.[216] Possession of a dwelling is of such crucial importance to tenants faced with a housing shortage that it should not depend on minor differences of opinion between the tenant and the trier of facts. Clearly, uncertainty of this nature cannot be tolerated if a particular tenant remedy is to be effective. A strict reading of *Javins*, however, seems to imply that even if there are housing code violations on a tenant's premises sufficient to subject a landlord to criminal penalties, if such violations are deemed de minimis by the trier of facts, the tenant will be evicted for withholding rent.[217] Thus, even if the tenant seeks to reduce the risk of losing possession of his premises by securing an official inspection report from the housing authorities stating that violations exist on his premises, he may still be evicted if the trier of facts subsequently concludes that the violations are de minimis. A partial solution to the uncertainty problem might be to have the housing authorities compile a list of specific violations that would justify rent withholding by a tenant.[218] When such a list has been compiled, the trier of facts would have the limited function of determining whether a specified violation existed on the premises of a tenant who has withheld rent. If it decides this question in the affirmative, it will be compelled to conclude that rent withholding was justified. This procedure would not only tend to reduce the uncertainty connected with the rent withholding remedy, but would also result in more speedy resolution of landlord-tenant cases.

A fourth major problem with the *Javins* remedy is the delay connected with its judicial application. Such delay may have several deleterious effects. Most immediate, of course, is the possibility that it will force tenants to live in uninhabitable dwellings for an unreasonable period of time. The delay may also make it possible for landlords to destroy evidence of building code violations after judicial proceedings have been initiated, thus adding to the existing difficulties that tenants may have in proving their allegations. A further likely effect is that marginal landlords will be driven out of business as

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[216] *Id.*

[217] *See id.* at 1082 n.63.

[218] Such a list might be similar to that authorized by § 302-a of the New York Multiple Dwelling Law (*see* notes 155-57 *supra* & accompanying text), except that it would include less "serious" violations.

a result of being deprived of their rent during the course of the judicial proceedings.[219]

Javins also fails to protect valid landlord interests. A strict reading of the opinion would seem to make it possible for tenants who have failed to pay rent for unjustified reasons to subsequently defend an eviction action by alleging that rent was not paid because violations of the housing code existed on their premises. Because certification of violations is not required before the rent withholding process is initiated, landlords may find themselves in a position of having to prove that housing code violations that presently exist on a tenant's premises did not exist when the tenant began withholding rent.[220]

But by far the greatest problem with the rent withholding and rent abatement remedy of *Javins* is that it may prove counterproductive in its attempt to secure habitable dwellings for urban tenants. This may result from several factors. Many landlords faced with the alternative of leaving their premises in disrepair and not collecting rent or repairing at great expense may simply board up and abandon the premises.[221] Furthermore, the possibility exists that many potential investors in the urban housing market will be discouraged by the prospect of having to face recurrent nonpayment of rent by tenants. In addition, nonpayment of rent for extended periods of time may force many marginal landlords out of the urban housing market. Although some advocates of rent withholding and rent abatement have discounted the significance of these factors, the increasing tide of building abandonment in many large cities[222] and recent landlord protests that urban housing has ceased to be a profitable investment support the fear that this remedy may result in a shrinkage of the housing supply.

2. *The Marini Remedy.*— The *Marini* repair and deduct remedy operates essentially as follows: When a tenant's premises are in an uninhabitable condition because of the landlord's failure to make

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[219] A subsequent decision by the District of Columbia circuit may require that a tenant deposit the withheld rent with the court during the course of the judicial proceedings if such proceedings are likely to be extended. *See* Bell v. Tsintsolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970). But unless provision is made for disbursements from the escrow account when a landlord demonstrates good cause, marginal landlords may still suffer irrevocable losses.

[220] A solution to this problem might be to require that a tenant procure an official inspection of his premises by the housing authorities before withholding rent.

[221] *See* REPORT OF THE NAT'L ADVISORY COMM. ON CIV. DISORDERS, 468-70 (N.Y. Times ed. 1968).

