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John E. Champion

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THE OHIO LANDLORD AND TENANT REFORM ACT OF 1974

The Ohio legislature has passed comprehensive legislation to deal with the changing nature of the residential tenancy. The new Ohio landlord-tenant act contains several departures from the common law. Repair responsibilities are divided between landlord and tenant. Lease-drafting and retaliatory practices are subjected to close scrutiny. A wide range of remedies is provided for the redress of grievances. The author analyzes the statutory scheme, noting the interplay among the provisions of the law. He concludes that the new statute lays the foundation for a new attitude of cooperation between landlord and tenant.

I. INTRODUCTION

IN THE closing hours of its final session, the 110th Ohio General Assembly enacted a major reform of the laws governing the residential landlord-tenant relationship.¹ The legislation mandates a comprehensive restructuring of Ohio's legislative treatment of the residential tenancy and deliberately lays to rest much of the state's common law in this area. In so doing, the statute draws heavily from the substance and philosophy of the recently drafted Uniform Residential Landlord and Tenant Act.²

A fundamental innovation of the new law is the abandonment of traditional reliance upon legal constructs, such as reversionary interests, for the dictation of duties, in favor of statutory division of

1. Amended Substitute Senate Bill 103 was passed on July 23, 1974 and became effective on November 4, 1974. The new law consists of a revision of the existing chapter of the Ohio Revised Code treating forcible entry and detainer, OHIO REV. CODE ANN. ch. 1923 (Page Supp. 1974), and an entirely new chapter of the Code, OHIO REV. CODE ANN. ch. 5321 (Page Supp. 1974). See Appendix for complete text.

2. Commissioners on Uniform State Laws, Special Committee on the Uniform Landlord-Tenant Relationship Act, Approved Draft (1974) [hereinafter cited as URLTA]. This draft was initially rejected at the midyear meeting of the American Bar Association held in Cleveland, Ohio, in February 1973. Subcommittee on the Model Landlord-Tenant Act of the Committee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE & TRUST J. 104 & n.4 (1973); reprinted in full in R. POWELL, 2 LAW OF REAL PROPERTY ¶ 260.1 (Rohan ed. 1973). It was subsequently approved by the House of Delegates of the American Bar Association at the midyear meeting held February 1974 in Houston, Texas. Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 & n.4 (1974). See *Proposed Uniform Residential Landlord and Tenant Act*, *supra* at 125-43, for the text of the final draft of the act, which is identical to the approved act.

responsibilities between landlord and tenant.³ This new scheme assigns duties on the basis of the relative abilities of the parties to fulfill obligations,⁴ rather than upon the strict legal theories of property law, which often led to inequitable allocations of responsibilities.⁵

To secure the performance of both landlord and tenant, the Act sets forth formidable remedies, some wholly new to Ohio, others merely refining common law remedies.⁶ The tenant is the primary beneficiary of the new statute, a necessary result in view of the statutory goal of placing with the tenant the task of initiating action to assure a habitable living space.

The remainder of the new law is designed to protect the allocation of responsibilities and the network of remedies from frustration by private parties. Perhaps the most important of these provisions is the prohibition of landlord retaliatory activity against the tenant in response to his lawful exercise of statutory rights.⁷ In addition, the statute rigidly controls the use of certain provisions in the individual lease agreement in order to prevent contractual avoidance of statutory objectives.⁸ Finally, in order to bar the summary disposition of complex issues and ensure the existence of a forum to hear all disputes that may arise, the statute expands both the scope of the hearing and the powers of the court in forcible entry and detainer proceedings.⁹

As with any new law of such broad influence, the legal community will require a period to adjust to the creation of what is, in fact, an entirely different legal environment. In this instance, the problems of adjustment may be particularly acute for several reasons. First, the statute relies heavily on Ohio common law to clarify critical

3. OHIO REV. CODE ANN. §§ 5321.04, .05 (Page Supp. 1974).

4. See note 24 *infra*.

5. See, e.g., Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966); Schoshinski, *Remedies for the Indigent Tenant—Proposal for Change*, 54 GEO. L.J. 59 (1966); Skillern, *Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387 (1967); cf. Bennett, *The Modern Lease—An Estate in Land or a Contract?*, 16 TEX. L. REV. 47 (1937).

6. OHIO REV. CODE ANN. §§ 5321.04(B), .05(C), .07(B), .09(D), .11-.12, 1923.02(H)-(I) (Page Supp. 1974).

7. *Id.* §§ 5321.02, .03.

8. *Id.* §§ 5321.13, .14.

9. *Id.* §§ 1923.061, .081, .15.

terms and to supplement the new law where collateral aspects of the landlord-tenant relationship are not thoroughly covered. Such interplay demands that the statute fit precisely into the existing common law context. Secondly, some of the provisions of the new law are triggered by vague standards of reasonableness or materiality. The objective factors relevant to defining these standards can be ascertained only through extensive review of the legal commentary and case law. Finally, the subtlety and complexity of the statute may make it difficult to apply. Intricate connections exist between many of its provisions. Unless these are carefully considered, much of their significance and much of the force of the statute as a whole will be lost. Obviously, none of these interpretive problems are insurmountable, but discovery of solutions is time-consuming. This Note is offered as a step toward accelerating the process.¹⁰

II. THE DIVISION OF RESPONSIBILITIES FOR THE CONDITION OF THE PREMISES

At common law the residential tenancy was viewed as a conveyance of an interest in land.¹¹ The landlord's responsibilities, in the absence of express agreements to the contrary, were limited to delivering possession at the beginning of the term¹² and thereafter refraining from disturbing the tenant's quiet enjoyment of the leased

10. To date, four articles dealing with the new law have been published. They have differed greatly in scope, circulation and emphasis. One is a brief outline, with little discussion of the major provisions. Klein, *Highlights of Recent Changes in Landlord-Tenant Law*, 46 LAW & FACT 5 (Cuyahoga County Bar Ass'n Nov. 1974). An overview with checklists and sample notice forms designed for the practitioner is found in Marshall & Gittes, *Tenants and Landlords: A New Set of Rules for an Old Relationship*, 43 OHIO BAR 37 (Jan. 13, 1975). These same authors, both of whom were involved in the drafting of the new law, have provided a far more extensive discussion in a publication of the Law Student Services Association of the Case Western Reserve University School of Law. Of particular interest in this article is the treatment of the procedural innovations under the new law and the discussion of possible legal strategies that could be employed by a tenant's lawyer in pursuing remedies under the law. Gittes & Marshall, *A Guide to Ohio's New Tenant-Landlord Law*, 3 LAW & HOUSING NEWSLETTER 2 (Jan. 1975). One student note, dealing with the law primarily from the perspective of the nationwide movement toward reform in this area, has also been published. Note, *Covenant of Habitability and the Ohio Landlord-Tenant Legislation*, 23 CLEV. ST. L. REV. 539 (1974).

11. *Brenner v. Spiegel*, 116 Ohio St. 631, 157 N.E. 491 (1927); 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

12. *Mullins v. Brown*, 87 Ohio App. 427, 94 N.E.2d 574 (1950); *Miller v. Innis*, 3 Ohio N.P. (n.s.) 50 (Ct. App. 1905), *aff'd* 3 Ohio N.P. (n.s.) 54

premises for the duration of the term.¹³ The landlord was under no duty to repair the premises.¹⁴ No implied warranty that the premises were safe or fit for habitation existed.¹⁵

The tenant's responsibilities for the condition of the premises were also minimal. His primary duty was to return the premises at the expiration of his term in the same condition as when he received them, normal wear and tear excepted.¹⁶ Thus, the tenant was responsible in voluntary waste¹⁷ for excessive damage caused by his own willful acts.¹⁸ On the basis of this duty to refrain from harmful actions, the courts imposed a further obligation to make such limited repairs as were necessary to assure the preservation of the leased premises in a reasonable state of maintenance.¹⁹ Upon the expiration of the term,²⁰ the tenant was liable to the landlord for damages resulting from breach of this duty.²¹

The nature of the tenant's duties emphasizes the basis of the com-

(C.P. Franklin County 1905), *aff'd mem.* 74 Ohio St. 476, 78 N.E. 1132 (1906).

13. *See* *Wetzel v. Richcreek*, 53 Ohio St. 62, 69-70, 40 N.E. 1004, 1006 (1895); 1 AMERICAN LAW OF PROPERTY § 3.47.

14. *Goddall v. Deters*, 121 Ohio St. 432, 169 N.E. 443 (1929); 1 AMERICAN LAW OF PROPERTY § 3.78.

15. *Branham v. Fordyce*, 103 Ohio App. 379, 145 N.E.2d 471 (1957).

16. *Cincinnati Oakland Motor Co. v. Meyer*, 37 Ohio App. 90, 174 N.E. 154 (1930).

17. *See, e.g., Chalmers v. Smith*, 152 Mass. 561, 26 N.E. 95 (1891) (overloading a storage area in barn rafters causing the building to collapse); *Kilfoyle v. Hull*, 4 Ohio Dec. Rep. 552, 553-54 (C.P. Cuyahoga County 1879) (action brought by landlord for injury to his reversionary interest caused by the painting of a sign on the side of a barn). *See generally* H. TIFFANY, 2 LAW OF REAL PROPERTY § 630 (3d ed. 1939).

18. *Rammell v. Bulen*, 51 Ohio L. Abs. 125, 128, 80 N.E.2d 167, 168 (Ct. App. 1948); 1 AMERICAN LAW OF PROPERTY § 3.39.

19. RESTATEMENT OF PROPERTY § 139 (1936). Although this section of the *Restatement* relates to the obligations of life tenants, the principles are fundamentally the same as those applicable to estates for years and other landlord-tenant relationships. 5 AMERICAN LAW OF PROPERTY § 20.12, at 101 n.9. *See also* Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, 41 MARQ. L. REV. 58, 59-61 (1957). The duty to keep the premises in a reasonable state of repair has also been described as the duty to make minor repairs. 1 AMERICAN LAW OF PROPERTY § 3.78.

20. The landlord had to prove both a duty to repair and negligent breach of that duty. *Mansfield Motors v. Freer*, 42 Ohio App. 214, 182 N.E. 51 (1932). Whether a duty to repair existed in a given case was determined by such factors as community custom, the availability of the landlord, the necessity of immediate repair, and the cost of repair relative to the rent and the duration of the tenancy. Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, *supra* note 19, at 70, 74-75.

21. 5 AMERICAN LAW OF PROPERTY § 20.12.

mon law's concern with the residential tenancy. These duties were not continuing ones as such. Although the duties theoretically possessed the force of law throughout the term, the tenant's liability did not mature until the end of the term. The law did not focus on the habitability of the dwelling during the tenancy; its interest lay in preserving the reversionary interest of the landlord. If the tenant wished to have a habitable dwelling, he was left to his own devices to secure it; if, on the other hand, he wished to avoid liability in voluntary waste, he had to return the premises to the landlord in a state as good as they were in when he received the possessory rights.

In a society based on agriculture, the elevation of the underlying land interests to preeminence was appropriate. However, in a more modern setting such an emphasis has proved to be "archaic and completely out of harmony with the facts."²² The judicial response to the changes in society has been the development of a new common law doctrine—the implied warranty of habitability.²³ Though the exact content of this doctrine varies from one jurisdiction to another, the principal policy underlying this reform is that the duty to repair a residential dwelling should be placed with the party who has the greatest stake in the continued maintenance of the dwelling and the greatest capacity to fulfill the duty.²⁴

In response to the implied warranty and various other judicial

22. 1 AMERICAN LAW OF PROPERTY § 3.78.

23. The implied warranty of habitability has its origin in two different bodies of law—the various local building and housing codes in effect nationwide and the UNIFORM COMMERCIAL CODE [hereinafter cited as UCC]. Although both have been used to support the development of an implied warranty of habitability, *see, e.g.,* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), some jurisdictions have adhered more closely to one than the other, so that different formulations of the warranty have resulted. In some jurisdictions the landlord is deemed to warrant only that the premises are and will remain in compliance with state and local building, housing, health, and sanitary codes. *See, e.g., Javins, supra; Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The other formulation results from an analogy to the warranties of merchantability and fitness for a particular purpose found in UCC §§ 2-314, -315, and in OHIO REV. CODE ANN. §§ 1302.27, .28 (Page 1962). Under this view the landlord is deemed to warrant that the premises are habitable and fit for residential occupancy. *See, e.g., Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973). While the housing code approach offers a relatively clear and fixed standard by which to measure performance, it lacks the flexibility and adaptability of the less well-defined standards of fitness and suitability adopted by the UCC approach. Comment, *Tenant Remedies—The Implied Warranty of Fitness and Habitability*, 16 VILL. L. REV. 710 (1971).

24. The common law principle requiring the tenant to maintain and repair

and legislative developments, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Residential Landlord and Tenant Act.²⁵ The Uniform Act synthesizes the various

the premises is itself founded on this policy. In the feudal agrarian society that produced the rule, the tenant's primary interest was in the land since he could use it to produce income through cultivation. Because his livelihood was derived from the land, he was likely to remain a tenant for many years. The dwelling that came with the land was only of secondary importance. Since it was small and simply constructed, the model farmer-tenant of the common law was likely to possess the skills necessary to keep it in repair. The imposition of repair duties on a tenant with a long-term business interest in the premises and with skills sufficient to fulfill the duty was therefore quite reasonable. The continuing vitality of these considerations is reflected in the new Ohio law, which excludes from its coverage residential premises rented in conjunction with two or more acres of farmland that is to be worked by the tenant. OHIO REV. CODE ANN. § 5321.01(c)(6) (Page Supp. 1974).

Prior to the development of the warranty of habitability, several exceptions limited the common law rule of caveat emptor for the lessee of residential premises. These exceptions placed duties of repair and disclosure on the landlord where it was evident that the tenant was unable to protect himself by inspection or unable to make repairs because of his short-term interest. The first exception was articulated in the case of *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892), in which the court held that the landlord had a duty to make repairs where the rental arrangement involved a short-term lease of a furnished dwelling. This principle has been further extended to require disclosure of latent defects that the tenant could not reasonably be expected to discover by diligent inspection. See, e.g., *Steeffel v. Rothschild*, 179 N.Y. 273, 72 N.E. 112 (1904); *Shinkle, Wilson & Kreis Co. v. Birney*, 68 Ohio St. 328, 67 N.E. 715 (1903). A third exception implied a warranty of fitness in the lease of premises which are under construction. See, e.g., *J.D. Young Corp. v. McClintic*, 26 S.W.2d 460 (Tex. Civ. App. 1930). Thus, the common law recognized that duties and responsibilities should be borne by those most capable of performing them. See generally, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739, 741-42 (1971).

In spite of these potentially broad exceptions to the common law caveat emptor principle, the social structure of today justifies an even broader rejection of the doctrine. The circumstances of the typical modern tenant are quite dissimilar from those of his agrarian forebears. His primary interest is in obtaining premises suitable for occupancy. Increased mobility and the absence of any vocational interest in the premises result in relatively short periods of tenancy for the average tenant. The structure of the dwelling is typically complex, while the tenant's employment skills are seldom related to repair or maintenance. Under these circumstances the tenant has little incentive to make repairs, often lacks the necessary skills, and frequently is not in a financial position to have them made. In contrast, the landlord's long-term business interest and ability to obtain financing to have repairs made, if not to develop the skills to do the work himself, place him in a much better position to fulfill the repair duty. See *Javins v. First Nat'l Realty Corp.*, *supra*; 1 AMERICAN LAW OF PROPERTY § 3.78; URLTA § 2-104, Comment.

25. See note 2 *supra*.

formulations of the implied warranty of habitability in the provision dealing with the duties of the landlord.²⁶ A companion section defines the complementary duties of the residential tenant.²⁷ The influence of the Uniform Act upon the measure adopted by the Ohio legislature is clear, particularly with respect to the two sections that the legislature adopted, with minor changes, as the vehicle for allocating duties between the landlord and the tenant.²⁸

A. *The Landlord's Obligations*

The structure of the landlord's duties²⁹ under the Ohio Act is complex. There are three distinct, yet potentially overlapping, levels, or tiers of obligations which the residential landlord must be prepared to meet. The first tier consists of a specified set of minimum duties that all landlords throughout the state must meet. The second tier

26. URLTA § 2.104(a). The Comment to this section notes that it follows the warranty of habitability doctrine now recognized in *Javins v. First Nat'l Realty Corp.*, 438 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Springs Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In describing the impact of § 2.104(a) the Comment states, "Generally duties of repair and maintenance of the dwelling unit and the premises are imposed upon the landlord by this Section. Major repairs, even access, to essential systems outside the dwelling unit are beyond the capacity of the tenant. Conversely, duties of cleanliness and proper use within the dwelling unit are appropriately fixed upon the tenant." URLTA § 2.104, Comment.

27. URLTA § 3.101.

28. These differences will be noted where they might affect the construction of a provision. Several bills were considered before the drafting and passage of the new law. One of the bills, Ohio H.B. 169, 110th Gen. Assembly, Regular Sess. (1973-74) [hereinafter cited as H.B. 169], was the full URLTA. Ohio H.B. 796, 110th Gen. Assembly, Regular Sess. (1973-74) [hereinafter cited as H.B. 796], sponsored by various tenant groups, used the provisions of URLTA that impose the landlord and tenant duties. The two bills that did not adopt the URLTA provisions in this respect were Ohio H.B. 277, 110th Gen. Assembly, Regular Sess. (1973-74) [hereinafter cited as H.B. 277], sponsored by the Ohio Board of Realtors, and S.B. 103, 110th Gen. Assembly, Regular Sess. (1973-74) [hereinafter cited as S. 103], drafted by the Governor's Advisory Commission on Housing and Urban Development. Copies of the various bills submitted and the legislative history were supplied by Jonathan Marshall of Columbus, Ohio, formerly with Ohio State Legal Services, and Fred Gittes, former director of the Ohio and the Columbus Tenants' Unions. See also Gittes & Marshall, *A Guide to Ohio's New Tenant-Landlord Law*, 3 LAW & HOUSING NEWSLETTER 2, 3 (Jan. 1975).

29. OHIO REV. CODE ANN. § 5321.04 (Page Supp. 1974).

imposes obligations that may vary with the geographical area in which the premises are located. The third tier of obligations consists of those set by the individual landlord and tenant as determined both by the terms of the rental agreement and by the reasonable expectations of the parties. The landlord is afforded a limited right of entry to perform the duties imposed by the statute.

1. *The First Tier: Statewide Minimum Duties*

The first tier of obligations consists of those duties common to all residential landlords in Ohio. In the absence of stricter duties imposed by local laws,³⁰ this tier establishes the full extent of the landlord's minimum duties. For the most part, the provisions that comprise this tier have a distinct common feature: they are strictly legislative creations with no common law background. For this reason, and also because they are directed at the so-called modern conveniences, these provisions leave little room for creative judicial interpretation. Under the first-tier obligations, the landlord is obliged to supply running water.³¹ He must supply reasonable amounts of heat and hot water unless (1) these utilities are generated "by an installation within the exclusive control of the tenant and supplied by a direct public utility connect," or (2) the dwelling unit is not required by law to be equipped with these facilities.³² The landlord must maintain in good and safe working order all elevators and "all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances" that are supplied by him.³³ Finally, where a structure contains more than three dwelling units, the landlord must supply containers for waste and arrange for them to be emptied.³⁴

The only duty at this level that does have a common law counter-

30. See notes 43-64 *infra* and accompanying text.

31. OHIO REV. CODE ANN. § 5321.04(A)(6) (Page Supp. 1974).

32. *Id.* Other bills required the landlord to supply heat only during the period between October 2 and May 1. H.B. 169, § 5315.19(A)(6); H.B. 796, § 5315.19(A)(6).

33. OHIO REV. CODE ANN. § 5321.04(A)(4) (Page Supp. 1974). Instead of restricting this provision only to the listed types of appliances, other bills were more inclusive, reading "all . . . air conditioning and other facilities and appliances." H.B. 169, § 5315.19(A)(4); H.B. 796, § 5315.19(A)(4). It should be noted that this maintenance duty with respect to ranges, dishwashers, refrigerators, washers, and dryers is the only repair obligation that may be transferred to the tenant—and then only by the terms of a written rental agreement. OHIO REV. CODE ANN. § 5321.05(A)(7) (Page Supp. 1974).

34. OHIO REV. CODE ANN. § 5321.04(A)(5) (Page Supp. 1974). Two

part is the requirement that the landlord "keep all common areas of the premises in a safe and sanitary condition."³⁵ This duty differs from its common law counterpart, however, with respect to the attributes of the area that trigger the duty and the extent of the activities required to fulfill it.

Under Ohio's common law the landlord had a duty to repair those areas of the premises over which he possessed a right of control. In premises occupied by two or more tenants, the law implied that this control extended over those portions used in common by the tenants.³⁶ The duty required the landlord to exercise ordinary or reasonable care to repair those areas and to keep them safe.³⁷ The courts, however, limited this potentially broad duty in two critical ways. First, the landlord could reduce the extent of his duty by an express abandonment of the right of control.³⁸ Secondly, narrow judicial definitions of "repair" prevented the duty from extending to such activities as keeping stairwells lighted³⁹ or removing ice and snow.⁴⁰

The new Ohio law reformulates and expands the duties of the landlord regarding common areas in order to avoid such restrictive interpretations. First, by defining the places over which the duty extends as "common areas," the law ties the duty to the element of common use by the tenants rather than to the right of control exercised by the landlord. The introduction of this element into the statutory scheme frustrates any attempt to avoid the duty by abandoning a right of control.

other bills did not limit this provision to structures containing more than three units, H.B. 169, § 5315.19(A)(5); H.B. 796, § 5315.19(A)(5).

35. OHIO REV. CODE ANN. § 5321.04(A)(3) (Page Supp. 1974). In the other two bills, this duty is described as one to keep the area "clean and safe." H.B. 169, § 5315.19(A)(3); H.B. 796, § 5315.19(A)(3).

36. *Rice v. Ziegler*, 128 Ohio St. 239, 190 N.E. 560 (1934).

37. *Harmony Realty Co. v. Underwood*, 118 Ohio St. 576, 579, 161 N.E. 924, 925 (1928).

38. *Dee v. Emery*, 10 Ohio Dec. Reprint 92 (Super. Ct. Cincinnati), *aff'd without opinion*, 27 WEEKLY L. BULL. 160 (Ohio Sup. Ct. 1884). See generally, Annot., 26 A.L.R.2d 468 (1952) for problems that may result from focusing a rule of law on such an elusive concept as the right of control.

39. *McKinley v. Niderst*, 118 Ohio St. 334, 160 N.E. 850 (1928), *aff'g* 27 Ohio App. 38, 160 N.E. 724 (1927).

40. *Jeswald v. Hutt*, 15 Ohio St. 2d 224, 239 N.E.2d 37 (1968); *Turoff v. Richman*, 76 Ohio App. 83, 61 N.E.2d 486 (1944). *But cf.* *Oswald v. Jeraj*, 146 Ohio St. 676, 67 N.E.2d 779 (1946), which held a landlord to be guilty of negligence in failing to remove ice and snow after he had made it a practice to do so over a long period of time. See generally Annot., 49 A.L.R.3d 387 (1973).

Secondly, by keying the landlord's duty to a condition to be achieved—safe and sanitary—rather than a description of required activities—repairs—the law effectively precludes the narrowing of the duty on the ground that the particular activity is not in the nature of a repair. Under the common law, for example, it might be successfully argued that there is no duty to remove ice from a sidewalk because the act of removing ice is not a repair.⁴¹ This argument defeats the primary intent of establishing a duty. The concern was the removal of dangerous conditions, not the literal definition of the activities that restored the premises.⁴² Clearly, not all of the activities necessary to maintain a safe and sanitary condition fall under the typical definition of repairs. The new statute focuses on this fact and widens the scope of the landlord's duty to embrace all activities necessary to achieve a safe and sanitary condition in the common areas.

2. *The Second Tier: The Community-Imposed Obligations*

The second tier of the landlord's responsibilities requires that he "comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety."⁴³ To the extent that codes promulgated by the state⁴⁴ are applicable, there may be said to be a state-wide minimum standard imposed similar to those in the first tier. The new law does not, however, restrict the required compliance to only those codes.⁴⁵ Minimum standards

41. *Cf. Cincinnati, N.O. & T.R. Co. v. Public Util. Comm'n*, 31 Ohio St. 2d 81, 285 N.E.2d 371 (1972) (holding that although vermin and rodent infestation and excessive dust violated health code requirements to keep an area "safe and sanitary," a party was not required to remedy the condition under his covenant to repair).

42. *Cf. Oswald v. Jeraj*, 146 Ohio St. 676, 67 N.E.2d 779 (1946) (refusing to allow the source of the unsafe condition, *i.e.*, natural causes, to overcome the fact that there was an unsafe condition present).

43. OHIO REV. CODE ANN. § 5321.04(A)(1) (Page Supp. 1974).

44. Such codes are authorized or set forth in chs. 3701, 3707, 3709, 3737, and 3781 of the Ohio Revised Code.

45. OHIO REV. CODE ANN. § 5321.04(A)(1) (Page Supp. 1974). H.B. 277, § 5315.19(A) required the landlord to comply with "either the applicable local building and housing codes or Chapter BB-53 of the Ohio Building Code" Under this formulation, not only would the landlord have had fewer code provisions with which to comply, but he would have been able to choose the less stringent set of regulations. H.B. 169, § 5315.19(A)(1) required compliance with only the building and housing codes. H.B. 796, § 5315.19(A)(1) limited the obligation to building and housing codes but did not limit the applicable provisions of those codes to those materially affecting health and safety. The new law expands the types of codes with which the landlord must

may also be fixed by the community through the enactment of local codes. Compliance with these codes, then, becomes a duty owed by the landlord directly to the tenant. The tenant may enforce this duty through private legal action.⁴⁶

A major problem in code enforcement, whether public or private, is that the quality of housing covered by any single set of codes can vary greatly. In large cities many dwellings do not meet the code standards. Of these structures many are simply slums, in a state of neglect. Many other buildings, however, were constructed long before building or housing codes were enacted. Thus, even if they were in the same condition as when built, they would fail a modern housing inspection. If an intensive enforcement effort were undertaken, the owners of many of these older buildings would find the cost of repair prohibitive. They would have no choice but to close or abandon their buildings, which, in turn, would decrease the amount of housing available.⁴⁷ In order to reconcile the need to pro-

comply for the purposes of this statute, but limits the applicable provisions of those codes to those materially affecting health and safety. See notes 47-56 *infra* and accompanying text.

46. The development of local building and housing codes began near the end of the 19th century as a response to the squalid living conditions of workers in urban industrial areas. It was hoped that governmental enforcement backed by a system of fines for violators would improve the quality and arrest the deterioration of rental housing. Unfortunately, the codes failed to achieve these goals. The fines proved to be too small to have any deterrence value, the enforcement agencies were inadequately staffed and financed, and the standards of compliance were too subjective. See, Landman, *Flexible Housing Code—The Mystique of the Single Standard: A Critical Analysis and Comparison of Model and Selected Housing Codes Leading to the Development of a Proposed Model Flexible Housing Code*, 18 *How. L.J.* 251 (1974); Gribetz & Gad, *Housing Code Enforcement: Sanctions and Remedies*, 66 *COLUM. L. REV.* 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 *HARV. L. REV.* 801 (1965).

It has been suggested that giving tenants a private right of action for a landlord's noncompliance with the codes would make enforcement of code standards more effective and thereby move society closer to the goal of a minimum standard of safety in rental housing. Note, *Housing Code Enforcement by Private Attorneys General: A Better Way?*, 1973 *URBAN L. ANN.* 299. Several jurisdictions have adopted the implied warranty of habitability doctrine for this purpose. See *Kline v. Burns*, 111 N.H. 87, 279 A.2d 248 (1971); Note, *Housing Code Enforcement by Private Attorneys General: A Better Way?*, 1973 *URBAN L. ANN.* 297. See also *Pines v. Perssion*, 14 Wis. 2d 570, 111 N.W.2d 409 (1961); Note, *Enforcement of Municipal Housing Codes*, *supra* at 843-48.

47. Note, *Enforcement of Municipal Housing Codes*, *supra* note 46, at 849-50. Two approaches have been suggested to decrease the risk inherent in strict code enforcement. The first is selective enforcement, which designates for close supervision areas of a city where strict enforcement would be most

tect the health and safety of the tenants with the often conflicting need to protect, if not expand, the housing supply, the new law restricts private enforcement to those provisions of local codes which "materially affect health and safety."⁴⁸

The effect of the statute is to construct another housing code, embodying a standard less stringent than that of the entire local code, one composed of only those code provisions that are essential to the protection of health and safety. The task of selecting the applicable local provisions is left to the courts. In each case it will be necessary to decide whether the code provision allegedly violated materially affects health and safety. In making this determination the courts must strike a balance between the need to protect the health and safety of tenants and the need to minimize the financial burden imposed on landlords. In each case the court must decide whether the provision at issue is so closely related to the health and safety of all tenants that it should be enforced even at the risk of adversely affecting the housing supply. Stated in another way, the question is whether a code provision should be part of the absolute minimum standards for safety and health that are enforceable by private action.⁴⁹

This inquiry focuses on the condition of the premises that is regulated by the local provision. The extent to which this condition affects the health and safety of an occupant then determines whether the provision should be enforceable by private action.⁵⁰ This analy-

likely to result in reduced deterioration. Comment, *Housing Codes and the Prevention of Urban Blight—Administrative and Enforcement Problems and Proposals*, 17 VILL. L. REV. 490 (1972). A second approach would abandon the use of a single set of codes for that of several sets, each one of which would be keyed to and used in a particular section of a city. In this way, the standards applicable to buildings constructed in 1970 would not be applicable to buildings constructed in 1890. This approach would key the codes to the practical realities of slums while not allowing inadequate practices to continue in newer and better preserved areas. Landman, *Flexible Housing Code*, *supra* note 46.

48. OHIO REV. CODE ANN. § 5321.04(A)(1) (Page Supp. 1974).

49. Violations of code provisions that are not included in this standard would perhaps be actionable, however, as breaches of the landlord's duty to keep the premises fit and habitable. OHIO REV. CODE ANN. § 5321.04(A)(2) (Page Supp. 1974). Such code provisions need not, therefore, be thought of as precluded from serving as grounds for tenant action. See notes 65-81 *infra* and accompanying text.

50. That the focus should be placed on the condition to be regulated is indicated by § 5321.07(A) of the new law, which defines tenant remedies. In describing the types of violations for which remedies are available, this section refers to noncompliance with "codes which apply to any condition of the

sis apparently excludes from the field of private enforcement procedural regulations embodied in licensing, filing, and certification requirements, which bring conditions to the attention of code enforcement agencies, but do not in themselves regulate conditions of the premises.

Once a local provision has been found to regulate the conditions of the premises, a determination regarding the materiality of the impact of the condition on health and safety is in order. This analysis requires a consideration of both the severity of the injury that could be caused by the condition and the probability that the injury would actually occur. At this point, more local provisions may be eliminated from consideration. There may be provisions regulating conditions which themselves are so tangentially related to health and safety that they may be summarily excluded. For example, a housing code might require that exterior walls be painted regularly.⁵¹ The immediate consequences of following the provision are purely aesthetic. The long-term impact may be more significant: deterioration of the wood may be prevented. But there is little chance that the present tenant will be so directly affected by the condition during his tenancy as to justify giving him a private right of action to enforce the provision.

Other provisions may be found that regulate conditions having direct influence on the tenant's life conditions, but may be dismissed from consideration because the impact of the conditions does not reach the required level of severity. For example, a provision might require a minimum percentage of window space in relation to floor area.⁵² While the tenant may prefer a certain minimum amount of

residential premises that could materially affect the health and safety of an occupant." OHIO REV. CODE ANN. § 5321.07(A) (Page Supp. 1974). This language was also used in defining the landlord's duty to comply with building and housing codes in S.B. 103, §§ 1923.17(A)-(B). It is of interest that the word "occupant" rather than "tenant" is used. "Occupant" may imply a broader class than "tenant." "Tenant" is defined by the statute as "a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." OHIO REV. CODE ANN. § 5321.01(A) (Page Supp. 1974). It would appear that "tenant" could be restricted to a person in contractual privity with the landlord. If this were so, then "occupant" could be used to cover those who might live with a tenant, such as his family, but who might not be in privity with the landlord.

51. *E.g.*, CLEVELAND, OHIO, CODIFIED ORDINANCES § 6.0515(A) (1969).

52. *Id.* § 6.0503: "Every habitable room shall be provided with natural light by one or more windows or approved equivalent facing upon an adequate open space. The aggregate glass area of such required windows shall not be less than ten (10) percent of the habitable floor area of the room served by them."

light for his dwelling, the probability that injury would result from a violation of this provision is remote. Moreover, it is difficult to hypothesize a serious injury flowing from a violation. A code section requiring the entrance of natural light assuredly contributes to the overall quality of life, but it is hardly a *sine qua non* of health and safety. It might be more readily classified as an amenity than a bare necessity.⁵³ Therefore, such a provision would not be enforceable by the tenant through private action; its violation is not a breach of the statutory duty to comply with the housing codes.

Remaining after the elimination of the procedural and the non-material local housing code provisions are those local laws that most Ohio landlords must meet if they are to fulfill their second-tier obligations. These provisions regulate substantive conditions of a dwelling that clearly relate to the health and safety of the tenant in a material way. Their potential impact on health is substantial; the severity of the injury caused by a violation could be great. An example of such a provision would be one prohibiting the use of lead-based paint by the landlord when decorating or repairing. It has been established that human consumption of such paint may cause severe physical and mental injuries;⁵⁴ likewise it has been established that the

53. In *Green v. Superior Court*, 110 Cal. 3d 619, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), the warranty of habitability was defined as being "in most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety." *Id.* at 637, 517 P.2d at 1183, 111 Cal. Rptr. at 719. The court, citing to *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970), stated that reference should be made to what constitutes "bare living requirements" as opposed to "amenities," in determining the content of the warranty.

The *Academy Spires* court held: ". . . In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting . . . go to what may be called 'amenities.' Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of unhabitability. . . ." (268 A.2d at p. 559).

110 Cal. 3d at 637 n.22, 517 P.2d at 1182, 111 Cal. Rptr. at 718.

Both of these cases call for ad hoc determinations of a rather visceral nature. It may be that guidance phrased in terms of "bare living requirements" versus "amenities" is sufficient. These tests still seem to beg the question of what is a "bare living requirement." The balancing used in the Ohio law seems to articulate the reasoning process in a much clearer fashion.

54. Estimates of the number of children across the Nation who may be lead sick run as high as 400,000 per year. About 200 children die from lead each year. . . . While annually 12,000 to 16,000 children are actually treated for lead poisoning and survive, half of these

incidence of consumption by children and the resulting injuries occur with alarming frequency, particularly in slum areas.⁵⁵ It is this kind of provision that the statute seeks to regulate through the second-tier obligations of the landlord.

It appears that this line of analysis may end at the point of the finding of materiality. As a practical matter, however, the courts must consider another variable before deciding whether a particular local code provision is embraced by the second tier of the landlord's obligations. The courts must balance the factors of probability and severity of injury against the cost of bringing buildings into compliance and the prospect of forcing landlords out of the housing market.

The burden placed on the court making such an inquiry is heavy. The court is faced with the necessity of weighing the possible extent of injury, the likelihood of occurrence, and the costs of avoidance, together with vague notions of general social utility. The judiciary, however, is not unaccustomed to such a chore. In fact, the elements to be considered in determining whether a provision falls into the so-called second tier closely parallel those that must be considered in the typical negligent tort case.⁵⁶

The necessity of determining the impact of numerous local code provisions poses serious problems for the judiciary and the landlords' sector of the economy. Conceivably, every provision of every local housing code might have to be considered. This may result in a substantial increase in litigation in the already overburdened courts. Furthermore, until specific local code sections are held to be material to second-tier liabilities, a landlord will be forced either to comply with substantial portions of the applicable local code or to rely upon his own judgment that a certain provision is, or is not, material to

children are left mentally retarded. This type of brain damage cannot be reversed by treatment.

SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT FOR LEAD-BASED PAINT POISONING PREVENTION ACT, S. REP. No. 91-1432, 91st Cong., 2nd Sess. 2 (1970).

55. Moscovitz, *A New Threat—Lead Poisoning of Slum Children*, 3 CLEARINGHOUSE L. REV. 92 (1969).

56. Writing for the court in *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1941), Judge Learned Hand said:

The degree of care demanded of a person by an occasion is the resultant of three factors; the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. . . . A solution always involves some preference, or choice between incommensurables

Id. at 612. See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31 (4th ed. 1971).

health or safety. Unnecessary compliance will result in increased operating costs and thus increased rental fees. The costs of the initial uncertainties in the second-tier obligations will be high.

These high costs, of course, will not be permanent. Over time, a body of case law will develop in a community holding some code provisions to be enforceable through the new law and others not enforceable. The various courts in the state will probably apply the case law already developed with respect to analogous provisions in other localities. It is reasonable to expect that the content of the landlord's second-tier obligations will become relatively clear and fixed. Gradually, the need for interpretive litigation will disappear and be replaced by the day-to-day analysis of the landlord's attorney.

The development of firmly established precedent regarding the precise nature of the landlord's second-tier obligations will not end the responsibilities of the judiciary in this area of the law. If nothing else, the court must serve as factfinder to determine whether there has been compliance with a material code provision. Inherent in this inquiry is another significant issue of law: whether strict or merely substantial compliance with second-tier obligations will shield the landlord from liability.

There is some case law under the doctrine of implied warranty of habitability to the effect that, where housing codes define the landlord's duty, only substantial compliance is required.⁵⁷ The duty imposed, however, requires compliance with *all* of the provisions of the pertinent code. The reason for adopting the rule of substantial compliance in these cases has been that it was necessary to introduce a degree of flexibility not found in a unitary code in order to protect the housing supply.⁵⁸ Substantial compliance provides this flexibility by permitting reference to such factors as the age and suitability of the structure in relation to the area in which it is located in determining liability.

The new Ohio law has provided the needed flexibility in its code compliance requirement in a manner markedly different from the

57. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.62 & 63 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 356, 280 N.E.2d 208, 217 (1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973). See also *Green v. Superior Court*, 110 Cal. 3d 619, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973); 25 CASE W. RES. L. REV. 371, 376-81 (1975).

58. See notes 47 *supra* for discussion of suggested means of affording this protection through different approaches to code enforcement and development.

common law doctrine. The legislature has rejected the substantial compliance approach⁵⁹ in favor of severely limiting the number of building, housing, health, and safety code provisions that can be enforced through the mechanisms of the new law.⁶⁰ The balancing of cost of compliance and effect on the housing supply against the threat posed to the tenant's health and safety takes place in the initial determination of whether a given code provision is enforceable through tenant action rather than in the determination of whether a given violation is actionable.⁶¹ Once a code provision is found to be so intimately connected with health and safety as to be enforceable by tenants, the act gives no indication that any further concessions to flexibility are required. By providing for flexibility only in the selection of the provisions and not in the extent of compliance required, the legislature has made possible the articulation of a clear standard by gradual definition of the landlord's duties as the case law develops. This preserves the hope that the second tier will eventually develop a code-like integrity of its own, accompanied by all the advantages of a code: uniformity of application, certainty of expectation, and predictability of result.⁶²

The need for strict compliance is made even more compelling by a consideration of the implications of using a substantial compliance test where the number of enforceable provisions has been so limited. After holding that a given provision is so intimately connected with health and safety as to be part of the bare minimum standard, a court requiring only substantial compliance would then be in the incongruous situation of having to make further inquiries into such factors as the condition of other dwellings in the neighborhood, the age of the building, and the amount of rent, in order to determine if a given tenant were entitled to even this minimum standard. In effect, the factors used to gauge substantial compliance would make the bare minimum standard to which a tenant should be entitled dependent upon the tenant's socioeconomic status.⁶³ Although such inquiries are quite proper when determining the third

59. See H.B. 277, § 5315.19(A) which explicitly required substantial compliance.

60. See notes 47-56 *supra* and accompanying text.

61. See text accompanying note 49 *supra*.

62. Comment, *The Implied Warranty of Fitness and Habitability*, *supra* note 23, at 727.

63. Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909, 927-28 (1971).

tier of duties, which grow out of the circumstances surrounding each individual tenancy,⁶⁴ it is highly doubtful that such socioeconomic determinants should be found to bear on matters fundamental to basic standards of health and safety.

The combination of a materiality requirement with substantial compliance would constitute legislative overkill. A double concession to flexibility would destroy any hope for certainty in the litigation process while placing undue emphasis on the social and economic position of the tenant. It appears the legislature believed itself confronted with an either-or situation and traded substantial compliance for the materiality requirement, believing it to be the wiser alternative for achieving a balance between flexibility and certainty.