[222] *See, e.g.*, N.Y. Times, Feb. 9, 1970, at 39, col. 1.

necessary repairs and replacements, the tenant must give notice of the need for repair to the landlord. If the landlord fails to repair within a reasonable time of such notice, or if after reasonable attempts, the tenant is unable to give notice, the tenant may make the necessary repairs and replacements himself and deduct their cost from future rent payments. The tenant, however, is not relieved of the duty to pay rent unless he exercises his right to make necessary repairs and replacements.

This brief statement of the *Marini* remedy sufficiently demonstrates that repair and deduct has several advantages over the *Javins* remedy of rent withholding and rent abatement. The rent withholding and rent abatement remedy will be successful only if it can coerce landlords into keeping their premises repaired. If landlords are not so coerced, once rent withholding begins there is no guarantee that the tenant's premises will ever be made habitable. Thus, although the tenant is not paying rent, he is still living in an uninhabitable dwelling. Repair and deduct avoids this shortcoming by insuring that any rent withheld from the landlord will be used for the purpose of rendering the tenant's premises habitable. If we proceed from the assumption that the purpose of tenant remedies should be to insure that a tenant's premises will be made habitable, rather than to punish recalcitrant landlords, repair and deduct is the preferable remedy.

A second advantage of the repair and deduct remedy over rent withholding and rent abatement is that its operation may impose a lesser burden on the courts. By providing that a landlord must be given a reasonable opportunity to make repairs before the tenant can resort to self-help, the *Marini* remedy allows for the possibility that many landlords will repair before there is a need to resort to court action. Furthermore, even after the remedy is invoked, a landlord is less likely to resort to court action to recover withheld rent if such rent has been used to improve his property.

Repair and deduct may also provide less inducement for landlords to abandon buildings. Certainly, landlords will be more reluctant to abandon buildings that have increased in value as a result of tenant repairs.

But despite these advantages over the *Javins* remedy, the *Marini* court's formulation of the repair and deduct remedy leaves several problems unresolved. First, the *Marini* court did not state whether a tenant may expressly waive the landlord's duty to repair. The court's statement that "a covenant in a lease can arise only by neces-

sary implication from specific language of the lease or because it is indispensable to carry into effect the purpose of the lease"[223] leaves open the possibility that an express covenant in a lease releasing the landlord from any duty to repair may preclude a court from implying a warranty of habitability. If such express covenants are enforced, *Marini* will be of no more benefit to a tenant than the repair and deduct statutes previously discussed.[224]

A second problem with *Marini* is that the court offered no specific guidelines for determining what condition of disrepair will justify invocation of the repair and deduct remedy. Some insight into this matter, however, may be gained from the fact that it cited its earlier decision of *Reste Realty Corp. v. Cooper*[225] to support its decision to imply a warranty of habitability. In *Reste*, the tenant alleged constructive eviction; therefore the issue of implied warranty of habitability was not directly involved. But at points in its opinion, the *Reste* court indicated that landlord interference with a tenant's beneficial enjoyment and use of leased premises — the constructive eviction standard — would also be the standard for determining breach of any other warranties.[226] If the *Marini* court's reliance on *Reste* is accepted as an approval of the language of that opinion, a tenant may have to demonstrate conditions constituting a constructive eviction before he will be justified in using the repair and deduct remedy. At least one New Jersey court seems to have interpreted *Marini* as standing for this proposition. In *Academy Spires, Inc. v. Brown*,[227] the Essex County Court for the State of New Jersey ruled

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[223] 56 N.J. at 143, 265 A.2d at 533.

[224] Of course this result may be avoided if courts accept the reasoning that leases are contracts of adhesion; then, if a tenant waives any of his rights as a result of his inability to bargain with the landlord, such waiver would be deemed void as against public policy. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[225] 53 N.J. 444, 251 A.2d 268 (1969). In *Reste*, the court, although making an argument for the rejection of caveat emptor in leases, employed a constructive eviction standard to determine the rights of the parties under the lease.