3. *The Third Tier: The Expectations of the Parties*

The third tier of the landlord's obligations represents a marked departure from the other two tiers. Whereas the first two tiers are keyed to minimum standards established by law, the duties of the third tier arise from the reasonable expectations of the parties to each rental arrangement. The duties imposed by this tier will therefore vary greatly; depending upon the circumstances of the rental arrangement, they may greatly exceed those demanded by state or local law.⁶⁵ In essence, the only limitation on these third-tier duties

64. See notes 65-81 *infra* and accompanying text.

65. H.B. 277, § 5315.19(A) sponsored by the Ohio Board of Realtors, imposed much less stringent standards for the landlord than the other bills. Blumberg, *The Ohio Struggle With the Uniform Residential Landlord and Tenant Act*, 7 CLEARINGHOUSE REV. 265-66 (1973). The standard of habitability was set by that bill as only substantial compliance with building, health, and safety codes. The far more stringent tenant union bill contained a provision imposing a requirement virtually identical to the fitness and habitability provision of the new law in addition to a code compliance requirement. See H.B. 796, § 5315.19(A)(1). The only difference between the "habitability" provision in this bill, URLTA, and the Ohio law is that the last uses the phrase "reasonably necessary" while the others use only "necessary." See Strum, *The Landlord-Tenant Relationship: 1980 and Beyond*, 9 REAL PROP. PROBATE & TRUST J. 17, 23 (Spring 1974), which takes the view that the same provision in URLTA imposes a higher standard than mere compliance with code provisions materially affecting health and safety. *Contra*, Lonquist & Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska* 8 CREIGHTON L. REV. 336, 353-54 (1975), which views a similar provision as imposing minimum duties, with a code compliance provision similar to that in the Ohio law as imposing the maximum duties.

is that they may be established at a level no lower than the minimum set by the first two tiers.⁶⁶

The wording chosen by the Ohio legislature to establish this tier is significant. The statute commands that the landlord "make all repairs and do whatever is reasonably necessary to put and keep the premises in fit and habitable condition."⁶⁷ Thus, it is clear that the landlord's duty is a continuing one. Not only must he "put" the premises in proper condition for delivery to the tenant, but he must "keep" them in that condition as well. Furthermore, there is no limitation, other than reasonableness, placed upon the nature of the activities in which he must engage to meet the standard.⁶⁸ Specifically included is the obligation to "make all repairs."⁶⁹

Of equal significance are the common law origins of the statutory language. The "fit and habitable condition" standard imposed by the Act is the same formula used by a number of courts in defining the landlord's duty under the developing common law warranty of habitability.⁷⁰ Under the facts that the courts considered in the warranty of habitability cases, the question before them was whether the landlord had breached some rudimentary duty to his tenants. The facts of many of these cases disclosed severe defects in the leased premises, and the issues could have been resolved by the establishment of some minimum duty on the part of the landlord.⁷¹ Such cases, on their facts, are not a suitable reference point for the establishment of a new third tier of obligations; minimum obligations are already operative by virtue of the first and second tiers.⁷²

The tendency of courts to go beyond the narrow situations presented in these cases to frame the duties embodied in the warranty

66. See OHIO REV. CODE ANN. § 5321.13(A) (Page Supp. 1974).

67. *Id.* § 5321.04(A)(2).

68. The responsibilities specifically imposed on the tenant by OHIO REV. CODE ANN. § 5321.05(A) (Page Supp. 1974) set a limit on the activities in which the landlord must engage, much as the explicit placement of the repair obligation on the landlord limits the activities in which the tenant must engage. See notes 97-98 *infra* and accompanying text.

69. OHIO REV. CODE ANN. § 5321.04(A)(2) (Page Supp. 1974).

70. See, e.g., *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972).

71. See, e.g., *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (housing and building code violations, falling bathroom ceiling); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972) (faulty furnace, defective wiring). See also *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 852 (Mass. 1973) (dissent).

72. See notes 43-49 *supra* and accompanying text.

of habitability does, however, make these cases relevant to the establishment of third-tier obligations. Although the courts addressed themselves to the standards that the law would protect, the language of the opinions often reflected a sensitivity to the need for the law to be responsive to the particularized expectations of the parties to the rental agreement.⁷³ Necessarily, such expectations would exceed minimal standards in many cases. Of course, such remarks may be dismissed by successor courts as dicta. However, such proclamations serve as valuable input for legislators considering landlord-tenant reform. The third tier of obligations adopts these expansive definitions of the implied warranty of habitability and extends express legal protection to the expectations of the parties.⁷⁴

Protection of the expectations of the parties introduces highly subjective elements into the analysis of the third-tier obligations of the landlord. The minimum limits of these obligations are established by the first- and second-tier duties. The upper limits, on the other hand, are undefined. Presumably, they would be based upon some notion of reasonableness.

Although the standard seems indefinite, it may not be so imprecise as it appears. There are, in fact, certain visible, quantifiable features of a dwelling that would indicate the type of dwelling the tenant expects to inhabit. Perhaps the most obvious feature the tenant would consider is the condition of the premises at the beginning of his term. Since the tenant's rent obligation remains constant throughout his term, he is entitled to expect that the condition that existed at his entry would likewise prevail for the duration of his term.⁷⁵

There are, of course, several other objective indications of the tenant's expectations.⁷⁶ They include:

1. the age of the structure;
2. the amount of rent;
3. the area in which the premises are located; and

73. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). See also 25 CASE W. RES. L. REV. 371, 377 n.37 (1975).

74. See note 23 *supra*.

75. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); see *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

76. See *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Steele v. Lattimer*, 214 Kans, 329, 338, 521 P.2d 304, 311 (1974) (concurring opinion).

4. the promises or representations made by the landlord, whether in the rental agreement or otherwise.⁷⁷

These objective elements are addressed to an evaluation of building maintenance in a very general sense. They do, however, give rise to certain other expectations regarding the specific manner in which the landlord will respond to defects that may arise. These further expectations are also based on objective factors regarding repair needs including:

1. the nature of the claimed defect or condition;
2. the effect of the defect or condition on health and safety;
3. the length of time the defect or condition has existed; and
4. whether the defect or condition would be a violation of any building, housing, or sanitary codes.⁷⁸

The third tier of landlord duties thus broadens the base of tenant protections. By emphasizing reasonable expectations, the third tier extends the remedies available under the new law to those tenants whose problems may not be so severe as to violate state or local minimum standards, but which are of sufficient magnitude to deprive these tenants of the full value of their bargains.⁷⁹ The flexibility inherent in the formula permits the law to impose different standards on a landlord operating low rent housing units from one operating a high rise luxury apartment. In the former situation, where the building might be old and located in a deteriorating neighborhood, the tenant may not be entitled to much more than compliance with the various code provisions materially affecting health and safety; his rent, in all likelihood, reflects this fact. In the latter situation, a failure to repair a closed-circuit television security system could

77. The obligations imposed by chapter 5321 cannot be waived or modified by agreement between the landlord and tenant, OHIO REV. CODE ANN. § 5321.13(A) (Page Supp. 1974), except that "[t]he landlord may agree to assume responsibility for fulfilling any duty or obligation imposed on a tenant by section 5321.05 of the *Revised Code*." *Id.* § 5321.13(F). Therefore, the rental agreement cannot be used to define the scope of this duty or the extent of the activities required to fulfill it. The rental agreement may, however, contain provisions that may aid in determining the content of the tenant's bargain, as, for example, when the document includes a list of rules or services that may be supplied. If other factors support the conclusion, a court might well find that the landlord's failure to enforce the rules or to supply the services is a breach, not only of contractual obligations, but of statutory duties as well.

78. See *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Steele v. Latimer*, 214 Kans. 329, 338, 521 P.2d 304, 311 (1974) (concurring opinion).

79. See Comment, *The Implied Warranty of Fitness and Habitability*, *supra* note 23, at 727.

be a violation of the duty owed to an affluent tenant whose high rental payments were in part induced by such features.⁸⁰

It is this aspect that permits the new legislation to be responsive to the middle or upper income tenant, who for a long period has been ignored by the developments in landlord-tenant law.⁸¹

4. *Performing the Statutory Duties: The Landlord's Right of Entry*

To enable the landlord to perform his new obligations under the Act, he is afforded a statutory right of entry.⁸² The right is limited to certain specific purposes: to inspect for defects and make repairs, to deliver large packages, to perform agreed-upon services, and to show the premises to prospective purchasers or renters.⁸³ In addition the landlord must give the tenant reasonable notice whenever feasible and make entry only at reasonable times.⁸⁴

Although this provision is phrased as a grant to the landlord, its thrust is to protect the tenant by restricting the breadth of the right of entry available at common law. Under the common law, a lease clause could provide for as extensive a right of entry as the landlord could induce the tenant to accept in the rental agreement. Because of the poor bargaining position of most tenants, the landlord could provide for the tenant to agree to a virtually unlimited right. The new law does not, however, permit the modification of this provision by rental agreement,⁸⁵ except when the modification removes duties from the tenant.⁸⁶ Consequently, the landlord is locked into the limited right of entry provided in the statute.⁸⁷

B. *The Tenant's Obligations*

The extent of a tenant's interest in a rented dwelling is that it

80. See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

81. See Comment, *Tenant's Rights in Pennsylvania: Has the Middle Class Been Forgotten?*, 12 DUQUESNE L. REV. 48 (1973).

82. OHIO REV. CODE ANN. § 5321.05(B) (Page Supp. 1974).

83. *Id.*

84. *Id.* § 5321.04(A)(8) provides, "Except in cases of emergency or if it is impractical to do so, [the landlord must] give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary."

85. *Id.* § 5321.13(A).

86. *Id.* § 5321.13(F).

87. The consequences of this limitation can be serious. For example, a landlord may incur certain liabilities if the local police, having obtained the

be suitable for occupation during the lease term.⁸⁸ Although his legal interest is a limited one, he has a very definite role to play in the scheme of allocation of responsibility under the Ohio law.

The first and most self-evident duty of the tenant to the landlord is to refrain "from intentionally or negligently destroying, defacing, damaging or removing any fixture, appliance, or other part of the premises."⁸⁹ This obligation appears to be a clear codification of the common law doctrine of voluntary waste.⁹⁰

Like the landlord, the tenant does have certain specifically detailed duties to perform. He is required to dispose of all rubbish and garbage in a safe and sanitary manner.⁹¹ He must keep all plumbing fixtures he uses clean.⁹² The tenant is required to use all electrical and plumbing facilities properly.⁹³ Under the terms of a written rental agreement he may also be required to maintain certain specified appliances.⁹⁴

Moreover, the tenant has an open-ended duty similar to that imposed on the landlord: he is obligated to "keep that part of the premises which he occupies and uses safe and sanitary."⁹⁵ This

proper search and arrest warrants, demand that he admit them to a tenant's apartment. If he fails to do so, he may be liable for obstruction of justice. If he admits them, he may be liable to the tenant for abusing the right of access since the law does not include this as a reason for entry.

88. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970); 1 AMERICAN LAW OF PROPERTY § 3.78; see also note 26 *supra*.

89. OHIO REV. CODE ANN. § 5321.05(A)(6) (Page Supp. 1974); cf. RESTATEMENT OF PROPERTY §§ 138, 139, 146 (1936).

90. See note 17 *supra* and accompanying text. It should be noted that the new Ohio law may differ from the common law in two ways. First, the Act prohibits damaging or defacing, which may leave the tenant free to make improvements without concern for ameliorative waste. Secondly, the new law affirmatively includes liability for acts of persons on the premises with the tenant's permission instead of excluding from liability the acts of strangers, or public enemies.

Because permission is used to trigger liability, it has been suggested that a tenant could be liable under the comparable provision of URLTA for damage done by the landlord or his agents or workmen, although such liability was probably not contemplated by the drafters. Subcommittee on the Model Landlord-Tenant Act of the Committee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE & TRUST J. 104, 113 (1973).

91. OHIO REV. CODE ANN. § 5321.05(A)(2) (Page Supp. 1974).

92. *Id.* § 5321.05(A)(3). This duty exists even if the tenant shares the use of the fixtures with other tenants. This provision, therefore, could relieve the landlord of a duty since shared facilities are otherwise the landlord's responsibility. See text accompanying notes 35-40 *supra*.

93. OHIO REV. CODE ANN. § 5321.05(A)(4) (Page Supp. 1974).

94. *Id.* § 5321.05(A)(7).

95. *Id.* § 5321.05(A)(1). The other bills described this duty, arguably

wording corresponds so closely to the definition of the analogous duties of the landlord⁹⁶ that it creates a possible overlap of statutory responsibilities, both in the common areas and the tenant's own dwelling unit. This overlap with respect to the common areas can be resolved by a close reading of the statute. The tenant's duties are keyed to simultaneous use and occupation of the areas affected by his duties;⁹⁷ a tenant may not occupy a common area. Thus, the maintenance of common areas is the exclusive province of the landlord.

The problem of overlap with respect to the tenant's own dwelling unit cannot be so summarily resolved. The tenant does in fact simultaneously use and occupy his apartment.

Closer examination of the relative duties of the landlord and tenant, however, may resolve the potential overlap. First, it stands to reason that the drafters could not possibly have intended to shift the burden of repair to the tenant after having devised such a comprehensive scheme to place repair duties on the shoulders of the landlord.⁹⁸ A limit is inherently placed upon the activities required of the tenant to fulfill his duty to keep the premises safe and sanitary.⁹⁹

more restrictively, as an obligation to keep the premises "as clean and safe as the condition of the premises permits." S.B. 103, § 1923.18(A)(1); H.B. 169, § 5315.21(A)(2); H.B. 277, § 5315.21(B); H.B. 796, § 5315.21(A)(2).

96. See notes 35-42 *supra* and accompanying text.

97. Since the conjunctive "and" is used, the preferred construction would dictate that, in order for the provision to apply, a tenant would have to occupy as well as use a part of the premises. See 1A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 21.14 (4th ed. 1972) [hereinafter cited as SUTHERLAND]. In order to "occupy," a tenant must possess or keep that part for use as well as actually use it. See BLACK'S LAW DICTIONARY 1231 (4th ed. rev. 1968). Normally only a tenant's dwelling unit would satisfy both the occupation and use elements, although basement storage bins or garages might also qualify.

98. OHIO REV. CODE ANN. § 5321.04(A)(2) (Page Supp. 1974). See also notes 26 and 67-69 *supra* and accompanying text. The definition of premises includes the tenant's dwelling unit as well as common areas, grounds, and facilities. *Id.* § 5321.01(C).

99. The only provision of the law using the word "repair" is that defining the landlord's obligations. He not only is required "to make all repairs," OHIO REV. CODE ANN. § 5321.04(A)(2) (Page Supp. 1974), but also is afforded a right of entry to make "ordinary" as well as "necessary" repairs. *Id.* § 5321.07(B)(2). The Act does not use the word "repair" to describe any of the tenant's obligations.

An examination of the other bills considered by the General Assembly also reveals grounds for the conclusion that the repair obligation is placed solely on the landlord. Each of the four bills initially before the legislature contained a provision permitting the landlord to transfer to the tenant by written agreement some repair obligations. S.B. 103, § 1923.22(F); H.B. 169, §§ 5315.19

A second argument against a broad tenant repair duty is that the placing of such a burdensome duty on the tenant would frustrate the entire statutory scheme of the legislation. The allocation-of-responsibilities approach which pervades the statute is, like the common law warranty of habitability, built on a foundation of assigning obligations consistent with the obligor's capabilities and interest in the endeavor.¹⁰⁰ The tenant's capabilities and interests cannot support a full-scale repair duty.

Finally, it is useful to refer to the specific duties that have been imposed since the general duties are typically construed as being of the same nature as the specific ones. The landlord's specific duties are addressed to the systemic, large-scale maintenance functions. In contrast, the tenant's specific duties are addressed to simple custodial acts.¹⁰¹

The most logical construction of the general upkeep obligation of the tenant extends it merely to the proper use of the premises

(C), (D); H.B. 277, § 5315.19(C); H.B. 796, §§ 5315.19(C), (D). The repair obligation was to be placed on the landlord subject to transfer by agreement. This provision does not appear in the new law, although the provision that allows the landlord to impose on the tenant a maintenance obligation for certain appliances bears a resemblance to it. OHIO REV. CODE ANN. § 5321.05 (A)(7) (Page Supp. 1974). The idea that the landlord has the obligation to repair subject to a limited right to transfer some portion of this obligation to the tenant seems to have remained throughout the legislative considerations. This was the position taken by State Representative Harry J. Lehmann of Shaker Heights, one of the two drafters of the bill finally enacted into law, in an interview in October 1974.

100. See note 24 *supra*.

101. An application of the principle of construction of *eiusdem generis* leads to the conclusion that the tenant's duties are restricted to those not requiring repair. This doctrine states, "Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A SUTHERLAND § 47.17 (footnotes omitted). In order for *eiusdem generis* to apply, five conditions must be met:

- (1) the statute contains an enumeration by specific words;
- (2) the members of the enumeration constitute a class;
- (3) the class is not exhausted by the enumeration;
- (4) a general reference supplementing the enumeration . . .
- (5) there is not clearly manifest an intent that the general term be given a broader meaning than the doctrine requires.

Id. § 47.18 (footnotes omitted).

The tenant's duties are enumerated in OHIO REV. CODE ANN. §§ 5321.05 (A)(1)-(8) (Page Supp. 1974). Of these duties, six specify the parts of the premises affected and the activities required. *Id.* § 5321.05(A)(3)-(8). See notes 89-94 *supra* and accompanying text; notes 107-15 *infra* and accompanying text. Five of these six limit the tenant's duties to proper use, operation, or clearing of certain areas of the premises. *Id.* § 5321.05(A)(3)-(6), (8).

and the performance of limited housekeeping tasks,¹⁰² activities that are not properly repairs and include such labor as cleaning, changing lightbulbs, or preventing the development of fire hazards. Conditions that require this sort of activity have immediate effect on the tenant's living environment and are readily noticed and easily corrected by the tenant because he occupies the specific dwelling unit.

The issue of statutory overlap also appears with regard to compliance with various local codes. According to the Act, the tenant is required to comply with "the requirements imposed on tenants by all applicable state and local housing, health and safety codes."¹⁰³ A number of cases have held that a lease covenant to comply with such codes or with "the laws" imposes a duty to make repairs.¹⁰⁴ However, since these cases involved leases that also contained covenants to make repairs, they provide little guidance in determining what requirements may be deemed to be "imposed on tenants" who have no contractual duty to repair. However, this issue can be quickly resolved by means of the reasoning set forth with regard to

Only one can be read as imposing a duty to make repair, *i.e.*, to "maintain" certain appliances, but even this limited repair duty can only exist when imposed by a written rental agreement. *Id.* § 5321.05(A)(7). Therefore, to the extent that no duty to repair is unconditionally imposed in these specific provisions, they may be thought of as a class, imposing duties short of repair regarding certain specific areas or objects.

The enumeration is not complete in that it does not cover all parts of a residential dwelling unit for which certain basic maintenance duties should be imposed, *e.g.*, floors or cabinets. The enumeration does, however, contain the general requirement to keep the premises safe and sanitary. *Id.* § 5321.05(A)(1). The fact that this provision is first rather than last does not affect the application of the *ejusdem generis* doctrine. 2A SUTHERLAND § 47.17. Since the specific provisions of the enumeration do not completely cover the dwelling unit or premises, such a general provision should, under the doctrine, be construed to embrace things "similar in nature to those . . . enumerated by the . . . specific words," *id.*, provided there is no clear indication that a broader meaning has been intended. As discussed earlier, the provision imposing the duty of repair on the landlord, OHIO REV. CODE ANN. § 5321.04(A)(2) (Page Supp. 1974), implies that no broader meaning is intended. See text accompanying notes 67-69 *supra*. Therefore, this provision may be limited to imposing only those basic maintenance duties which cannot be characterized as repairs.

102. The term "housekeeping" is borrowed from a discussion of Arizona's landlord-tenant statute. The provision of the Arizona law that sets forth the tenant's duties is also modeled after URLTA and seems best suited, in denotation and connotation, to convey the thrust of the tenant's duties under the Ohio, Arizona, and URLTA provisions. See Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 121 (1974).

103. OHIO REV. CODE ANN. § 5321.05(A)(5) (Page Supp. 1974).

104. See Annot., 22 A.L.R.3d 521, 540-43 (1968).

the duty to keep the premises "safe and sanitary."¹⁰⁵ In view of the absence of a repair duty as well as the policy of tying responsibilities to capabilities, the code provisions that would be applicable to tenants would be those that regulate the aspects of the premises over which the tenant has control and that do not involve repair responsibilities. These would, in most instances, be those that regulate the manner of use of the premises.¹⁰⁶

According to the statute, the tenant owes duties not only to the landlord, but also to the other tenants who occupy units in a multi-unit dwelling.¹⁰⁷ Specifically, the tenant and those on the premises with his permission are required to conduct themselves "in a manner that will not disturb his neighbors' peaceful enjoyment of the premises."¹⁰⁸ Whereas the obligation to refrain from damaging the premises protects the landlord's interests in the premises, this obligation protects the interests of the other tenants in the premises. This duty is not an innovation of the Ohio legislature. The common law has long recognized the right of a person to enjoy the occupation of his property "without serious annoyance from the acts of others."¹⁰⁹ If one person used "his property to damage another or disturb his quiet enjoyment of it," then that person would be liable for creating a nuisance.¹¹⁰ The thrust of the protection afforded by the new law is to enable the landlord to stand in the shoes of the aggrieved tenant to take legal action to stop the nuisance.