[226] At one point the *Reste* court stated:

> [W]herever a tenant's right to vacate the leased premises comes into existence because he is deprived of their beneficial enjoyment and use on account of acts chargeable to the landlord, it is immaterial whether the right is expressed in terms of a breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects. *Id.* at 461, 251 A.2d at 276-77.

See Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 403, 261 A.2d 413, 417 (L. Div. 1970), a case decided before *Marini*, where the court clearly implied that to be actionable, the breach of the implied warranty of habitability must be substantial enough to constitute a constructive eviction.

[227] 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970).

that the test to be used to determine whether there has been a breach of the implied covenant of habitability is whether the defects or the services that have not been rendered go to bare living requirements. Applying this test, the court concluded that "[l]iving with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability."[228] But in the case of a multi-story apartment, the court considered the failure to supply heat, hot water, garbage disposal service, and elevator service a breach of the landlord's implied warranty of habitability.

The major defect of the repair and deduct remedy is that it will be of little value to a short-term lessee. A tenant who holds a month-to-month tenancy will not benefit from the remedy even though he makes repairs equalling 1 month's rent if he can be evicted at the end of the month. This may be a critical defect because most tenancies in urban areas are for short terms.[229]

D. *Remedies Against Retaliatory Evictions*

Most jurisdictions allow a landlord to evict a tenant from month to month or at sufferance for any reason or for no reason at all if he provides the tenant with short notice.[230] Some cases, however, have limited the landlord's power so that he may not evict in retaliation for certain tenant activities. The first case was *Tarver v. G. & C. Construction Corp.*,[231] in which the tenants informed the local health department of the existence of housing code violations on their premises. On the day of the complaint, the landlord increased the tenants' rent from $35 to $150 per week. The tenants sought a preliminary injunction to prevent the landlord from evicting or taking other retaliatory action against them. They argued that if the court failed to protect them against retaliation, they would be denied rights granted by the Constitution.[232] The United States District Court for the Southern District of New York granted the injunction, noting the presence of the requisite "state action" to bring the al-

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[228] *Id.* at 482-83, 268 A.2d at 559.

[229] *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 542 (1966).

[230] *See, e.g.*, Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Ct. App. 1947); De Wolfe v. McAllister, 229 Mass. 410, 118 N.E. 885 (1918); D.C. CODE ANN. §§ 45-902, -910 (1968).

[231] Civil No. 64-2945 (S.D.N.Y. Nov. 9, 1964).

[232] The tenants claimed that if the court permitted the eviction, it would be denying them their rights to freedom of speech, freedom to petition the government for a redress of grievances, and freedom to inform the government of violations of the law.

leged violations of constitutional rights within the 14th amendment:[233] "[P]atently eviction requires the action of state courts and state judicial officers, acting in their official capacities, and the action of the state within the Fourteenth Amendment."[234]

Although *Tarver* firmly stated that eviction or other retaliatory action by a landlord against a tenant who has reported housing code violations may constitute a violation of the tenant's constitutional rights, subsequent decisions recognizing the defense of landlord retaliation have found it unnecessary to reach the constitutional issues. In *Edwards v. Habib*,[235] the major case in this area, the landlord sought to evict a tenant in retaliation for her complaints to the housing authorities of housing code violations. The tenant argued that if the court allowed the eviction, she would be deprived of her constitutional rights of freedom of speech, freedom to petition the government for a redress of grievances, and freedom to inform the government of violations of the law. The trial court held that evidence of the landlord's motive in bringing the action was inadmissible, and directed a verdict for the landlord. The District of Columbia Court of Appeals, although recognizing that a landlord's right to terminate a tenancy is not unlimited,[236] affirmed.[237] The United States Court of Appeals for the District of Columbia Circuit, reversing the lower courts, held that although a landlord may evict a tenant from month to month or at sufferance for any reason or for no reason at all, he may not terminate the tenancy in retaliation for a tenant's complaints to the housing authorities. The court, however, concluded that it need not decide whether judicial recognition of the constitutional claims was "constitutionally compelled." Rather, it concluded that evictions in retaliation for a tenant's complaints to the housing authorities could not be allowed because to do so would frustrate the policy expressed by Congress through its enactment of the housing regulations. The court said:

> The notion that the effectiveness of remedial legislation will be

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[233] *See generally* Bell v. Maryland, 278 U.S. 226 (1964); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[234] Tarver v. G. & C. Constr. Corp., Civil No. 64-2945 (S.D.N.Y. Nov. 9, 1964).

[235] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[236] *See, e.g.*, Bloch v. Hirsh, 256 U.S. 135 (1921) (emergency rent control legislation restricting the contractual rights of the landlord); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) (evictions in retaliation for tenants' voting or registering to vote); Rudder v. United States, 226 F.2d 51 (1955) (where the government is landlord); Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962) (eviction sought solely because of tenant's race).

[237] 227 A.2d 388 (D.C. Ct. App. 1967).

> inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the validity of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.[238]

Subsequent to *Edwards*, other jurisdictions, either by court decision or by statute, have refused to allow evictions or rent increases in retaliation for a tenant's invocation of statutory provisions. In *Dickut v. Norton*,[239] a case similar to *Edwards*, the Supreme Court of Wisconsin, while finding it unnecessary to reach the tenant's constitutional arguments, concluded that to allow an eviction in retaliation for a tenant's complaints to the housing authorities would frustrate legislative policy.[240] And the Supreme Court of California has recently held that a landlord will not be permitted to increase the rent of a tenant in retaliation for the tenant's having exercised his rights under the state's repair and deduct statute.[241] In addition, legislation in several jurisdictions prohibits landlord retaliation against tenants who have sought to exercise rights granted them by statute.[242]

In light of the narrow language of the above cases and statutes prohibiting landlord retaliation against tenants for exercising rights either expressly or impliedly granted by statute, a question arises as to whether landlord action in retaliation for other lawful acts of tenants will be prohibited. In *Robinson v. Diamond Housing Corp.*,[243] the tenant had successfully defended a prior action for possession on the ground that the lease was void because the premises were in violation of the housing regulations when leased. A year later, the landlord brought another action for possession. The tenant demanded a jury trial claiming that the landlord's action was in retaliation for her earlier successful defense and was therefore illegal. The landlord moved for summary judgment and supported

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238 397 F.2d at 701-02.

239 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

240 The *Norton* court said:

> We likewise conclude that a landlord may terminate a tenancy at will or from month to month (or lesser periods) for any legitimate reason or no reason at all, but he cannot terminate such tenancy simply because his tenant has reported an actual housing code violation as a means of retaliation. *Id.* at 399, 173 N.W.2d at 301-02.

241 Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

242 *See, e.g.*, CAL. CIV. CODE § 1942.5 (West Supp. 1971); ILL. REV. STAT. ch. 80, § 71 (Smith-Hurd 1966); MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1971); *id.* ch. 239, § 2A; MICH. COMP. LAWS ANN. § 600.5646(4)(b) (Supp. 1971); N.J. STAT. ANN. § 2A:42-10.10 (Supp. 1971); R.I. GEN. LAWS ANN. § 34-20-10 (1969).