Since a landlord's action for breach of this provision would be based on injuries to other tenants, whether conduct amounts to a breach of the duty imposed by the law should be determined in the same manner as if the affected tenants were suing. The factfinder reaches his decision by applying all the elements of the tort of nuisance.¹¹¹ Thus, under Ohio law, for the plaintiff to succeed, he must

105. See notes 95-102 *supra* and accompanying text.

106. See 1 AMERICAN LAW OF PROPERTY § 3.80.

107. OHIO REV. CODE ANN. § 5321.05(A) (8) (Page Supp. 1974).

108. *Id.*

109. 2 AMERICAN LAW OF PROPERTY § 81.

110. *Village of Cardington v. Fredericks*, 46 Ohio St. 442, 446, 21 N.E. 766, 767 (1899); *Newcomb v. Dredge*, 105 Ohio App. 417, 152 N.E.2d 801 (1957).

111. New York gives a landlord the power to evict a tenant if he can "by competent evidence establish to the satisfaction of the court that the tenant is objectionable." REAL PROP. ACTIONS § 711 (McKinney 1963). The factors that must be established are very similar to those required to show a nuisance. The misconduct must be continuous and persistent and there must appear to be "a lack of desire or of ability on the part of the tenant to prevent or control the objectionable conduct." *Kaufman v. Hammer*, 49 Misc. 2d 773, 775, 268

demonstrate that, by virtue of the conduct of the tenant or his guests, he suffered material, substantial, and tangible injury.¹¹² Even then, the inquiry would be reduced to the weighing of circumstances¹¹³—whether the conduct was a “reasonable exercise of dominion [over the defendant’s dwelling unit] having regard to all interests affected, his own and that of his neighbors, and having in view also public policy.”¹¹⁴ The nature of the dwelling itself may also be a critical consideration. For example, loud music and late parties in a “singles” apartment building would less likely be a nuisance than the same activity in a building occupied by retired persons.¹¹⁵

The question, in essence, may be whether the landlord would have been liable for the conduct complained of had he, and not the tenant, been the wrongdoer. Since, in all likelihood, the landlord and not the wrongdoer will be the primary target of the complaints of the aggrieved tenant, this provision actually serves as a means of indemnifying the landlord.¹¹⁶

III. REMEDIES FOR BREACH OF OBLIGATION

A. Remedies Available to the Landlord

1. Eviction

Because eviction is the most drastic remedy available to the landlord, it has always been a carefully limited right. Prior to the enactment of the new law, eviction was available to the landlord in an action for forcible entry and detainer against holdover tenants, tenants in possession under an oral tenancy though in default of rent,

N.Y.S.2d 80, 82 (Nassau County Dist. Ct. 1966). Conduct that is merely disagreeable or distasteful, or displeasing or shocking to an “over-sensitive or fastidious nature, no matter how irritating or unpleasant” is insufficient. *Valley Courts, Inc. v. Newton*, 47 Misc. 2d 1028, 1030, 263 N.Y.S.2d 863, 865 (Syracuse City Ct. 1965).

112. *Eller v. Koehler*, 68 Ohio St. 51, 56, 67 N.E. 89, 91 (1903). Another way of stating the proposition is that the conduct must result in an injury which is greater than “a trifling annoyance, inconvenience or discomfort.” *Antonik v. Chamberlain*, 81 Ohio App. 465, 476, 78 N.E.2d 752, 759 (1947).

113. 68 Ohio St. at 55, 67 N.E. at 90.

114. *Antonik v. Chamberlain*, 81 Ohio App. 465, 477, 78 N.E.2d 752, 759 (1947).

115. *Cf. Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 266 N.Y.S.2d 447 (N.Y. City Ct. 1966) (noise made by small children behaving normally is not a sufficient nuisance to make tenant objectionable).

116. OHIO REV. CODE ANN. § 5321.05(C) (Page Supp. 1974) would allow a landlord to recover damages where the tenant’s acts resulted in a condition which amounted to a breach of the landlord’s duties to another tenant.

and tenants occupying lands without color of title.¹¹⁷ Without abrogating these grounds, the new legislation adds two new grounds for an action in forcible entry and detainer.

The first of the new grounds for eviction is intended to implement the entire statutory scheme; it allows use of the sanction for the breach of a statutory obligation imposed on the tenant by the new law.¹¹⁸ Before eviction can be obtained on this ground, however, certain conditions must be met. First, in order to justify the forfeiture, the alleged violation must be substantial; that is, it must materially affect health and safety.¹¹⁹ Secondly, the landlord must strictly follow a prescribed procedure. He must send the tenant a written notice "specifying the act and omission that constitutes non-compliance"¹²⁰ and the date on which the rental agreement is to terminate. The law further requires that this date of termination be set at "not less than thirty days after receipt of the notice."¹²¹ Finally, there must be a showing that the tenant failed to remedy the condition that is the subject of the notice before the termination date.

The second additional ground for eviction is that the tenant has "breached an obligation . . . imposed by a written rental agreement."¹²² Unlike the ground based on the breach of statutory obligations, this ground has a direct counterpart in the common law. At common law there was no right in the lessor to declare an eviction for breach of a rental agreement unless the lease conferred such a right,¹²³ but practically every residential lease contained such a provision.¹²⁴ Even when the right was expressly reserved, however, evictions were difficult to obtain because they were considered to be

117. Prior to the amendments made by the Act, OHIO REV. CODE ANN. § 1923.02 (Page 1968) provided in part that relief in forcible entry and detainer would be granted:

- (A) Against tenants holding over their terms;
- (B) Against tenants in possession under an oral tenancy, who are in default in the payment of rent as provided in this section;
-
- (E) When the defendant is an occupier of lands or tenements, without color of title, and to which the complainant has the right of possession.
- (F) In any other case of their unlawful detention.

118. OHIO REV. CODE ANN. § 1923.02(H) (Page Supp. 1974).

119. *Id.*

120. *Id.* § 5321.11 sets forth the notice requirements.

121. *Id.*

122. OHIO REV. CODE ANN. § 1923.02(I) (Page Supp. 1974).

123. *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897).

124. 1 AMERICAN LAW OF PROPERTY § 3.94.

in the nature of a forfeiture, and the judicial attitude toward forfeitures was not a favorable one.¹²⁵ Courts developed the practice of strictly construing a clause providing for a forfeiture against the party seeking to enforce it.¹²⁶ In addition, the courts would grant a forfeiture only if no alternative form of relief would be sufficient.¹²⁷ When the tenant was willing to cure the breach by money payment or substantial performance, the forfeiture could be enjoined.¹²⁸ The landlord could also be required to show that he demanded performance and that the performance was not forthcoming.¹²⁹

The Act appears to expand the right to eviction by giving the landlord a statutory right to declare a forfeiture for breach of a written rental agreement that is not dependent on a reservation of that right in the written instrument. Merely changing the source of the right from contractual to statutory, however, does not change the limitations on forfeiture that have developed under the common law. Since the legislature only codified a common law remedy, the courts may continue to rely upon the limitations developed at common law.¹³⁰

The philosophy of the common law limitations pervades the right to evict for breach of a statutory obligation. The antiforfeiture bias is inherent in the demanding notice requirements; the idea that only a material breach triggers the right to evict closely parallels the common law notion that eviction was a remedy of last resort.¹³¹ Indeed the preservation of the common law limitations plays a critical role in the process by which a tenant may be evicted for breach of

125. *Smith v. Whitbeck*, 13 Ohio St. 471 (1862); *Bates & Springer, Inc. v. Nay*, 91 Ohio L. Abs. 425, 187 N.E.2d 415 (Ct. App. 1963). *Dietrich v. Ezra Smith Corp.*, 12 Ohio App. 243, 31 Ohio C.C.R.(n.s.) 204 (1920).

126. *Gould v. Hyatt*, 40 Ohio L. Abs. 468, 154 N.E. 173 (Ct. App. 1926).

127. *Peppe v. Knoepp*, 103 Ohio App. 223, 140 N.E.2d 26 (1956); *Reck v. Daley*, 72 Ohio App. 307, 48 N.E.2d 879 (1943).

128. *Reck v. Daley*, 72 Ohio App. 307, 48 N.E.2d 879 (1943); *Eichenlaub v. Neal*, 10 Ohio C.C.R. 427, 3 Ohio N.P. 365, *aff'd*, 56 Ohio St. 782, 49 N.E. 1113 (1897).

129. *Smith v. Whitbeck*, 13 Ohio St. 471 (1862).

130. *Thompson v. Ford*, 164 Ohio St. 74, 128 N.E.2d 111 (1955); 2A SUTHERLAND § 50.05.

131. Compare the requirement in New York that the tenant's breach of his rental agreement must be of a substantial obligation of the tenancy in order to declare a forfeiture. A trivial or inconsequential breach will not suffice. *Moss v. Hirschtritt*, 60 Misc. 2d 402, 303 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1969); *Madison 52nd Corp. v. Ogust*, 49 Misc. 2d 663, 268 N.Y.S.2d 126 (N.Y. City Civ. Ct. 1966), *aff'd*, 52 Misc. 2d 935 (Sup. Ct. 1969).

a statutory obligation. But for the presence of these limitations, it would probably become a popular tactic of landlords to avoid the demanding preconditions of eviction for breach of statutory duty by simply including the tenant's statutory duties in the written rental agreement.¹³² This would impose the statutory-duties obligations by contract as well as by law. Then, in the event of a breach of a statutory duty, the landlord could seek eviction on contractual grounds. This would deprive the tenant of his opportunity to remedy the breach and thereby retain possession. The likelihood that such a maneuver would succeed in the courts in view of the traditional common law limitations, however, is slight. In all probability, eviction based on breach of contractual terms will be carefully scrutinized by the courts to prevent abuse by landlords.

An important aspect of both of the new grounds for eviction is that they form part of a statutory scheme designed to restrict rather than to enlarge the landlord's right to evict. It is true that eviction may be based on breach of the new statutory obligations, but these obligations are much less severe than those imposed upon the tenant at common law.¹³³ Moreover, the availability of eviction for breach of lease terms is severely limited by the preservation of the prejudices of the common law against forfeitures. Yet even these limitations do not present the complete spectrum of protections against eviction. The retaliatory eviction provision closely monitors the landlord's mo-

132. See, e.g., Form Apartment Lease ¶ 10, adopted by the Apartment and Home Owners Association of Cleveland in 1975:

The Tenant shall keep that part of the premises that he occupies and uses safe and sanitary; dispose of all rubbish, garbage, and other waste in a clean, safe, and sanitary manner; keep all plumbing fixtures in the dwelling unit, or used by Tenant, as clean as their condition permits; use and operate all electrical and plumbing fixtures properly; comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes; personally refrain, and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises; conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises; not unreasonably withhold consent for the Landlord to enter into the dwelling unit in order to inspect the premises, make ordinary, necessary, or agreed repairs, decorations, alterations, or improvements, deliver parcels which are too large for the Tenant's mail facilities, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors; and maintain in good working order and condition the following appliances supplied by the Landlord:

133. See notes 89-106 *supra* and accompanying text.

tives for eviction.¹³⁴ Even when that section is inapplicable, provisions for setoff in lieu of eviction and expanded opportunities for tenants to defend against proceedings in forcible entry and detainer make the tenant much less vulnerable to eviction.¹³⁵

2. *Self-Help Eviction and Distraint*

Prior to the enactment of the new law, a landlord could remove a tenant who had forfeited his right of possession without the use of legal process provided he did not breach the peace in the course of removal.¹³⁶ Typically, this was accomplished by changing the locks¹³⁷ or by removing the tenant's personal possessions from the premises.¹³⁸ The new law has reacted to such activities by prohibiting "any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act against the tenant . . . for the purpose of recovering possession . . ." ¹³⁹ The provision also forbids a landlord to "seize the furnishing or possessions of a tenant . . . for the purpose of recovering rent payments, other than in accordance with an order issued by a court of competent jurisdiction."¹⁴⁰ The law attaches potentially severe penalties to any violation of this provision by making the landlord liable for the tenant's attorneys' fees as well as any damages to the tenant resulting from the removal.¹⁴¹

There may be several reasons for the legislature's rejection of self-help evictions. There is the general belief that legal remedies

134. *E.g.*, OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1974), prohibiting the landlord from using eviction to retaliate against a tenant. *See* notes 236-304 *infra* and accompanying text.

135. *Id.* § 1923.061(B). *See* notes 390-404 *infra* and accompanying text discussing the right of the tenant to set off his damages against rent due, the expanded notice requirements, and the broadened scope of the forcible entry and detainer proceeding giving a tenant greater opportunity to defend against a landlord.

136. *Smith v. Hawkes*, 2 Ohio Dec. Reprint 733 (C.P. Pickaway County 1862). Even prior to the enactment of the new law there was some doubt cast on the validity of this rule by a well-reasoned holding to the contrary. *See Edwards v. C.N. Investment Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652 (Shaker Heights Mun. Ct. 1971).

137. *See* Comment, *Landlord-Tenant Reform in Cincinnati*, 43 U. CIN. L. REV. 175, 182 (1974).

138. *Smith v. Hawkes*, 2 Ohio Dec. Reprints 733 (C.P. Pickaway County 1862).

139. OHIO REV. CODE ANN. § 5321.15(A) (Page Supp. 1974).

140. *Id.* § 5321.15(B).

141. *Id.* § 5321.15(C).

are created to be used. When the landlord's right is infringed, he should rely on his legal remedy and comply with all the conditions thereunder.¹⁴² In this way, not only is the landlord's right enforced, but the tenant's right to a hearing is recognized and a volatile situation is avoided.¹⁴³ Furthermore, forbidding the landlord to resort to self-help maintains a balance with the tenant who is denied access to self-help remedies, and confirms the overall statutory policy against self-help measures.¹⁴⁴

Although the provision forbidding distraint may be harsh, it is arguably not broad enough in scope to effect a thorough abolition of self-help remedies. For example, in the Uniform Act, the landlord's right to acquire liens on the tenant's personal property through lease provision is abolished entirely.¹⁴⁵ The oppressive feature presented by such liens is that the landlord could execute on the personalty either on his own initiative or through special summary proceedings for distress.¹⁴⁶ This is not a real problem in Ohio, however, since the state has no distress provisions.¹⁴⁷ Furthermore, it seems doubtful that any property attachment without some provision for notice and hearing could withstand a constitutional challenge based on a due process argument.¹⁴⁸ Finally, a landlord cannot secure

142. *Cowards v. Fleming*, 89 Ohio App. 485, 493, 102 N.E.2d 850, 854 (1951).

143. *Edwards v. C.N. Investment Co.*, 27 Ohio Misc. 57, 61, 272 N.E.2d 652, 655 (Shaker Heights Mun. Ct. 1971). Even if such a situation occurs, the tenant's remedy is available through the legal process, rather than through self-help. See generally, Note, *Forcibly Ejected Tenant—Damages, Possession Both or Nothing*, 28 U. CIN. L. REV. 369, 373 (1959).

144. The remedies given the tenant by the Act, with the exception of termination, require some form of judicial supervision. See text accompanying notes 158-200, 208-35 *infra* for discussion of new remedies. The law does not even create a repair-and-deduct remedy which is a common self-help provision in landlord-tenant legislation. See notes 223-35 *infra* and accompanying text. It should also be noted that the retaliatory conduct provision reflects the overall policy against self-help. See text accompanying notes 261-64 *infra*.

145. URLTA § 4.205(a). This provision also abolishes distraint for failure to pay rent, but this would be unnecessary in Ohio since there is no statutory distraint or distress and apparently no analogous common law remedy. See *Sutliff v. Atwood*, 15 Ohio St. 186, 193-94 (1864).

146. See, e.g., ILL. STAT. ANN. ch. 80, §§ 16-35 (Smith-Hurd 1966); KY. REV. STAT. ANN. §§ 383.030-.068 (1971); PA. STAT. ANN. tit. 68, §§ 250.302-.313 (1965).

147. See note 145 *supra*.

148. In the wake of *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), summary proceedings were held to be unconstitutional by several courts. See, e.g., *Cross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972); *Holt v. Brown*, 366 F. Supp. 2 (W.D. Ky. 1971); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Blacker v.*

a waiver of hearing through a warrant of attorney under the new law since such a waiver is expressly prohibited.¹⁴⁹ Thus, the tenant would invariably be provided with a hearing prior to the attachment of his property.¹⁵⁰

3. Damages

Although evictions may be more difficult to obtain under the new law, the landlord may recover damages, as at common law, for the tenant's torts and breaches of contract.¹⁵¹ Where there is a breach of the tenant's statutory duties, the landlord is restricted to actual damages and reasonable attorneys' fees.¹⁵² Damages can only compensate an injured party or deter certain activities. Neither of these purposes can be served unless a tenant has sufficient resources to satisfy a judgment. Where the landlord is renting to welfare recipients and the poor, he has little chance of actually collecting a judgment. Damages are also made available to the landlord for attempts by tenants to frustrate the statutory scheme by unjustified use of statutory remedies. In the event that a tenant initiates a statutory rent withholding,¹⁵³ alleging a violation of the landlord's duty where the condition precipitating the action has in fact been caused by the tenant's own "act or omission," the landlord may recover damages and costs.¹⁵⁴ If it can be shown that the tenant has used his new remedies in bad faith, the landlord may recover not only damages caused but attorneys' fees and costs as well.¹⁵⁵

Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971). See also for a discussion of the issues involved Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 47-52 (1973).

149. OHIO REV. CODE ANN. § 5321.13(B) (Page Supp. 1974); see text accompanying notes 350-59 *infra*.

150. It is also possible that a lien on personal property, if contained in a form lease, could be attacked under the unconscionability provision of the new law. OHIO REV. CODE ANN. § 5321.14 (Page Supp. 1974). See text accompanying notes 360-67 *infra*.

151. "In any action under Chapter 5321 of the Revised Code, any party may recover damages for the breach of contract or the breach of any duty that is imposed by law." OHIO REV. CODE ANN. § 5321.12 (Page Supp. 1974).

152. *Id.* § 5321.05(C).

153. See notes 170-89 *infra* and accompanying text.

154. OHIO REV. CODE ANN. § 5321.09(D) (Page Supp. 1974).

155. *Id.* This provision states that "the tenant shall be liable for damages caused to the landlord, and for costs, together with reasonable attorneys' fees if the tenant intentionally acted in bad faith." Each of the clauses is a separate element of the liability, as the commas indicate. The requirement of bad faith is in the clause imposing liability for attorneys' fees, which is set off from

The damage remedy indicates that the new law is not strictly a pro-tenant vehicle. Nevertheless, the usefulness of the remedy from the point of view of the landlord may be marginal at best. Of course, one can attempt to justify the potential hardship upon the residential landlord by reasoning that under a legal system that compensates for injury with money, everyone faces the possibility that an injury might go unanswered because the wrongdoer is judgment-proof. It might also be argued that, like the common merchant, the landlord has accepted the insolvency of a customer as a normal business risk. However, unlike the judgment debtor or the merchant, the landlord is compelled either by long-term commitments or stringent antieviction legislation¹⁵⁶ to continue to deal with the wrongdoer. Thus, without compensation for damage or an effective means to deter future damage, the landlord is uniquely vulnerable to his tenants.¹⁵⁷

B. Remedies Available to the Tenant

1. Section 5321.07 Remedies

The new law provides several remedies for the tenant faced with the landlord's breach of a contractual or statutory duty.¹⁵⁸ The remedies are designed to offer the tenant a number of options in approaching the landlord. The remedies, enumerated in section 5321.07 of the Act are:

the damages and costs not only by a comma but by the word "together." It therefore seems that only the liability for attorneys' fees is dependent on bad faith. Tenants are discouraged in this way from initiating rent withholding motivated primarily by a desire to harass the landlord. Where the remedy is used for trivial breaches or with greater frequency than may be reasonably necessary to obtain compliance, the element of bad faith might well be present.

156. See text accompanying notes 117-50 *supra*.

157. The balance may not be so unequal as it appears. Arguably, the landlord could obtain insurance, much like an automobile owner's uninsured motorists coverage, to cover such damages. In this manner, the risks could be spread much more effectively.

158. OHIO REV. CODE ANN. § 5321.07 (Page Supp. 1974). However, some landlords may avoid these sanctions. Where a landlord "is a party to any rental agreements which cover three or fewer dwelling units," he may make the sanctions inapplicable to him by giving the tenant written notice of the number of units that he has in a written rental agreement or, "in the case of an oral tenancy, delivers written notice of such fact to the tenant at the time of initial occupancy." *Id.* § 5321.07(C). This provision protects the small landlord from the stringent sanctions of the new bill, but does not relieve him of his statutory responsibilities since the tenant still has a right to sue for damages for breach of a legal duty. *Id.*; see text accompanying notes 212-35 *infra*.

1. rent withholding,
2. limited receivership
3. rent abatement,
4. termination,
5. injunctive relief.

The right to invoke these remedies may be triggered in two ways. First, a government agency may certify that there has been a violation of a provision of a building, housing, health, or safety code which applies "to any condition of the residential premises that could materially affect the health and safety of an occupant."¹⁵⁹ This method of verification by an outside observer has been the most common means of establishing a landlord's breach of duty under the common law warranty of habitability doctrine.¹⁶⁰ The problem with certification, however, is that it can only accommodate patent violations of codified duties. Ohio has developed through the second and third tiers certain duties whose breach cannot be readily ascertained by resort to any fixed standard.¹⁶¹ It is hardly possible, for example, for a housing inspector to identify with any degree of certainty whether a given condition was within the expectation of the tenant. Thus, were certification the only means of triggering the remedies under the Act, it would severely restrict their availability for breaches of more subtle obligations.

So that the full measure of the landlord's duties may be enforceable by resort to private remedies, the Act provides an alternative basis for triggering the right to use the remedies: the tenant's rea-

159. OHIO REV. CODE ANN. § 5321.07(A) (Page Supp. 1974) provides in part:

If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code or by the rental agreement, or the conditions of the premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or a governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes which apply to any condition of the residential premises that could materially affect the health and safety of an occupant

160. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). Inspection and official findings are not the exclusive method of determining whether the landlord has breached his duty. See *Javins*, 428 F.2d at 1082 (citing *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 494 (D.C. Cir. 1969)); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); note 70 *supra*. In some jurisdictions, however, they have been made the sole methods by which a breach can be established. See, e.g., ILL. ANN. STAT. ch. 23, §§ 11-23 (Smith-Hurd Supp. 1974).

161. See text accompanying notes 65-81 *supra*.

sonable belief that the landlord has not fulfilled his obligations.¹⁶² This provision gives the tenant discretion to decide whether sufficient grounds exist to use one of the new remedies. This method, while somewhat innovative in a statutory framework, has been previously suggested at common law.¹⁶³ The exercise of the tenants' discretion must be closely monitored in the first years of the statute's life. There are, however, certain minimal protections against frivolous, vindictive suits.¹⁶⁴

A tenant may avail himself of the new remedies only if he has satisfied certain procedural conditions. First, he must be current in his rent payments.¹⁶⁵ Secondly, he must send written notice to the landlord specifying the acts, omissions, or conditions that constitute the landlord's noncompliance.¹⁶⁶ The landlord or his agent must actually receive this notice.¹⁶⁷ Finally, the tenant must wait either a reasonable time or 30 days, whichever is shorter, before using any of the remedies.¹⁶⁸ This period is designed to enable the landlord to avoid further action by correcting the complaints listed in the notice.

In addition to these formalized prerequisites, there are internal practical guides to be followed in using the remedies. First, in many cases a single remedy may not be wholly responsive to the particular problems confronting the tenant. Inherent in the statutory design

162. OHIO REV. CODE ANN. § 5321.07(A) (Page Supp. 1974).

163. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.62 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

164. OHIO REV. CODE ANN. § 5321.09(D) (Page Supp. 1974); see text accompanying note 181 *infra*.

165. OHIO REV. CODE ANN. § 5321.07(B) (Page Supp. 1974). Although a default in rent payments precludes use of the new remedies, the tenant may still obtain redress by waiting until the landlord tries to evict him, at which time he may counterclaim for damages and set them off against the rent due under § 1923.061(B). This could be risky, however, since the tenant would not know if the court would consider the damages to be as great as the amount by which the tenant was in default. See generally notes 212-35 *infra* and accompanying text.

166. OHIO REV. CODE ANN. § 5321.07(A) (Page Supp. 1974). By failing to give the tenant his name and address, the landlord may be found to have waived his right to notice. *Id.* § 5321.18(C). See note 388 *infra* and accompanying text.

167. *Id.* § 5321.07(B) provides in part: "If a landlord receives the notice described in division (A) of this section and after receipt of such notice fails to remedy the condition within a reasonable time considering the severity and the time necessary to remedy such condition, or within thirty days, whichever is sooner . . . [the tenant may, if the other preconditions are met, pursue his statutory remedies]."

168. *Id.*

that provides the tenant with several possible responses is the idea that the attorney representing a tenant may shape the specific remedy to the tenant's peculiar situation, combining a number of the provisions. The only limitation on this would seem to be that of conceptual consistency. For example, a tenant cannot invoke termination and initiate rent withholding at the same time. Another, and perhaps countervailing, factor to consider in using these remedies is that they do reflect a constant tension between the needs of the individual tenant and the needs of the community to secure a sufficient supply of housing. In many cases, these policies will not conflict. When they do, however, it is not inconceivable that a court would exert its equitable powers in certain isolated situations to curtail creative shaping of remedies or even restrict the choices of remedies available to the tenant from the statutory list.¹⁶⁹ A liberal reading of the legislation could certainly support such an approach.

a. *Rent Withholding.* According to the statute, a tenant may withhold the amount of rent due under the terms of his lease, if his landlord fails to remedy the defects listed by the tenant in his notice.¹⁷⁰ To prevent the possibility of the dissipation of rent monies by the tenant, the rent must be deposited with the clerk of court in the county or municipality in which the premises are located.¹⁷¹ So that finances will not prove to be an obstacle to the vindication of his statutory rights, there is no need for the tenant to file a suit or pay a filing fee. The role of the clerk is carefully defined. He is directed to keep a record of the names and addresses of the landlord and tenant involved, to maintain a running balance of the monies deposited with him, to provide the landlord with notice of deposits, and to maintain an escrow account for the deposited funds,¹⁷² the clerk may not refuse to accept rent deposited for rent-withholding purposes; his duties are wholly ministerial rather than discretionary.¹⁷³

169. *See id.* § 1923.15.

170. *Id.* § 5321.07(B)(1).

171. *Id.*

172. *Id.* § 5321.08(A)-(C). Failure to give the tenant the landlord's name and address will operate as a waiver of notice from the clerk. *Id.* § 5321.18 (C). *See* text accompanying note 378 *infra*. The clerk may assess his costs against the escrow fund at a rate not in excess of 1 percent of the amount deposited. *Id.* § 5321.08(D).

173. Gittes & Marshall, *A Guide to Ohio's New Tenant-Landlord Law*, 3 LAW & HOUSING NEWSLETTER 2, 23 (Jan. 1975).

Once the rental funds have been deposited with the court, the landlord has the burden of recovering them. He may obtain the money either by having the tenant give notice to the clerk of courts that the defect has been corrected¹⁷⁴ or by bringing an action in court against the tenant to obtain release of the rent.¹⁷⁵ The landlord may base his action either on procedural grounds, that the tenant has failed to give proper notice or to be current in rent,¹⁷⁶ or on allegations that go to the substance of the complaint—that the landlord had never violated his duties or that he had remedied the defect.¹⁷⁷ If the landlord's allegations are upheld at trial, then the rents, less court costs, are returned to the landlord.¹⁷⁸ If the court finds that the defect was the result of the tenant's act or omission, the tenant is liable for both damages and costs¹⁷⁹ and may face eviction.¹⁸⁰ Furthermore, if the court finds that the tenant "intentionally acted in bad faith," he may be liable for the landlord's attorneys' fees as well.¹⁸¹

Of the sanctions available to the tenant, rent withholding is the least onerous for the landlord. It merely serves to delay the landlord's receipt of his rental payment until the repairs have been made. At that time the withheld rent, less costs if litigation is necessary, is delivered to the landlord without any setoff for the claim of the tenant that he was deprived of a portion of his bargain for the duration of the breach. In locales where the sanction has been used, it has met with some success in obtaining landlord compliance without litigation.¹⁸² The primary shortcoming of the remedy stems from the fact that the correction of a defect in the dwelling often requires capital. If all landlords had other sources of income, rent withholding would work satisfactorily. In realty, however, most landlords, particularly in low income areas, do not enjoy this advan-

174. OHIO REV. CODE ANN. § 5321.09(A)(1) (Page Supp. 1974).

175. *Id.* § 5321.09(B).

176. *Id.* § 5321.09(A)(2).

177. *Id.* § 5321.09(A)(3).

178. *Id.* § 5321.09(C).

179. *Id.* § 5321.09(D).

180. *Id.* § 5321.03(A)(2).

181. *Id.* § 5321.09(D).

182. Gittes & Marshall, *supra* note 173, at 23 (citing success of remedy under a Columbus, Ohio city ordinance and testimony before the Ohio Senate Judiciary Committee regarding the success of the Pennsylvania procedure instituted in 1967); Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFF. L. REV. 572, 593 (1966).

tage.¹⁸³ The effect of rent withholding in many situations, therefore, is to deprive the landlord of money when he most needs it, when repairs must be made and paid for.

Moreover, the new law could conceivably discourage financial institutions from lending capital to residential landlords in need. One provision of the statute mandates that a party who receives payments of rent must assume the responsibility for fulfilling the landlord's statutory obligations.¹⁸⁴ Thus, were a bank to grant a mortgage secured by rental obligations, the default of the mortgagor could force the bank either to repair the defective premises or become subject to rent withholding itself. Even if the bank were to grant a mortgage secured by the premises themselves, default by the landlord would leave the mortgagee bank in an unfavorable position. Since any purchaser of the land would be forced to repair the leased property to avoid rent withholding by the tenants, any foreclosure sale would necessarily draw a price below that obtainable for similarly located property in full repair. In sum, then, the sanction of rent withholding may place the unprosperous landlord in a difficult position and, perhaps, isolate him from financial assistance.

The Act attempts, however, to mitigate the harshness of rent withholding for the marginal, or nonentrepreneurial, landlord in two ways. First, a landlord with three or fewer units may avoid the remedies entirely by informing his tenants in writing of the size of his operation.¹⁸⁵ Secondly, a court may, in certain circumstances, release part of the withheld rents. The court may release funds to help cover various items, including mortgage payments and maintenance costs attributable to the premises.¹⁸⁶ In deciding whether to release such funds, the court may take into consideration the cost

183. Comment, *Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOYOLA L. REV. (L.A.) 66, 80 (1974).

184. OHIO REV. CODE ANN. § 5321.13(E) (Page Supp. 1974) provides: "A rental agreement, or the assignment, conveyance, trust deed, or security instrument of the landlord's interest in the rental agreement may not permit the receipt of rent free of the obligation to comply with section 5321.04 of the *Revised Code*." The possible effects of this provision on the acquisition of financing are discussed in text accompanying notes 368-70 *infra*.

185. *Id.* § 5321.07(C). See note 158 *supra*.

186. *Id.* § 5321.10(A) provides:

If a landlord bring an action for release of rent deposited with the clerk of court, the court may, during the pendency of the action, upon application of the landlord, release part of the rent on deposit for payment of the periodic interest on a mortgage on the premises, the periodic principal payments on a mortgage on the premises, the insurance premiums for the premises, real estate taxes on the premises, utility services, repairs, and other customary and usual costs of operating the premises as a rental unit.

of repairing the condition that was the basis of the tenant's complaint.¹⁸⁷

Although the idea of obtaining a release may be attractive to the landlord, the law attaches some conditions to the option of freeing the withheld rent. The landlord must make known his accounts to the court.¹⁸⁸ He must show the court his income from the structure or structures of which the dwelling unit is a part, the amounts of the mortgage and interest payments, the operating expenses, and the anticipated cost of repair. Practically speaking, this forces the landlord to choose between giving up his business privacy and financing repairs and other expenses without rental income. Presumably, the landlords who would seek a release under this option would most often be the small-scale landlords to whom the privacy of business dealings is not a significant consideration.

Although the release provision is designed to balance tenant relief against the danger of contracting the housing supply, the balance established is imperfect. The Act's definition of expenses for which release may be obtained is susceptible to abuse. There is always the danger that a landlord would realize his profits from the structure in advance by over-financing, with the result that all of the rental income would be channeled into repaying indebtedness, an expense for which a release may be obtained.¹⁸⁹

The disclosure that is a condition precedent to seeking the release of withheld rental monies may, of course, discourage such practices. Rarely, if ever, will a landlord willingly disclose that his building is mortgaged to an unusually high degree. Furthermore, even if disclosure of unusually high debt were made by the landlord, the court could examine the circumstances and act in a manner consistent with achieving the overall goals of the statute.¹⁹⁰

187. *Id.* § 5321.10(B) provides:

In determining whether to release rent for the payments described in division (A) of this section, the Court shall consider the amount of rent the landlord receives from other rental units in the buildings of which the residential premises are a part, the cost of operating those units, and the costs which may be required to remedy the condition contained in the notice given pursuant to division (A) of section 5321.07 of the *Revised Code*.

188. *Id.*

189. Gittes & Marshall, *supra* note 173, at 25.

190. OHIO REV. CODE ANN. § 5321.10 (Page Supp. 1974). Strictly speaking, however, there is no statutory basis for denying a release based on the improper motives of a landlord. Inquiry into enterprises unrelated to the structure in question is not authorized, so that the court may be prevented from denying a release because of the landlord's general speculative approach to

b. *Receivership*. Under the new statute, the court itself is allowed to use funds on deposit under a rent withholding to have the defect in the premises repaired.¹⁹¹ This method of obtaining compliance bears a resemblance to a court-administered receivership,¹⁹² but from the standpoint of the landlord, it is only slightly more harsh than the court's mere retention of the funds. The landlord benefits from the improved condition of the building and gets back whatever is left of the rent after deduction of costs.

Nevertheless, this procedure may have some serious consequences for the landlord. Once the court has undertaken repairs with the rental money, the landlord has, in effect, lost all control over the repairs. The choice of repairman and, hence, the cost of repairs is critical to both the small and large-scale landlord. The landlord with few holdings is typically a handyman, who can afford to own properties only because of his ability to cut costs by making his own repairs. The entrepreneurial landlord, on the other hand, often avoids the expenses of repairs by employing a salaried maintenance man, avoiding the high hourly rates demanded by specialized repair personnel.

Further problems have arisen in the administration of the more expansive receivership remedies adopted elsewhere.¹⁹³ In some

business. Nevertheless, the language of the provision indicates that judicial release of rental funds is entirely discretionary with the court.

191. *Id.* § 5321.07(B)(2) permits the tenant to:

Apply to the court for an order directing the landlord to remedy the condition. As part thereof, the tenant may deposit rent pursuant to division (B)(1) of this section, and may apply for an order reducing the periodic rent due the landlord until such time as the landlord does remedy the condition, and *may apply for an order to use the rent deposited to remedy the condition*. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B)(1) of this section. [Emphasis added.]

192. Most receivership statutes empower a municipality to take over all management functions of an apartment building. See Comment, *Rent Withholding*, *supra* note 183, at 86. S.B. 103, § 1909.02(I) provided for the court to appoint a receiver to manage the residential premises and to fulfill the landlord's obligations if all other remedies proved inadequate. It is this type of receivership that has proven to be the most troublesome. See notes 193-94 *infra* and accompanying text. The rather limited authority given the courts under the new Ohio law, *i.e.*, to use deposited rent to pay for needed repairs, does not seem to contemplate such extensive management. It is possible, however, that, given the need for extensive repairs and the participation of a large number of tenants, even the rather circumscribed power granted by the Act could lead to many of the problems found with the more extensive receiverships.

193. See Comment, *Rent Withholding*, *supra* note 183, at 86. See also Mc-

states receiverships have proved exceedingly complex and costly. Where the needed repairs have been expensive, courts have been forced to obtain commercial financing and to repay the loans from withheld rents. The repayment period has proved to be long, requiring the courts to engage actively in the management of the apartment dwellings. These difficulties have not ended once the repairs were made and the debt was fully paid. Many landlords, after being out of control for a long period, have refused to resume the management of the premises.¹⁹⁴

Although these experiences are products of receivership programs of a much more ambitious nature than the Ohio plan appears to be, they offer valuable guidelines for implementation of Ohio's receivership device. The other programs indicate that court administration of repair is most effective when the repairs are relatively minor and can be paid for by 2 or 3 months' rent. The necessity of avoiding entanglement of the courts in financing arrangements further demands that the remedy be avoided where the repairs would be expensive or require a substantial commitment. Thus, instead of using this procedure as a form of receivership, the judiciary should use the remedy as a form of court-administered repair-and-deduct statute, through which the costs of repair would be deducted from the amount of the escrow account.¹⁹⁵ A court should therefore be quite certain of the cost and extent of the necessary repairs before ordering the repair.

c. *Rent Abatement.* The Act also provides that a tenant may apply to the court for a prospective decrease in rent in response to a breach of duties by his landlord.¹⁹⁶ This order would remain in effect until the landlord corrected the defect that precipitated the tenant's complaint.¹⁹⁷ The provision sets no limit on the amount of rent reduction, and does not establish any means by which the landlord can gain access to rent that has been "abated." Moreover, abatement may be granted in conjunction with rent withholding, thereby reducing the court-held fund and, consequently, the amount available for release to cover expenses and repairs.¹⁹⁸

Elhaney, *Retaliatory Evictions: Landlords, Tenants, and Law Reform*, 29 MD. L. REV. 193, 199-202 (1969); Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821, 845-52 (1972).

194. See Comment, *Rent Withholding*, *supra* note 183, at 86.

195. See note 192 *supra*. See also text accompanying notes 223-35 *infra*.

196. OHIO REV. CODE ANN. § 5321.07(B)(2) (Page Supp. 1974).

197. *Id.*

198. If it appears that the court might have to direct the repairs, rent abate-

From the point of view of the tenant, rent abatement is a second line of defense against the offending landlord. He may remain unresponsive to rent withholding or receivership because, regardless of how much time it takes him to complete repairs, he receives a dollar-for-dollar refund for expenditures made by him. Even where repairs are administered by the judiciary, the landlord receives the benefit of the completed repairs in the increased value of the premises. With rent abatement, however, the landlord is permanently deprived of the abated portion of the rent. When he finally does make the necessary repairs, he effectively pays twice for them. Equity favors such a result. Since the tenant is deprived of his bargain until repairs are completed, it seems entirely fair that his landlord should suffer some corresponding detriment.

A crucial shortcoming of the rent abatement remedy is that its terms may frustrate the entire policy of compelling landlords to maintain habitable dwellings. On the one hand, by permanently depriving the landlord of income, the sanction may severely reduce his ability to make repairs. On the other hand, landlords might defeat the policy by using the remedy to effect a judicial reformation of the rental agreement. Because the court can adjust the rent to reflect the decrease in value of the premises, the landlord might then feel he has the choice of either making the repairs in order to get full rent or permitting the tenant to continue in possession at the reduced rent without making the repairs. If the tenant's complaint rests upon the argument that he has paid for something that he is not getting, that the landlord has breached a third-tier duty,¹⁹⁹ then relieving him of the duty to pay may well be acceptable to the landlord and tenant and also in keeping with the public policy underlying the new law. But where the complaint is of a condition or defect materially affecting health and safety, such a reformation would encounter serious policy obstacles.

Although a tenant might be willing to live in unsafe or otherwise unfit premises in exchange for low rent payments, the legislature has made the decision that certain minimum standards are to be available for all.²⁰⁰ They have further provided that the obligations and

ment would be unwise since it would reduce the amount of funds available with which to pay for the repairs.

199. *Id.* § 5321.04(A)(2); see notes 65-81 *supra* and accompanying text.

200. Defects of this degree of seriousness would probably constitute breaches of first- or second-tier duties. See notes 30-64 *supra* and accompanying text; cf. note 80 *supra* and accompanying text.

benefits of the new law cannot be waived.²⁰¹ It is therefore doubtful that a court should allow the landlord and tenant to bargain with regard to such basic standards.

A second consideration that argues against allowing abatement to effect a contractual reformation without repair is the problem posed by subsequent deterioration. Eventually, the deterioration will reach such a level that a future tenant would have no alternative but to compel repair.²⁰² It seems patently unfair to allow a present tenant to foist the responsibility to compel repair onto some future tenant solely for the purpose of obtaining a rent reduction. In addition, such a deferral of repairs would ultimately result in increased cost of repairs to the landlord, thus increasing the possibility that he would abandon the building. All things considered, the result of deferral would be to place the present tenant in jeopardy, to require a future tenant to purchase a potential lawsuit with the premises, and to increase the ultimate cost to the landlord.

It seems advisable, therefore, for a court to join an order compelling the landlord to make repairs with a prospective rent abatement,²⁰³ at least in situations where the condition or defect is a serious one. In this way, although the landlord might be able to avoid the repair duty merely by obtaining the tenant's agreement not to seek enforcement of the injunction, the landlord would place himself in great risk and at the tenant's mercy. He would be more likely to make the repairs than try to bargain with the tenant to the frustration of the new law and to the detriment of all.

d. *Termination.* Under the common law, a tenant could terminate his rental agreement before the end of his term only for actual or constructive eviction.²⁰⁴ Under the new law, a tenant has the option of terminating for any breach of duty by the landlord, whether the duty be statutory or contractual.²⁰⁵ From one perspective, this is the most severe of all the sanctions available to the tenant under the Act. The other remedies only defer or reduce the benefits flowing to the landlord, whereas termination ends the landlord's right to any future benefits flowing from the contractual relationship. The tenant need not go to court to use this remedy. The landlord has none of the benefits of a judicial contest; he is faced with a *fait*

201. OHIO REV. CODE ANN. § 5321.13(A) (Page Supp. 1974).

202. *Id.* § 5321.07(B)(2); see notes 208-11 *infra* and accompanying text.