243 267 A.2d 833 (D.C. Ct. App. 1970).

the motion with an affidavit stating that the tenant had been served with a 30-day notice to quit, that it was unwilling to make repairs on the property, and that it wished to withdraw the property from the rental market. The trial court granted the landlord's motion. On appeal, the tenant argued that by granting the summary judgment the trial court had precluded her from inquiring into the landlord's good faith in its attempts to evict her. The District of Columbia Court of Appeals rejected her contentions and held that the retaliatory defense of *Edwards v. Habib* was not available. The court said: "The *Edwards* case involved a situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities and *it should be*, we think, *limited to its facts*."[244]

At present, only three jurisdictions have legislation that protects tenants from landlord reprisals in situations beyond those involving tenant exercise of rights granted by statute. A Rhode Island statute provides that a tenant may defend his possession on the ground "that the alleged termination was intended as a penalty for any other justified lawful act of the tenant."[245] Similarly, a Michigan statute protects the tenant from termination intended as retaliation for any lawful act arising out of the tenancy.[246] And a New Jersey statute prohibits landlord retaliation against a tenant who has sought to secure or enforce any rights under the lease, or under the laws of the state, its governmental subdivisions, or the United States. The New Jersey statute also protects the tenant from retaliation for organizing or participating in the activities of any lawful group.[247]

But even in jurisdictions where evictions or other acts of the landlord will not be allowed when they are intended as retaliation for lawful acts of the tenant, several factors may make this protection illusory. First, in light of present housing shortages, landlords need not always resort to the ultimate sanction of eviction to incapacitate tenants. In the case of most tenants, mere threats of eviction, even if the tenants are aware that such an eviction would be illegal, will be sufficient to deter them from engaging in permissible conduct. Consequently, if tenants are to be adequately protected, not only must actual evictions or other reprisals be made unlawful, but simple communication to the tenants of a landlord's intention to undertake such action should also be proscribed. If landlord intimida-

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244 *Id.* at 835 (emphasis added).

245 R.I. GEN. LAWS ANN. § 32-20-10(C) (1969).

246 MICH. COMP. LAWS ANN. § 600.5646(4)(c) (Supp. 1971).

247 N.J. STAT. ANN. § 2A:42-10.10 (Supp. 1971).

tion is to be eliminated, all landlord conduct which may have a chilling effect on lawful tenant conduct must be made unlawful.

A second factor militating against the potential effectiveness of the defense of landlord retaliation is the difficulty that most tenants are likely to incur in attempting to prove a retaliatory motive on the part of landlords. In spite of this, most of the cases and statutes recognizing the defense have imposed the burden of proving a retaliatory motive on the tenant.[248] In at least one case, proof by a preponderance of the evidence has been held insufficient. In the recent decision of *Dickut v. Norton*,[249] the Supreme Court of Wisconsin said:

> We therefore hold that the defendant can raise the defense of retaliatory eviction. To be successful in this defense, however, *he must prove by evidence that is clear and convincing* that a condition existed which did violate the housing code, that the plaintiff-landlord knew the tenant reported the condition to the enforcement authorities, and that the landlord, for the sole purpose of retaliation, sought to terminate the tenancy.[250]

Clearly, in the face of such a strict burden of proof, the defense of landlord retaliation would be useless to most tenants. As a matter of fact, in most cases, imposition of any burden of proof on the tenant may be unrealistic. We cannot expect a tenant with limited means and probably ineffective legal assistance to be able to ferret out evidence of retaliation that usually lies buried within the conscience of the landlord. Because improper motivation is characteristically a force of such low visibility, in cases where circumstances surrounding the landlord's action strongly evidence a retaliatory motive it would seem reasonable to impose the burden of proving nonretaliation on the landlord. Although this position has often been proposed,[251] it has been adopted by only a few jurisdictions.[252]

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[248] *See, e.g.*, Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr, 729 (1970); Dickut v. Norton. 45 Wis. 2d 389, 173 N.W.2d 297 (1970); R.I. GEN. LAWS ANN. § 34-20-10 (1969).

[249] 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

[250] *Id.* at 399, 173 N.W.2d at 302 (emphasis added).

[251] *See, e.g.*, H.R. 257, 90th Cong., 2d Sess. 1250(a) (1967); MODEL RESIDENTIAL TENANT CODE § 2-407 (Tent. Draft 1969).

[252] CAL. CIV. CODE § 1942.5 (West Supp. 1971); MASS. GEN. ANN. LAWS ch. 239, § 2A (Supp. 1971); N.J. STAT. ANN. § 2A:42-10.12 (Supp. 1971).

As to the constitutionality of statutes providing for a rebuttable presumption of retaliation, see State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (App. Div. 1969), where the court held that the rebuttable presumption provision of the New Jersey statute was constitutional because there was a rational connection between the fact to be proved (tenant exercise of statutory rights) and the ultimate fact to be presumed (landlord retaliation).

But even where the tenant is allowed to raise the defense of retaliatory eviction and would have no difficulty in proving a retaliatory motive, he may never get an opportunity to raise the defense if the landlord resorts to self-help eviction. Although self-help retaliatory evictions are likely to receive the same judicial treatment as retaliatory evictions sought through the courts, subsequent judicial relief is an inadequate remedy. A tenant is likely to be deterred from exercising any of his rights at the risk of an eviction, even though such an eviction may later be deemed unlawful. Effective protection of tenants, therefore, would seem to require that some sanctions be applied against landlords who resort to self-help.

VII. CONCLUSIONS

The foregoing analysis of landlord-tenant law generates several conclusions concerning what courts and legislatures must do in order to insure that modern urban tenants will be able to secure and enjoy habitable dwellings.

Courts and legislatures must continually assert that a modern urban tenant has a right to a habitable dwelling during the term of his tenancy. This assertion should come through the enactment and enforcement of statutes providing for a warranty of habitability and repair in all leases. The warranty should include a promise by the landlord not only to deliver a habitable dwelling at the commencement of the tenancy, but also to repair all dilapidations arising during the term of the tenancy. The following is an example of a statute imposing such a warranty:

> (1) In every lease or letting for any term of residential premises, the landlord covenants:
>
> (a) that the premises and all common areas are fit (as provided by the minimum housing code of the city or town in which the premises are located) for the use intended by the parties;
>
> (b) to keep the premises in good repair during the term of the lease or letting, and to comply with the applicable health and safety laws or ordinances of the state and of the city or town where the premises are located, except when the disrepair or violation of the applicable health or safety laws or ordinances has been caused by the wilful or negligent conduct of such tenant.[253]

In order to make the warranty of habitability and repair effective, tenants must be provided with an adequate remedy when the warranty is breached. Although all of the remedies thus far fashioned by courts and legislatures seem to have some shortcomings, a repair

[253] R.I. GEN. LAWS ANN. § 34-18-6(1)(a), (b) (1969).

and deduct remedy like that allowed in *Marini* is best suited to enforce the warranty. Thus, the statute should provide:

> (2) If a landlord fails to fulfill the obligations imposed by section 1, the tenant must give notice of such failure to the landlord. If notice cannot be effected after reasonable attempts, or if the landlord fails to fulfill the above obligations within 5 days of such notice, the tenant may cause the needed repairs or replacements to be made and deduct the cost thereof from future rent payments.

And to insure that the tenant's rights and the landlord's obligations are not waived by the tenant as a result of his inferior bargaining position, the statute should further provide:

> (3) The parties to the lease or letting may not modify the obligations imposed by section 1 or the rights granted by section 2.

To further insure that the warranty and the remedy provided for its breach will be effective, tenants must be protected against landlord retaliation. This protection may be afforded by the enactment and enforcement of a statute providing that proof of landlord retaliation is a complete defense to a landlord's action for possession of the premises. In order to fully protect the tenant, the defense should not be limited to landlord retaliation for the tenant's exercise of his statutory rights. And because tenants are likely to incur difficulty in establishing retaliatory motives on the part of landlords, in those situations where the circumstances surrounding an attempted eviction peculiarly evidence a retaliatory motive, a rebuttable presumption of retaliation should arise. An example of such a statute is set out in the margin.[254]

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[254] N.J. STAT. ANN. § 2A:42-10.10 (Supp. 1971) provides:

> No landlord . . . shall serve a notice to quit upon any tenant or institute any action against a tenant to recover possession of premises . . . :
> a. As a reprisal for the tenant's effort to secure or enforce any rights under the lease or contract, or under the laws of the State of ___ or its governmental subdivisions, or of the United States; or
> b. As a reprisal for the tenant's good faith complaint to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code or ordinance, or State law or regulation which has as its objective the regulation of premises used for dwelling purposes; or
> c. As a reprisal for the tenant's being an organizer of, a member of, or involved in any activities of, any lawful organization; or
> d. On account of the tenant's failure or refusal to comply with the terms of the tenancy as altered by the landlord, if the landlord shall have altered substantially the terms of the tenancy as a reprisal for any actions of the tenant set forth in subsections a, b, and c of section 1 of this act. Substantial alteration shall include the refusal to renew a lease or to continue a tenancy of the tenant without cause.
>
> . . . .
>
> A landlord shall be subject to a civil action by the tenant for damages and other appropriate relief, including injunctive and other equitable remedies, as

To insure that the defense of retaliation will not be circumvented by landlords resorting to self-help eviction, a statute making self-help evictions unlawful should also be enacted.[255] Abolishment of self-help evictions is supported not only by the experience of those jurisdictions that have already made evictions by self-help illegal,[256] but also by public policy considerations.[257]

Statutes such as the above, if strictly enforced, are sufficient to protect tenant interests in the short run. But this kind of legislation can only provide a short-term solution to tenant problems. Legislatures must also begin to realize that a modern urban tenant's greatest problem is not a lack of rights and remedies vis-à-vis

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may be determined by a court of competent jurisdiction in every case in which the landlord has violated the provisions of this section.

Id. § 10.11 provides:

> In any action brought by a landlord against a tenant to recover possession of premises as units to which this act is applicable . . . judgment shall be entered for the tenant if the tenant shall establish the notice to quit, if any, or the action to recover possession was intended for any of the reasons set forth in subsections a, b, c, or d of section 1 of this act.

Id. § 10.12 provides:

> In any action or proceeding instituted by or against a tenant, the receipt by the tenant of a notice to quit or any substantial alteration of the terms of the tenancy without cause after:
> a. The tenant attempts to secure or enforce any rights under the lease or contract, or under the laws of the State of ___, or its governmental subdivisions, or of the United States; or
> b. The tenant, having brought a good faith complaint to the attention of the landlord and having given him a reasonable time to correct the alleged violation, complains to a governmental authority with a report of the landlord's alleged violation of any health or safety law, regulation, code or ordinance; or
> c. The tenant organizes, becomes a member of, or becomes involved in any activities of, any lawful organizations; or
> d. Judgment under section 2 of this act is entered for the tenant in a previous action for recovery of premises between the parties; shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such attempt, report, complaint, or for being an organizer of, a member of, or involved in any activities of, any lawful organization.

[255] An example of such a statute is R. I. GEN. LAWS ANN. § 34-18-17 (Supp. 1970):

> The right of the landlord or a reversioner upon nonpayment of rent to utilize "self-help," so called, whether pursuant to the common law or pursuant to any agreement in writing or by parol, to re-enter and repossess himself of land, buildings or parts of buildings leased upon non-payment of rent is prohibited.

[256] *See generally* Boyer & Grable, *Reform of Landlord-Tenant Statutes to Eliminate Self-Help in Evicting Tenants*, 22 U. MIAMI L. REV. 800 (1968). *See also* Jordon v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961); Ardell v. Milner, 166 So. 2d 714 (Fla. App. 1964).

[257] Preservation of the peace and order of the community will be enhanced if landlords are prohibited from unilaterally determining when a tenant should be deprived of possession of his premises. Furthermore, the safety of both tenants and landlords will be less threatened by dispossessions if certain prescribed procedures are adhered to. Moreover, the landlord has readily available means to accomplish dispossession without resorting to self-help.

the landlord, but the lack of sufficient dwelling units. As long as there is a shortage of adequate housing, tenant remedies can only serve as stopgap measures.

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