203. See note 288 *infra*.

204. *Wetzell v. Ritchcreek*, 53 Ohio St. 62, 40 N.E. 1004 (1895).

205. OHIO REV. CODE ANN. § 5321.07(A) & (B)(3) (Page Supp. 1974).

accompli. His only means of responding to a termination is a suit for damages for breach of the rental agreement.

In a statute that seeks to force landlords to maintain certain standards through the threat of tenant action, termination is a uniquely self-centered remedy. Unlike the other tenant remedies, termination is not directed at securing the landlord's immediate compliance with his statutory obligations. Instead, the sanction primarily serves to protect the tenant's interests by freeing him to find a more suitable dwelling.

The problems that arise from the termination remedy are the result of the intense focus on the individual tenant. By making termination so easy the legislature has given the tenant a means of avoiding the direct avenues of tenant enforcement. Moreover, because the termination process is practically unsupervised, the sanction could become simply a means of voiding a lease when new space becomes available, rather than an instrument for the vindication of legitimate tenant grievances. The potential that termination holds to become an easy escape route suggests that its use should be carefully scrutinized by the courts in order to advance, rather than frustrate the scheme of the statute. The courts should limit use of the remedy to those situations in which it is the only means by which the tenant's interests can be advanced.²⁰⁶ Thus, termination would properly be utilized where alternative tenant remedies have been effectively exhausted or are of no value whatsoever. The nature of repairs required to rectify a serious situation would be a relevant consideration in analyzing the preferability of termination to other remedies. For example, where a threat to the health and safety could not be quickly removed, or where the repairs necessary to bring the premises into compliance would be so extensive as to impair substantially the use of the premises, termination would be a permissible practical response. Of equal significance in determining whether

206. Since the law does not require that a tenant obtain court approval for termination, the courts can only become involved if the landlord brings an action for improper termination. The landlord is only likely to bring such a suit if (1) he feels confident that he will obtain a judgment and (2) the tenant is able to satisfy such a judgment. By restricting the use of the termination remedy to extreme situations, the major effect would be felt by middle and upper income tenants, who would be able to satisfy a judgment. Since the geographic and economic mobility of these tenants is greater than that of the poor, one could hypothesize that they would be those most likely to abuse the termination remedy. Clearly defined limitations on the use of termination would increase the certainty with which a landlord could bring suit to enforce his contracts, thereby minimizing the chances of abuse.

termination is the proper remedy in a particular situation is the landlord's history of compliance with other statutory duties. Where the landlord has shown disregard for his obligations, either by repeated failures to correct conditions despite the application of other sanctions or by the frequency with which his tenants have had to resort to legal remedies, termination is preferable to the continued attempts to resolve problems by litigation.

The issue whether termination will become widespread, however, is probably moot for the present. The effectiveness of termination as a tenant remedy is contingent on the market environment. Where the housing supply surpasses demand, the tenant may use termination with impunity in his quest of the most favorable bargain. However, when the supply lags far behind demand, as it does now, landlords may charge exorbitant prices. In such times, tenants do not wish to enter the market if they can avoid it; they attempt to negotiate long-term leases as a hedge against rising prices. In this type of environment the tenant's remedy of termination may be illusory.²⁰⁷

e. *Injunction.* Although the focus of the new law is on private enforcement, the civil sanction of injunction is available as a final resort. Under the statute, the tenant may obtain a court order compelling the landlord to make the necessary repairs²⁰⁸ or to cease abusing his right of entry.²⁰⁹ These orders are probably most effective when joined with rent withholding or rent abatement.²¹⁰

207. RESTATEMENT (SECOND) OF PROPERTY § 5.4, Reporter's Notes ¶ 9 (Tent. Draft No. 2, 1974) [hereinafter cited as RESTATEMENT (SECOND) OF PROPERTY].

208. OHIO REV. CODE ANN. § 5321.07(B)(2) (Page Supp. 1974); see note 191 *supra* and accompanying text.

209. OHIO REV. CODE ANN. § 5321.04(B) (Page Supp. 1974); see *id.* § 1923.15 for the grant of power to issue injunctive orders in forcible entry and detainer provisions.

210. It should be noted that the tenant's right to seek rent abatement or receivership is "as a part" of the right to obtain an order compelling the landlord to make repairs. OHIO REV. CODE ANN. § 5321.07(B)(2) (Page Supp. 1974). It might therefore be argued that the court may only grant abatement or receivership in conjunction with an injunction. This argument is countered by the consideration that this provision creates only the tenant's right to seek the remedy, not the court's power to award the remedy. Cf. *id.* § 1923.15; notes 393-94 *infra* and accompanying text. In addition, if the argument were accepted, the court would be placed in the rather curious situation of ordering a landlord to make repairs while directing the clerk to have them made out of deposited rent. Therefore, this provision is more sensibly read as not imposing restrictions on the court's power to grant relief. This leaves the courts free to use their remedial powers as the facts of the case require.

Unlike many of the other remedies, a court order does not present the landlord with a series of options. After the issuance of the order, a landlord's continued refusal or failure to correct his non-compliance could result in civil or criminal contempt penalties. These penalties could prove more severe than the fines imposed for building, housing, health, or safety codes, since they may include total forfeiture of rent from the tenant. Thus, the use of the order and the threat of possible penalties is probably the most effective deterrent against a landlord's casual treatment of his obligations to the tenant.²¹¹

2. Damages and Statutory Setoff

The tenant's right to recovery of damages for breach of contract or breach of "any other duty that is imposed by law"²¹² is one of dual importance. Since the landlord's obligations regarding the condition of the premises are obligations imposed by law, the tenant may seek damages for a breach of those obligations. More significantly, an award of damages can enable a tenant to retain possession of leased premises even if he himself has breached an obligation owed to the landlord. Under the new law, if the landlord brings an action in forcible entry and detainer to recover possession for non-payment of rent, a tenant may use the amount of damages owed him by the landlord as a setoff against rent due, and if that amount equals or exceeds the rent due, the tenant can retain possession.²¹³ As a result of the setoff provisions, the method used to calculate the damages can be crucial; unfortunately, the new law is silent about the appropriate method.

The case law dealing with the common law doctrine of warranty of habitability reveals that there are basically two methods of computation that have found acceptance. There are, however, substantial differences between the two as regards their utility under the Act.

The first method is taken from contract and commercial law.²¹⁴ It sets the tenant's damages at the difference between the fair rental

211. See text accompanying notes 291-96 *infra* for discussion of the manner in which a court might order a landlord to "go out of business" through its power to enjoin a reletting of the premises under OHIO REV. CODE ANN. § 1923.15 (Page Supp. 1974), and the policies to be considered in making such a decision.

212. OHIO REV. CODE ANN. § 5321.12 (Page Supp. 1974).

213. *Id.* § 1923.061(B).

214. See 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1391, 1404 (3d ed. W. Jaeger 1968); cf. UCC § 2-714(2).

value of the premises in a repaired condition and the fair rental value, if any, of the premises in their defective condition.²¹⁵ The agreed-upon rental price is normally only evidence and not a conclusive statement of the fair rental value.²¹⁶ This measure of damages, however, has two significant disadvantages when used under the new law.

An obvious disadvantage of this fair rental approach is that it may require tenants to produce costly expert appraisals of at least the fair rental value of the premises in repaired condition. The expense of these appraisals will, in effect, make damages available only to tenants who can afford to pay the fees of the experts.²¹⁷ Not quite so obvious is the hardship of the remedy on a tenant who, either because of market peculiarities or poor bargaining ability,²¹⁸ is paying a rent in excess of the fair rental value of the premises in a repaired condition. Under these circumstances, the maximum available damages would be less than the amount of rent owed. If the defects were so substantial as to make the premises worthless, this ceiling on damages would, in effect, force the tenant to share in the penalty for the landlord's breach for no other reason than that he paid an inflated price for his dwelling.

Some courts, particularly those presented directly with a question of damages, have not adopted the fair rental value approach.²¹⁹

215. *Green v. Superior Court*, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 845 (Mass. 1973).

This is also the measure of damages accepted by Ohio common law for a landlord's breach of a covenant to make repairs. *Cochran v. Widra*, 35 Ohio L. Abs. 608, 41 N.E.2d 875 (Ct. App. 1931).

216. *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 845 (Mass. 1973); Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1466 (1974); cf. *Cochran v. Widra*, 35 Ohio L. Abs. 608, 41 N.E.2d 875 (Ct. App. 1931); 11 S. WILLISTON, *supra* note 214, § 1391, at 436. *But cf.* 5 A. CORBIN, CONTRACTS § 1004, at 41 (1964): "When goods have been sold and delivered at an agreed price in money, the court does not have to find the value of the goods. The parties have themselves 'valued' them; and the plaintiff is given judgment for the amount of that agreed value—the price."

217. *See Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 487, 268 A.2d 556, 562 (Dist. Ct. 1970); Moskowitz, *supra* note 216, at 1468.

218. Moskowitz, *supra* note 216, at 1466 n.103; cf. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973) (rent of \$35 per week for apartment valued by the court at \$75 per month). As an example of market peculiarities, consider a multi-unit building in which tenants who have been renting for several years pay less than new tenants.

219. *See King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973);

These courts have, instead, used a formula that sets damages at the difference between the agreed-upon rental price of the premises and the value of the premises in a defective condition.²²⁰ By using this method of computing damages, the disadvantages inherent in the fair rental value measure are eliminated. First, while it is arguable that expert evidence should be required to ascertain the fair rental value of the defective premises, as a practical matter the courts have not required this. It has been recognized that even sophisticated expert testimony upon the fair rental value of premises operated in violation of the law is of questionable worth.²²¹ The courts have therefore estimated that value on their own, basing their decision upon the evidence of the nature and extent of the defects.²²² Secondly, where the landlord has been able to exact an inflated price, the agreed-upon price method will provide a more realistic measure of the tenant's injury since no portion of the rent would be insulated from the damages measurement and setoff.

The significance of the method used to compute damages applicable under the new law may be best illustrated in the form of a hypothetical situation. Two landlords, *A* and *B*, own identical apartments in the same neighborhood; the fair market value of both apartments in maintained condition is \$75 per month. Landlord *A* rents

Glyco v. Schultz, 35 Ohio Misc. 25, 34, 289 N.E.2d 919, 926 (Sylvania Mun. Ct. 1972); *Kline v. Burns*, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971); *cf. Green v. Superior Court*, 10 Cal. 3d 616, 639 n.29, 517 P.2d 1168, 1183-84, 111 Cal. Rptr. 704, 719-20 (1974); *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973); *see also Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 485, 268 A.2d 556, 561 (Dist. Ct. 1970).

220. There is an alternative formulation of this measure that sets the damages as a percentage reduction in rent equal to the percentage reduction in the tenant's use of the premises attributable to the defective condition. *See Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 485-87, 268 A.2d 556, 561-62 (Dist. Ct. 1970). This does not, however, seem to be a different measure of damages. Essentially, it only provides a method of calculating the amount of money owed by the tenant to the landlord for the defective premises, *i.e.*, the value of the premises in defective condition. The difference between this figure and the agreed-upon rental price is the damage incurred by the tenant. *Cf. Glyco v. Schultz*, 35 Ohio Misc. 25, 34, 289 N.E.2d 919, 926 (Sylvania Mun. Ct. 1972). *But cf. Moskovitz, supra* note 216, at 1468-70.

221. *See Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 486, 268 A.2d 556, 562 (Dist. Ct. 1970); *Steinberg v. Carreras*, 74 Misc. 2d 32, 38, 344 N.Y.S.2d 136, 144 (N.Y. City Civ. Ct. 1973); *Moskovitz, supra* note 216, at 1467-68.

222. *See Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 487-88, 268 A.2d 556, 562 (Dist. Ct. 1970); *Glyco v. Schultz*, 35 Ohio Misc. 25, 34-35, 289 N.E.2d 919, 926 (Sylvania Mun. Ct. 1972); *cf. Green v. Superior Court*, 10 Cal. 3d 616, 639, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974).

his apartment for \$75 per month; landlord *B* has been able to obtain \$100 per month for his apartment. Both *A* and *B* then neglect their legal duties under the Act to such an extent that the fair market value of the premises is reduced to \$0.

In this situation if *A*'s tenant stops paying rent, *A* would be unable to evict him for his default under either the fair market value or rental price measure of damages. Under the fair market value approach, the tenant's damages would be the fair market value of the premises as repaired (\$75) minus the fair market value of the premises unrepaired (\$0), or \$75. Since the rent price equals the fair market value of the premises as repaired, the damages would also be \$75 under the rental price method (rental price minus fair market value of the unrepaired premises). A judgment for *A*'s tenant in the amount of \$75 would completely offset the rent owed to *A*. Thus, *A*'s tenant would remain in possession.

On the other hand, if *B*'s tenant discontinued his rent payments, whether *B* could evict would depend on the measure of damages applied by the court in determining the value of the tenant's counterclaim for *B*'s breach. If the fair market value method is used, the tenant's damages would again be \$75 (fair market value of premises as repaired minus the fair market value of the defective premises). Since the tenant's rent obligation is \$100, he would still owe the landlord \$25 in rent after the court offset his damage against the landlord. Thus *B* could evict since the damages did not completely negate the rental obligation. Under the fair market value formula, then, the landlord who was able to bargain for rent higher than the fair market value would be able to regain possession, while the landlord who has charged no more than the fair market value would not be able to evict under the same circumstances. Significant too, is the fact that the tenant paying an inflated rent is doubly harmed.

If the rental price method of computing damages were applied in *B*'s case, however, he would be unable to use the higher rental price to secure immunity from the setoff procedure and obtain an eviction order. Since his tenant's damages would equal the \$100 rental price (\$100 rental price minus \$0 fair market value of the premises in defective condition), the use of the setoff would leave no rent owing to *B*. Like *A*, he would be unable to evict. The result is definitely the more equitable one.

The application of the rule of statutory setoff to prevent eviction is a significant development of the Ohio law. It might be argued,

however, that the legislature did not develop the full potential of the setoff provisions. One of the easiest routes for development might be using the cost of tenant-made repairs as a measure of damages.²²³ If this measure were used under the Act, a tenant could have repairs made, deduct the cost from his rent, and if eviction were sought for the deficiency, use the cost of repairs to set off the rent due, and thus possibly retain possession. This would convert the setoff procedure into a self-help repair-and-deduct device.

Repair-and-deduct is an attractive option for the tenant. It eliminates the need to go through time-consuming court procedures to correct small problems or emergency conditions that require immediate attention.²²⁴ It offers the opportunity to a group of tenants to pool their rents to make major repairs. It provides greater leverage when requesting repairs since the landlord is faced with the possibility that the repairs will be made without his consent, but at his expense should he refuse to undertake them himself.

The judicial imposition of a repair-and-deduct remedy, which could be achieved through interpretation of the new Ohio setoff provision, must overcome three substantial obstacles. First, the remedy itself has several inherent problems. In the absence of some limit upon the amount of rent that may be used for repairs, there is a risk that the cost of repairs could so reduce the landlord's income that he could not meet his other expenses.²²⁵ Furthermore, without a requirement of notice and a waiting period before having the repairs made, the landlord might be deprived of the opportunity to make the repairs himself or be caught in a race to repair with the tenant.²²⁶ Lastly, because of the average tenant's inexperience in making repairs and contracting with building tradesmen, repairs might be poorly done or inordinantly expensive.²²⁷

223. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); see *Cochran v. Widra*, 35 Ohio L. Abs. 608, 41 N.E.2d 875 (Ct. App. 1931).

224. See *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971); Comment, *Landlord-Tenant Law Reform in Cincinnati*, 43 U. CIN. L. REV. 175, 178-79 (1974); cf. RESTATEMENT (SECOND) OF PROPERTY § 10.2, Comment a.

225. Cf. RESTATEMENT (SECOND) OF PROPERTY § 10.2, Comments a, b and Reporter's Notes ¶ 9; Subcommittee on the Model Landlord-Tenant Act of the Committee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE & TRUST J. 104, 116-17 (1973).

226. RESTATEMENT (SECOND) OF PROPERTY § 10.2, Reporter's Notes ¶ 3; Dooley & Goldberg, *A Model Tenants' Remedies Act*, 7 HARV. J. LEGIS. 357, 379 (1970).

227. This was a major concern of the Ohio Board of Realtors and other landlord groups who appeared before the Governor's Committee on Housing

In recognition of these problems, the overwhelming majority of states that have developed a repair-and-deduct remedy have done so through the legislative rather than the judicial process.²²⁸ In order to minimize the risks presented by the remedy, the legislatures have carefully limited its application.²²⁹ These laws generally prescribe a maximum dollar amount that may be used to make repairs, the number of times per year the remedy may be used, the length of time after giving the landlord notice that the tenant must wait before commencing repairs, and whether the cost is to be the actual cost or the reasonable value of the work.²³⁰ Moreover some of the courts have taken a strict posture toward the laws to further purge them of risks.²³¹ The end result is that the remedy has been weakened. The question whether the risks of repair-and-deduct can be minimized without impairing the utility of the remedy has apparently been answered in the negative.²³²

In addition to the intrinsic deficiencies of the remedy, a judicial reading of the legislative intent of the Ohio law would probably preclude the development of repair-and-deduct in the courts. In one of the bills considered by the Ohio legislature there was an express repair-and-deduct provision.²³³ The bill was rejected. Further-

hearings prior to legislative consideration of the proposed reforms. Because of the tenant's inability to make sound repairs, the repair duty was imposed exclusively on the landlord and no repair-and-deduct provision was put into the law. Interview with Peter Simmons, Professor of Law at the Ohio State University Law School and Member of the Governor's Committee on Housing, in Cleveland, Ohio, Oct. 21, 1974.

228. See, e.g., CAL. CIV. CODE § 1942 (West Supp. 1974); MASS. GEN. LAWS ANN. ch. 111, § 127L (Supp. 1975); URLTA § 4.103.

229. New Jersey and New York are the only two states permitting the remedy in absence of statutory authority. See *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. 1971). See also Annot., 40 A.L.R.3d 1368 (1971).

230. See, e.g., CAL. CIV. CODE § 1942 (West Supp. 1974) (requiring reasonable notice, 30 days being deemed reasonable; setting maximum amount at 1 month's rent; limiting use to once each year); MASS. GEN. LAWS ANN. ch. 111, § 127L (Supp. 1974) (landlord has 10 days after notice to begin repairs and 21 days from notice to finish; limit of 2 months' rent in any 12-month period). See also RESTATEMENT (SECOND) OF PROPERTY § 10.2, Statutory Notes at 268-70.

231. See *Olinger v. Reahard*, 117 Ind. App. 172, 70 N.E.2d 436 (1947); cf. *Sherrod v. Lidyoff*, 108 Cal. App. 2d 325, 236 P.2d 28 (1928). See also RESTATEMENT (SECOND) OF PROPERTY § 10.2, Comment e and Reporter's Notes ¶ 9; Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739, 748-51 (1971).

232. See *Green v. Superior Court*, 10 Cal. 3d 616, 631, 517 P.2d 1168, 1178, 111 Cal. Rptr. 704, 714 (1974).

233. See Substitute H.B. 169, § 1923.19(A)(1). See also URLTA § 4.103.

more, the overall scheme of the statute does not favor a reading of a repair-and-deduct provision. Since the remedies set forth are comprehensive, it is difficult to argue that the legislature intended them to be other than the exclusive set of available remedies. Also, the statute is clearly prejudiced against self-help remedies.²³⁴

Finally, there is one overriding reason which would probably bar the development of an implied repair-and-deduct remedy even if the other obstacles were overcome. Under the Ohio common law, it is firmly established that the measure of damages for a landlord's breach of a covenant to repair cannot include the cost of tenant-made repairs.²³⁵ Since the new law is no more than a covenant imposed by law, this rule seems directly on point.

IV. RETALIATORY CONDUCT

A. *Origins of the Provision*

Unlike local building and housing codes, which seek to obtain compliance through criminal penalties and governmental enforcement,²³⁶ the new landlord-tenant Act relies upon civil sanctions applied by private parties to enforce its goals.²³⁷ Thus, if the new law is to be successful in providing minimally adequate rental housing through the alteration of the traditional balance of rights and obligations between the landlord and tenant, those who bear the responsibility for enforcement must be free to apply the Act's sanctions to secure its benefits. The more restricted this freedom becomes, the less significance the sanctions will have, and ultimately the less effective the law will be.

The shortage of rental housing, the expense of moving, and the inequality of bargaining power between the tenant and landlord place the tenant in a highly vulnerable position.²³⁸ The opportunities for reprisal are great, particularly in the case of the short-term or periodic tenant, over whom the landlord holds a virtually unre-

234. OHIO REV. CODE ANN. § 5321.15 (Page Supp. 1974), bars self-help eviction or diminution of services. See text accompanying notes 136-42 *supra*.

235. *Holder v. Farmakis*, 66 Ohio L. Abs. 279, 117 N.E.2d 491 (Ct. App. 1950); see *Cochran v. Widra*, 35 Ohio L. Abs. 608, 41 N.E.2d 875 (Ct. App. 1931).

236. See note 46 *supra*.

237. See notes 117-235 *supra* and accompanying text.

238. See *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-42 (1966).

stricted power of termination.²³⁹ If the price of asserting his legal rights may be eviction or an exorbitant rent increase, a tenant will be deterred from pursuing the remedies available to him.

A number of states have provided some measure of protection by allowing the tenant to use a landlord's retaliatory motive as a defense in an action for possession.²⁴⁰ In states where the defense has been created by the courts, it has been supported by two rationales. The first is that where a tenant is given a right to take legal action to enforce public laws (as in filing complaints with housing authorities), allowing a landlord to terminate the tenancy in reply would thwart the purposes of the statute.²⁴¹ The second justification is that eviction would infringe upon the tenant's constitutional right to organize or to petition the government and his guarantee to free speech.²⁴² As the case law developed, however, it became apparent that the original conception of the defense did not fully anticipate its full parameters. In the slow, uneven fashion of common law development, the courts gradually dealt with issues such as the validity of rent increases motivated by retaliation²⁴³ and the degree of protection from retaliation to be afforded to tenant union activities.²⁴⁴

By statutorily creating the defense in Ohio,²⁴⁵ the legislature has articulated the scope of impermissible retaliatory conduct. Section 5321.02 defines the specific acts on the part of the landlord that may be considered retaliatory in the presence of an improper motive.²⁴⁶ Furthermore, the provisions enumerates the remedies available to the

239. All that is necessary to terminate the tenancy is the giving of appropriate notice by the landlord that the tenancy is terminated. See 1 AMERICAN LAW OF PROPERTY §§ 3.23, 3.90. The notice requirements under the new Ohio law are found in OHIO REV. CODE ANN. § 5321.17 (Page Supp. 1974); see text accompanying notes 380-81 *infra*. Normally, the landlord's motives are not to be considered since he is under no duty to renew the tenancy for another period. See *Ferguson v. Buddenberg*, 87 Ohio App. 326, 94 N.E.2d 568 (1950).

240. See, e.g., statutes and cases cited in notes 179-82 *infra*.

241. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 699-703 (D.C. Cir. 1968); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

242. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 696-98 (D.C. Cir. 1968); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 505-06 (S.D.N.Y. 1969); *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 225, 281 A.2d 544, 546 (App. Div. 1971). But see *Fallis v. Dunbar*, 386 F. Supp. 1117 (N.D. Ohio 1974).

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

244. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969).

245. OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1974).

246. *Id.* § 5321.02(A).

tenant victimized by a retaliatory act. He may use the landlord's activity as a defense against an eviction proceeding. He may use it to recover possession lost in a previous eviction. And he may terminate his tenancy as a result of the retaliation and avoid any further contractual duties to the landlord.²⁴⁷ In addition, the tenant may recover actual damages and attorneys' fees.²⁴⁸

The Act also establishes the scope of tenant activities that are protected by the retaliation defense. The common law retaliation defense extended protection to any lawful act taken by the tenant to secure rights granted him by law, and some states have simply incorporated this formulation into statutory forms of the defense.²⁴⁹ Other states have used a more restrictive approach by listing the specific types of activity that are protected from retaliation.²⁵⁰ The retaliation provision in the new Ohio law, which is modeled after the retaliatory conduct provision of the Uniform Act,²⁵¹ appears to take the latter approach. The protected areas are those in which

1. the tenant has complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety;
2. the tenant has complained to the landlord of any violation of section 5321.04 of the *Revised Code*;
3. the tenant has joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms or conditions of a rental agreement.²⁵²

An important issue that must be considered is the allocation of the burden of proof. Antiretaliation measures typically speak to "re-

247. *Id.* §§ 5321.02(B)(1)-(B)(3).

248. *Id.* § 5321.02(B).

249. Some statutes prohibit retaliation for an attempt to secure or enforce rights under the lease or agreement or under the laws of the state, of its governmental subdivisions, or of the United States without any limitation on the acts that fall within the protection. MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1974-75); MINN. STAT. ANN. § 566.03 (Supp. 1974); N.J. STAT. ANN. §§ 2A:42-10.10 to .12 (Supp. 1974-75); R.I. GEN. LAWS ANN. § 34-20-10 to 11 (1969).

250. *See, e.g.*, CAL. CIV. CODE § 1942.5 (West Supp. 1974); CONN. GEN. STAT. ANN. § 19-375a (Supp. 1974-75); HAWAII REV. STAT. § 521-74(a) (Supp. 1974); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1974-75); MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1975); N.H. REV. STAT. ANN. §§ 5410:13-a, 13-b (Supp. 1973). *See also* ARIZ. REV. STAT. ANN. § 33-1381 (1974); URLTA § 5.101.

251. *See* URLTA § 5.101.

252. OHIO REV. CODE ANN. § 5321.02(A) (Page Supp. 1974).

taliatory motive." Because the element of subjectivity thus introduced is undesirable, the Uniform Act and most of the state statutes²⁵³ give the tenant the benefit of a presumption of retaliation if the landlord's reprisal occurs within a given period of time after the tenant has engaged in a protected activity. The new Ohio statute, however, does not contain such a provision.²⁵⁴

Ohio takes a further step to mitigate the effect of the retaliation provision on the landlord. The new law provides that a landlord may, under certain specified circumstances, seek an eviction or a rent increase notwithstanding the presence of a retaliatory motive.²⁵⁵

B. *The Extent of Protection*

The statutory list of specific protected activities²⁵⁶ offers litigants a degree of certainty. The list creates a major problem, however, in that the activities listed are not coextensive with the full spectrum of statutory activities in which the tenant may engage in order to secure the landlord's compliance with his statutory obligations. Given the specific enumeration in the provision, it is arguable that the doctrine of statutory construction *expressio unius est exclusio alterius*²⁵⁷ would demand that the protection afforded by the retaliatory conduct defense not extend to tenant activities not expressly included by the statute. This argument, however, would ignore an equally important rule of construction that calls for the exercise of caution to avoid frustration of legislative intent through too rigid an application of the *expressio unius* rule:²⁵⁸ "Where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, [or] is a necessary incidental to a power or right . . . the maxim will be disregarded and an expanded

253. URLTA § 5.101 and the statutes cited in notes 249-50 *supra*, with the exception of those in effect in Hawaii, Illinois, and Rhode Island, create presumptions of retaliation. The presumption created is that any eviction or termination attempted during a specified time after a tenant has acted in a protected manner is presumed to be retaliatory. The period during which the presumption operates ranges from 60 days to 6 months.

254. See notes 265-74 *infra* and accompanying text for discussion of problems created by the absence of such presumption.

255. OHIO REV. CODE ANN. § 5321.03 (Page Supp. 1974).

256. *Id.* § 5321.02(A).

257. "[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an *inference* that all omissions should be understood as exclusions." 2A SUTHERLAND § 47.23 (emphasis added).

258. See *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 164, 224 N.E.2d 906 (1967).

meaning given."²⁵⁹ If the enumerated items are interpreted as being the only activities for which the defense of retaliatory conduct is available, a tenant's resort to the formidable remedies created by the new law would fully expose him to reprisal. Such an interpretation would effectively emasculate the force of the private enforcement program and, consequently, the thorough reform of the landlord-tenant relationship established by the new law.²⁶⁰ There is little reason to believe that a tenant faced with the possibility of termination or substantial rent increases would dare to employ his new remedies against a landlord who refused to respond to complaints, nor is there reason to expect that landlords would voluntarily assume the substantial obligations imposed by the new law. Thus, if the new law is to retain any vitality in the area of private enforcement of landlord duties, the retaliatory conduct defense provision must be interpreted in a liberal rather than restrictive manner.

Assuming that the list of protected tenant activities is not exclusive, the exact scope of the defense must still be delineated. Fortunately, other references to retaliatory conduct made in the Act provide criteria to be used in defining the breadth of tenant protection.

The clearest indication of legislative policy toward retaliatory conduct outside the retaliation provision itself is found in the portion of the Act dealing with forcible entry and detainer.²⁶¹ The law requires that the summons issued to initiate eviction proceedings state that "no person shall be evicted in retaliation for the exercise of his

259. 2A SUTHERLAND § 47.25. The *expressio unius* maxim should be used with caution as a tool to ascertain legislative intent, not to frustrate legislative policy. See *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 164, 224 N.E.2d 906 (1967).

260. The importance of this protection to the success of the statutory scheme is emphasized in a discussion of a comparable provision of URLTA § 5.101(a).

If any of these prohibitions or protections were removed, the entire structure of the Act would be jeopardized, for each represents a step which a tenant might reasonably take when displeased with his landlord's attitude or actions regarding maintenance or repair. [The retaliatory conduct provision] thus stands as a delicately integrated scheme which definitely should remain undisturbed by the enacting body.

Davis, *URLTA, Kansas, and the Common Law*, 21 U. KAN. L. REV. 337, 420 (1973).

The Ohio statute is similar to the URLTA section except that it does not include a presumption. See notes 265-74 *infra* and accompanying text. Had the presumption been incorporated in the law, much of this discussion would not be necessary.

261. OHIO REV. CODE ANN. § 1923.06(B) (Page Supp. 1974).

lawful rights.”²⁶² It is manifest that resort to remedies created by the same statute is an “exercise of lawful rights.” Thus, the defense of retaliation must be available when eviction or other prescribed measures are used by the landlord in response to the tenant’s use of statutory remedies.

The reason that the legislature did not include the use of the statutory remedies in the retaliatory conduct provision is not clear from a cursory reading of the provision. However, a closer examination of the enumerations in that section reveals a critical element common to each of the items listed: each is initially a nonjudicially supervised activity. It is this coloration of self-help that is the critical element. Since the new law does not extend to the tenant any self-help remedies²⁶³ and prohibits the landlord from using self-help,²⁶⁴ it may be implied that the use of self-help does not fit into the general category of a “lawful right.” Therefore, the only positive way of protecting a measure with self-help overtones from retaliation is to include it specifically within the scope of the retaliation defense.

In this light, the retaliatory conduct provision can be seen not as a complete enumeration of all activity that is within the scope of the protection but rather as a list of those unsupervised activities that are to be afforded the same protection as measures that have acquired their status as “lawful rights” by mere inclusion in the terms of the statute. Only this construction affords protection in the use of the new remedies, thereby insuring the tenant’s freedom to seek judicial aid in enforcing the new law.

C. *Proof of Retaliatory Conduct*

Ohio is one of five jurisdictions in the nation that has enacted a retaliatory conduct provision by statute without concomitantly creating a presumption that requires the landlord to prove the absence of retaliatory intent.²⁶⁵ Where the presumption does exist, it is

262. *Id.*

263. The law does not provide a repair-and-deduct remedy, *see* notes 223-35 *supra* and accompanying text, nor does it expressly authorize self-help rent withholding. *See generally* Note, *Rent Withholding—A Proposal for Legislation in Ohio*, 18 CASE W. RES. L. REV. 1705, 1715 (1967).

264. OHIO REV. CODE ANN. § 5321.15 (Page Supp. 1974) prohibits the use of exclusion from the premises, termination of services and utilities, threats, or seizing of a tenant’s personal property to facilitate eviction or rent collection.

265. *See* note 253 *supra*; Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*,

typically keyed to the length of time between the occurrence of the tenant's protected activity and the prohibited activity of the landlord. The value of the presumption should not be underestimated. When it is operative the tenant need prove only that he engaged in a protected activity and that the landlord subsequently engaged in a proscribed activity.²⁶⁶ No showing of causation or motive is necessary.

Although a presumption provides the tenant with what is perhaps the maximum protection by relieving him of the burden of proof regarding motivation, the absence of presumptive liability does not totally vitiate the protection of the retaliation defense.²⁶⁷ Both the general evidentiary rules in Ohio²⁶⁸ and the retaliation cases in other jurisdictions strongly indicate that retaliation may be proved by a bare preponderance of the evidence.²⁶⁹ Even this relatively light

59 GEO. L.J. 909, 960 (1971) (reprinting DIST. OF COLUMBIA HOUSING REG. § 2910(C) (1970)).

266. If there is no presumption operating in favor of the tenant, he may be required to prove a number of facts, for many of which no evidence is readily available. For example, in at least one jurisdiction, a tenant must prove that his landlord was aware of a tenant's actions before a court will find retaliatory motivation on the part of the landlord. *Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970). While this may raise no evidentiary difficulties where the tenant's action is that of lodging complaints with the landlord or initiating legal action, a proof problem may arise if the activity is participation in a tenant union or submission of a complaint to a governmental agency. In addition, where the act of the tenant is the filing of a complaint with an agency, the common law appears to require a substantial violation of a building, housing, health, or safety code for protection from retaliation to attach. By so limiting the tenant's protected right to complain, a deterrent to using such complaints to harass the landlord is created. Proof of a code violation might be required under OHIO REV. CODE ANN. § 5321.02(A) (1) (Page Supp. 1974). See *Wilkins v. Tebbetts*, 216 So. 2d 477 (Fla. Ct. App. 1968).

267. Cf. *McElhaney, Retaliatory Evictions: Landlords, Tenants and Law Reform*, 29 Md. L. Rev. 193, 220-23 (1969).

268. "There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence." *Johnson v. Stackhouse Oldsmobile, Inc.*, 27 Ohio St. 2d 140, 142, 271 N.E.2d 782, 784 (1971); *quoting Jones, Stranathan & Co. v. Greaves*, 26 Ohio St. 2, 4 (1874).

269. In jurisdictions where no presumption of retaliation is available to the tenant the preponderance standard is generally required. See, e.g., *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972). In *Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970), however, the court required that the retaliatory motive be shown by clear and convincing evidence. This court was not applying a statutory defense of retaliatory conduct, but was recognizing the defense at common law. It is probable that judicial concerns regarding the impact of widespread availability of such a defense were the pri-

burden of proof, however, may cause the tenant serious difficulties. The evidentiary problems that may arise stem primarily from the difficulty of proving the subjective state of mind known as retaliatory intent. In the absence of a landlord's testimony that his conduct was retributive,²⁷⁰ a tenant must use indirect evidence to infer improper motivation. Obviously, such evidence is difficult both to discover and evaluate. Of the various types of indirect evidence available to the tenant, the factor given most weight in many of the cases is the length of time between the tenant's protected activity and the alleged retaliatory conduct of the landlord.²⁷¹

The shorter the period between the act and the alleged reprisal, the stronger the inference of retaliation. The sudden initiation of threats of eviction or rent hikes would likewise support an inference of retaliatory motive.²⁷² It could also be shown that (1) the tenant had always been well-behaved and that no reason other than reprisal could thus exist; (2) the landlord has been evasive or unduly reticent when asked to justify the eviction; (3) the reasons given for the eviction, such as violations of legal or contractual duties, had not been the subject of previous complaints; or (4) the acts or omissions given as reasons had not resulted in the eviction of other tenants

mary motive behind the imposition of the relatively rigid burden of proof. Such a standard of proof is only required in Ohio in an action for fraud where a party is trying to set aside a written instrument. *Household Finance Corp. v. Altenberg*, 5 Ohio St. 2d 190, 193, 214 N.E.2d 667, 669 (1966). See also *Merrick v. Ditzler*, 91 Ohio St. 256, 260-67, 110 N.E. 493, 494-96 (1915). Since the applicability of the clear-and-convincing standard is strictly limited and since this higher standard is not expressly called for by the Act, there is no reason to impede the retaliation defense with a high burden of proof.

270. A landlord may of course unwittingly testify against himself. In *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1969), for example, in a previous action a tenant had had her lease invalidated because of housing code violations existing at the time she entered into the agreement. Under the illegal contract theory of *Brown v. Southhall Realty Corp.*, 237 A.2d 834 (D.C. Ct. App. 1968), this relieved the tenant of the duty to pay rent. The landlord then came into court seeking an eviction because the tenant was not paying rent. The court held that if the eviction were allowed on such grounds it would constitute a penalty upon the exercise of the right to be relieved of paying rent under an illegal contract. In other words, it would be retaliatory. The landlord had inadvertently testified to the retaliatory motive merely by stating his grounds for eviction. *Id.* at 858-59.

271. Cf. *Fallis v. Dunbar*, 386 F. Supp. 1117, 1118-19 (N.D. Ohio 1974); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 511, 476 P.2d 97, 98, 90 Cal. Rptr. 729, 730 (1970).

272. Cf. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 502-03 (S.D.N.Y. 1969).

who had engaged in similar activities.²⁷³ Although this type of proof may be difficult to discover, the experiences under other statutes that require proof of intent or motive indicates that the burden will not be overly demanding.²⁷⁴

D. *Reasons Sufficient to Overcome the Defense of Retaliation*

A landlord may have legitimate motives for raising rent or evicting a tenant that coexist with retaliatory intent. When such legitimate motives are present, the availability of the retaliation defense is dependent upon whether these motives can justify the landlord's conduct notwithstanding his vindictiveness. Jurisdictions are split on this issue. Some hold that in order for the defense to prevail eviction must be solely motivated by the intent to retaliate.²⁷⁵ Others hold that a presumption of retaliation may be overcome only by a showing that retaliation was not even considered by the landlord.²⁷⁶ A less extreme approach has been adopted by courts that require only that retaliation must be the dominant or overriding motive.²⁷⁷

Ohio approaches the problem by statutorily specifying the reasons or circumstances in which a landlord is permitted to raise rents or seek eviction notwithstanding retaliatory intent.²⁷⁸ The finite list of permissible circumstances set forth in the provision indicates that the enumerated reasons are meant to be exclusive. While in the

273. Moskowitz, *Retaliatory Eviction—A New Doctrine in California*, 46 CAL. STATE B.J. 23, 33 (1971); 1971 WIS. L. REV. 938, 946-49.

274. See Moskowitz, *supra* note 273, at 31-33; 1971 WIS. L. REV. 938, 948-49; Daniels, *supra* note 265, at 947. These articles draw interesting analogies to cases involving retaliatory discharge under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970).

275. In *Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970), the court, in a jurisdiction without a statutory authorization of a retaliation defense, held that, in order for the defense to prevail, retaliation had to be the sole motive for the landlord's proscribed activity. See note 269 *supra*. This requirement, however, is so onerous that it may make the protection afforded by the defense almost illusory. Comment, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 133 (1974); 1971 WIS. L. REV. 938, 951.

276. *E. & E. Newman, Inc. v. Hallock*, 116 N.J. Super. 220, 224, 281 A.2d 544 (App. Div. 1971); *Silberg v. Lipscomb*, 117 N.J. Super. 491, 496, 285 A.2d 86, 88 (Dist. Ct. 1971).

277. See, *e.g.*, *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 864-65 (D.C. Cir. 1972); see also MICH. COMP. LAWS ANN. § 600.5720(2)(a) (Supp. 1974-75) ("That the alleged termination was intended primarily as a penalty . . ."); Moskowitz, *supra* note 273, at 31-32 (discussing the possible analogy with the "motivating" or "substantial" reason test for retaliatory discharge under the National Labor Relations Act).

278. See OHIO REV. CODE ANN. §§ 5321.03(A)(1)-(4) (Page Supp. 1974).

case of statutorily protected tenant activities the interpretative doctrine of *expressio unius est exclusio alterius* should be ignored in favor of a more liberal interpretation,²⁷⁹ the doctrine should be applied rigidly with respect to motivations statutorily more powerful than the retaliatory conduct defense. A nonexclusive reading of these circumstances would result in decreased protection of the tenant and cause the tenant to be hesitant to assert his rights in any manner but one expressly permitted by the new law.²⁸⁰ A broad interpretation could lead to an open-ended exemption from the retaliation defense and should be avoided to protect the overall goals of the Act.²⁸¹ Therefore, only the specific reasons stated in the new law should justify a landlord's actions in the face of proof of retaliatory intent.

Since the exceptions to the retaliation provisions are for the benefit of the landlord, he bears the evidentiary burden of proving that one or more of them is applicable to his situation.²⁸² In other words, if the tenant can prove the simple existence of a retaliatory intent, the landlord must counter with proof that at least one of the statutory exemptions applies. If either the tenant's proof fails or the landlord's proof succeeds, the court will uphold the landlord's action. The exact delineation of exemptions from the retaliation defense in the statute has two distinct advantages of particular merit. First, it provides both parties with a firm basis to assess the possibility of success in litigation. Secondly, this approach strikes a balance in the allocation of evidentiary burdens between the landlord and tenant.

While the mechanics of this provision are relatively complex, the rationale behind sustaining retaliatory actions in particular situations is basic: response in kind. Thus, while some tenant activities may justify one type of retaliatory response from the landlord, that same activity may not suffice as justification for retaliation in another form. For example, an increase in rent, if effected solely with retributory motives, may be overturned by a tenant.²⁸³ The landlord can, however, justify the increased rent if he can prove increased

279. See notes 257-60 *supra* and accompanying text.

280. *Cf. id.*

281. *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251, 65 N.E.2d 711, 712 (1946); *Kroff v. Amrhein*, 94 Ohio St. 282, 286, 114 N.E. 267, 268 (1916) (remedial statutes); 2A SUTHERLAND § 47.11.

282. 2A SUTHERLAND § 47.11.

283. OHIO REV. CODE ANN. § 5321.02(A) (Page Supp. 1974). See also notes 256-64 *supra* and accompanying text.

operating costs or the need for capital to cover costs of improvements.²⁸⁴ Increased costs or expenses cannot justify the harsher sanction of eviction, because eviction is not a response in kind to the increased need for money.²⁸⁵

Eviction, the other type of retaliatory conduct contemplated by the statute, necessarily presents a different case. It may be a legitimate response to more varied forms of conduct and circumstances. That is, more activities and events go to the essence of the retention of the possessory interest than to the amount of the rent. Ohio recognizes this fact and justifies eviction even when accompanied by retaliatory motives in four different circumstances.²⁸⁶

The first situation occurs when the tenant is in default of rent.²⁸⁷ The reasoning behind this justification is plain: the rental obligation is perhaps the most essential covenant the tenant makes with his landlord and should outweigh any other considerations. Moreover, the recent trends of the courts to view the lease as a contract²⁸⁸ only confirms the essential nature of the covenant to pay rent.

The second set of circumstances that justifies retaliatory eviction appears when the violation of an applicable building, housing, health, or safety code, which was the subject of a tenant's complaint to either the landlord or a government agency, was "primarily caused by any act or lack of reasonable care by the tenant" or by a member of his household including someone on the premises with his consent.²⁸⁹ Again, this justification has a firm common law background. It speaks to the inability of the tenant to shift the onus to the landlord for situations caused by the tenant.²⁹⁰

284. OHIO REV. CODE ANN. § 5321.02(C) (Page Supp. 1974).

285. See notes 291-96 *infra* and accompanying text; cf. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

286. See OHIO REV. CODE ANN. § 5321.03 (Page Supp. 1974).

287. *Id.* § 5321.03(A)(1). From a different perspective, being current in rent payments could be viewed as a condition precedent to using the retaliatory conduct defense. Once a tenant acts against the landlord in a protected fashion, the price of keeping the defense available is timely rent payment.

288. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970); *Green v. Superior Court*, 10 Cal. 3d 616, 624, 517 P.2d 1168, 1172-73, 111 Cal. Rptr. 704, 708-09 (1974); *King v. Moorehead*, 495 S.W.2d 65, 75-76 (Mo. Ct. App. 1973).

289. OHIO REV. CODE ANN. § 5321.03(A)(2) (Page Supp. 1974). The landlord can recover damages and attorneys' fees if the acts or negligence violate the tenant's statutory duties. *Id.* § 5321.05(C). The same relief is available if the tenant has initiated a proceeding under § 5321.07 in bad faith or on grounds caused by his own negligent acts or omissions. *Id.* § 5321.09(D).

290. See notes 89-90 *supra* and accompanying text.

The third situation that can justify an eviction notwithstanding retaliatory intent occurs when the repairs necessary to comply with the applicable building, housing, health, or safety code would be so extensive as "to effectively deprive the tenant of the use of the dwelling unit."²⁹¹ This justification has no extensive common law background; its focus is unique. It speaks to the effects of contemplated repairs rather than to the impact of present unrepaired conditions. Judicial precedent to support this justification is minimal. The theoretical basis for exoneration of retaliatory motive in this situation might be termed the "sound business purpose" rationale. This rationale was accepted by the United States Circuit Court of Appeals for the District of Columbia in *Robinson v. Diamond Housing Corp.*²⁹² In that case, the court refused to proscribe as retaliatory the closing of a dwelling where another motive for the closing was the landlord's inability to realize a return on his investment.²⁹³ This rationale shifts the burden of deterioration of housing from the landlord to the tenant. The landlord is relieved of the necessity to make extensive repairs; the tenant must seek a new home.

Although the Act enables the landlord to evict rather than repair, the new law does take steps to prevent abuse of this theory as enunciated in *Robinson*. By expressly limiting its use to situations in which repairs are necessary to comply with local codes, the Act precludes a landlord from using the eviction process merely because overfinancing of the dwelling prevents a normal return on his investment.²⁹⁴ Moreover, where an eviction is upheld on the basis of necessary repairs, the court can enjoin reletting of the dwelling until repairs are completed.²⁹⁵ Thus, should a landlord employ this justification to meet an allegation of retaliatory conduct, he may be placed in the situation of having to make necessary repairs or lose rental value of his property entirely.²⁹⁶

The final situation that can justify an otherwise retaliatory evic-

291. OHIO REV. CODE ANN. § 5321.03(A)(3) (Page Supp. 1974).

292. 463 F.2d 853, 865 (D.C. Cir. 1972).

293. *Id.* at 865.

294. See text accompanying note 189 *supra* and notes 368-69 *infra* discussing aspects of financial pyramiding in relation to the Act.

295. OHIO REV. CODE ANN. § 1923.15 (Page Supp. 1974).

296. So limiting the choices of the landlord may decrease the housing supply through what might be called a "court approved dissolution." Nevertheless, such a result may be in the public interest in cases where the premises in question are in a severe state of deterioration. Furthermore, should the court fear an adverse effect on the housing supply, it is authorized to order repairs if the public interest so demands. *Id.* § 1923.15.

tion is where "a tenant is holding over his term."²⁹⁷ This justification is not innovative. Where the tenant no longer has possessory rights to protect, he should not be protected from eviction. The problem that arises from this exception is that it could be employed to vitiate the protection afforded by the defense of retaliation as regards any periodic tenant, since it could be reasoned that a periodic tenant becomes a holdover after the landlord declares the tenancy terminated or declines to renew.²⁹⁸ Such an interpretation is circular; it makes a nullity of the retaliation defense because the label of holdover summarily disposes of the entire issue whether the landlord had a right to evict in the first instance.²⁹⁹ The actual issue that arises when the retaliation defense is asserted by a periodic tenant is not whether a landlord may evict a holdover tenant, but whether the law will label the tenant a holdover. It is that status which must be confronted first in the litigation process.

Although the holdover exception may appear to be especially harsh for the periodic tenant, not every application of the holdover exception will produce such inequitable results. For example, where a notice of termination precedes the tenant's engaging in activities, not even the periodic tenant could complain of the eviction or termination. Indeed, absent the application of the holdover exception in this situation, there might be some question whether a landlord could ever rightfully secure an eviction. At the very least, then, the holder exception should remove the need to litigate the tenant's intent to frustrate a nonretaliatory termination by engaging in protected activities subsequent to receipt of the notice of eviction or termination.

There are a number of situations that are not so easily resolved. For example, should the holdover exception apply where a tenant with a rental agreement for a fixed term engages in activity for which the retaliation defense is available, and the landlord subsequently refuses to renew the lease? Arguably, this tenant's situation is distinguishable from that of a periodic tenant. The periodic tenant does not contemplate a fixed end to his tenancy, but a tenant who has specified a termination date well in advance without a binding re-

297. *Id.* § 5321.03(A)(4).

298. *Id.* § 5321.17(A) and (B). See text accompanying notes 380-81 *infra* for notice requirements.

299. See *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968); *Moskovitz*, *supra* note 273, at 23-24; *Schoshinski*, *supra* note 238, at 542-45; Comment, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 130-33 (1974); 1971 WIS. L. REV. 938, 940-44.

newal option may be deemed to have considered the possibility of not being permitted to relet and accepted the risk of termination or even desired the option to leave. In this context, it appears justified that the tenant would become a holdover after the expiration of his agreement. The holdover exception would probably allow the landlord to evict him.

Finally, it is not difficult to envision a situation in which a landlord has threatened not to renew a lease although the tenant believed at the time of negotiation of the lease that the decision concerning renewal was virtually his alone. This pressure may well restrict a tenant's freedom to use the new law almost as much as would threats of a more immediate eviction. The unavailability of the retaliatory defense on the occasion of nonrenewal would deprive the tenant of the defense at the only time when it would be of any importance to him, since the agreement upon the fixed term of occupancy would preclude most arbitrary attempts at eviction.³⁰⁰ The landlord's conduct appears to be exactly the type at which the retaliation defense is aimed. Conceptually, the tenant's expectations should bring him outside the holdover exception. The question, however, remains unresolved.

The unavailability of the retaliation defense in a failure-to-renew situation illustrates the limits of both the defense and the pro-tenant policies of the entire statute. The new law does not convert the private residential landlord into a public utility; nor does the retaliatory conduct defense give the tenant a life estate. The real effect of the defense is to provide a period during which the landlord can reconsider his decision or the tenant can find another dwelling. Although the Act does not establish a fixed period during which a presumption of retaliation operates in favor of the tenant,³⁰¹ at some point in time, the tenant's activity is so far attenuated from the alleged retaliatory act that the defense cannot be successfully maintained. A landlord cannot be forced to enter into a new rental agreement, but he can be required to take time to "cool off" before refusing to enter voluntarily into a new agreement for a fixed term.³⁰² The protection

300. See notes 121-35 *supra* and accompanying text for discussion of requirements for eviction for breach of a written rental agreement.

301. Statutory presumptions in other states have a life of from 60 days to 6 months. See note 253 *supra*. After a longer period they may be completely unavailable. Moskowitz, *supra* note 273, at 28; Comment, *Retaliatory Eviction in California: The Legislature Slams the Door and Boards up the Windows*, 46 S. CAL. L. REV. 118, 126 (1972); cf. McElhaney, *Retaliatory Evictions: Landlords, Tenants and Law Reform*, 29 Md. L. REV. 193, 220-23 (1969).

302. Section 1923.15 may prevent the landlord from attempting to forego

is only from a landlord's immediate vindictiveness, not from a long term dissatisfaction with the tenant. Thus, to allow the retaliation defense where the landlord has refused to renew would, in effect, only permit the tenant to retain possession as a periodic tenant.

The statutory justifications play an important role in this process. They represent a recognition of the fact that, despite being colored by vindictiveness, certain evictions are authorized to effectuate the larger policies of the statute. On the other hand, justifications are so narrowly drawn that they maximize the vulnerability of the vindictive landlord.³⁰³ Moreover, they do not exculpate the landlord from his wrongful actions; he remains liable in damages for any violation of his legal duties.³⁰⁴

V. CONTRACTUAL CONTROLS

In the eyes of the law, landlord and tenant have traditionally been free to bargain as they saw fit, adding to or subtracting from their responsibilities with impunity.³⁰⁵ In reality, the superior bargaining power of the landlord results in little, if any, bargaining and permits him to impose very harsh terms on the tenant.³⁰⁶ Although the new Ohio law allows the use of rental agreements to set the terms and conditions of the tenancy, the Act limits the freedom of contract to prevent the parties from thwarting the purpose of the law.³⁰⁷ The

the cooling-off period and renting to a more compliant tenant. Under that section, the court may enjoin the reletting of premises if they are found to be in a defective condition by a housing inspection agent. OHIO REV. CODE ANN. § 1923.15 (Page Supp. 1974). Thus, if a landlord comes into court seeking an eviction, he runs the risk of a general inspection and a potential injunction. The statute, therefore, prevents use of eviction as a vehicle for avoiding the repair responsibility. Of course, if the inspection were to disclose no defective conditions, no injunction would issue and the tenant's only recourse would be the retaliation defense provision. See also notes 295-96 *supra* and accompanying text.

303. Cf. *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 65 N.E.2d 711 (1946).

304. OHIO REV. CODE ANN. § 5321.03(B) (Page Supp. 1974).

305. See, e.g., *George H. Dingley Lumber Co. v. Erie R.R. Co.*, 102 Ohio St. 236, 131 N.E. 723 (1921).

306. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); see Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970); Comment, *A Flexible Approach to the Problem of Exculpatory Clauses in Standard Form Lease*, 1972 WIS. L. REV. 520.

307. OHIO REV. CODE ANN. § 5321.06 (Page Supp. 1974) provides:

A landlord and a tenant may include in a rental agreement any terms and conditions, including any term relating to rent, the duration of an agreement, and any other provisions governing the rights and ob-

devices used by the statute take three forms. First, the law requires that certain procedures be followed in handling security deposits.³⁰⁸ Secondly, it renders unenforceable four types of provisions traditionally used to modify rights, responsibilities, and liabilities.³⁰⁹ Finally, the statute demands various notices by parties who elect to undertake certain statutorily approved activities.³¹⁰

A. *Security Deposits*

The provision dealing with security deposits is one of the most deliberate reforms of the new law. In their consideration of various bills, the legislators became sensitive to the flagrant abuses resulting from the unjustifiable retention of deposits by landlords at the end of the lease term.³¹¹ The legislature responded to this problem by making it clear that such unwarranted confiscation will not be tolerated.

A security deposit is defined under the statute as "any deposit of money or property to secure performance by the tenant under a rental agreement."³¹² This definition immediately sets the tone of

ligations of the parties that are not inconsistent with or prohibited by Chapter 5321 of the *Revised Code* or any other rule of law.

308. *Id.* § 5321.16.

309. *Id.* §§ 5321.13(A)-(D).

310. *Id.* § 5321.17.

311. Comments of State Representative Harry Lehman, one of the principal drafters of the Act, at a conference sponsored by the Cleveland Heights Community Congress on Nov. 16, 1974.

To some extent the law also protects tenants who subsequently occupy the premises. Since the landlord will have to make an inspection when a tenant leaves in order to compile the required list, damages done by a previous tenant would be noted, thereby minimizing the possibility that a subsequent tenant would be charged with that damage.

312. OHIO REV. CODE ANN. § 5321.01(E) (Page Supp. 1974). The distinguishing characteristics of a security deposit are that the tenant is entitled to its return at the end of the term of occupancy if he has fulfilled his obligations and that he remains liable for damages in excess of the amount of the security deposit. *Cain v. Brown*, 105 Ohio St. 264, 136 N.E. 916 (1922). There are other forms of security that may be taken by the landlord that do not fall under the restrictions of this statute since they do not fit the definition of security deposit. Such security may take the form of advance rent, liquidated damages, or additional consideration. 1 AMERICAN LAW OF PROPERTY § 3.73; ABA Committee on Leases, *Security Deposits and Guarantees Under Leases*, 1 REAL PROP. PROBATE & TRUST J. 405, 418-20 (1966) [hereinafter referred to as ABA, *Security Deposits*]. Each of these forms of security has certain disadvantages that may make it unattractive to the residential landlord.

Advance Rents: A tenant has the right to the return of the advance if either he or the landlord terminates the agreement prior to the period for which the rent was paid in advance. The tenant also remains liable for any damages

the legislative approach. It makes clear that when the tenant has performed his duties the purpose of the security deposit has been achieved and the amount remaining in the fund is to be returned to the tenant. On the other hand, the law avoids setting limitations on the amount a landlord may require as a security deposit.³¹³ Presumably, the latitude is given the landlord to allow for the varied circumstances under which a rental agreement may be negotiated and to provide the landlord with the cushion he may believe necessary to avoid large losses. However, should the landlord demand a relatively large deposit, the law does not allow any windfall to the landlord. If the amount of the deposit exceeds the greater of \$50 or 1 month's rent, the landlord must pay 5 percent interest annually on that excess,³¹⁴ roughly the equivalent of what the tenant would realize if he had deposited the amount in a personal savings account.

done to the premises. Therefore this type of security is generally held to be a security deposit. *Cain v. Brown, supra*; 1 AMERICAN LAW OF PROPERTY § 3.73; Harris, *A Reveille to Lessees*, 15 S. CAL. L. REV. 412, 424-25 (1942). It is therefore not a viable device for avoiding the new laws governing security deposits.

Liquidated Damages: If there is doubt whether a security provision represents liquidated damages or a penalty, it will be treated as a penalty, particularly if the actual damages are disproportionate to the amount of the security. *Friedlander v. Yakobian*, 10 Ohio L. Abs. 107 (Ct. App. 1931). Consequently, the security may have to be returned despite actual damages. *Midwest Properties Co. v. Renkel*, 38 Ohio App. 503, 176 N.E. 665 (1930).

Additional Consideration: If the tenant is entitled to the return of any of the security under any circumstances this will be sufficient to convert the consideration into a security deposit. *See Cain v. Brown, supra*; ABA, *Security Deposits*, at 419-20.

Each of these forms of security is a device for avoiding the laws relating to security deposits, and the use of any of them might be found to be unconscionable under OHIO REV. CODE ANN. § 5321.14 (Page Supp. 1974). *See notes 360-67 infra* and accompanying text.

313. *See* OHIO REV. CODE ANN. § 5321.16 (Page Supp. 1974). A statutory maximum security deposit is suggested in the URLTA § 2.101(a). The Comment to that section suggests that this position was adopted rather than one prohibiting security deposits altogether.

The virtue of not limiting the amount of the deposit is that the landlord is free to take the security necessary under any given circumstance. Should he abuse this flexibility, the unconscionability provision of the new law may afford the tenant a remedy. *See notes 360-67 infra* and accompanying text.

314. OHIO REV. CODE ANN. § 5321.16(A) (Page Supp. 1974). The landlord is relieved of the duty to pay interest if a tenant remains in possession less than 6 months. This limitation on a tenant's right to receive interest could be attributed to the small amount of money that would normally be involved as well as to a recognition of the administrative and bookkeeping problems connected with such short tenancies. It may also be indicative of a legislative policy favoring relatively stable and continuing rental relationships.

After the rental agreement has terminated and the tenant has surrendered possession, the statute gives the landlord 30 days to (1) deliver a written notice to the tenant itemizing and identifying each deduction made from the deposit, and (2) return to the tenant whatever might be left of the deposit.³¹⁵ If the landlord fails to comply with these rules, he is subject to the statutory penalty: "the tenant may recover the property and the money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys' fees."³¹⁶

On its face, the penalty provision is a powerful deterrent; however, the provision leaves unresolved the crucial question whether providing the written notice and returning the unclaimed portion of the deposit within the 30 days is a condition precedent to the landlord's right to deduct damages from the deposit.³¹⁷ If the right is not conditioned on adherence to the procedural steps, the measure of damages, "the amount wrongfully withheld," would only be the part of the security deposit that is in excess of the damage to the premises. Practically, then, as the dollar amount of tenant-caused damages approaches the value of the security deposit, the sole sanction that is imposed on the landlord who fails to comply with the notice requirements is payment of the tenant's attorneys' fees. Furthermore, without an itemized list of charges, the tenant would be left to speculate on the charges actually applied by the landlord against his deposit. His only means of discovering both the nature and the amount of the charges would be to file suit. Since court costs are not made part of the tenant's recovery and since the award of attorneys' fees is only discretionary,³¹⁸ the tenant would have to

URLTA § 2.010(a) rejects interest payments in favor of providing a maximum amount for security deposits. This solution does not appear to be as satisfactory as Ohio's. By imposing an interest rate instead of limiting the amount or abolishing the security deposit, the Ohio law seems to balance the very real need of landlords to have some means of protecting themselves against the need of tenants to be protected from overreaching landlords.

315. *Id.* § 5321.16(B).

316. *Id.* § 5321.16(C).

317. See Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE AND TRUST J. 104, 110 (1973); Comment, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 102 n.179 (1974). Setoff of actual damages before assessing the penalty was specifically allowed in only one of the bills before the Ohio legislature. H.B. 277, § 5315.16.

318. OHIO REV. CODE ANN. § 5321.16(C) (Page Supp. 1974). In cases where no actual or potential injuries will result from a failure to adhere to

take a fairly substantial risk—conceivably only to discover that the charges are not unreasonable and do in fact equal the amount of the deposit.

On the other hand, if the landlord's right to deduct damages is construed as being conditional on his compliance with the law, he would have no right to any portion of the deposit when he fails to provide timely notice and remittance of the unclaimed portion.³¹⁹ His failure to act would result in the entire amount of the deposit being wrongfully withheld and therefore due to the tenant. The possible sanction under this construction would be liability for twice the amount of the security deposit plus attorneys' fees.³²⁰ The landlord could then set up his actual damages as a counterclaim and, if he could prove them, use them as a setoff against the damages awarded the tenant.³²¹

This harsher penalty is much more consistent with the objectives of the legislation. By imposing heavy sanctions on the landlord, the Act performs two critical functions. First, it permits the tenant who has not received the required notice to bring an action secure in the knowledge that it will produce something more than a list of deductions, which he was entitled to at the outset. Secondly, it protects against the landlord's disregard for procedural requirements by presenting him with a substantial incentive to comply.³²² At the same time the legislation includes a mechanism to avoid the inequitable

a provision, the word "may" will generally be given a discretionary rather than an imperative or mandatory construction. *See* State v. Board of Education, 127 Ohio St. 336, 188 N.E. 566 (1933); 2A SUTHERLAND § 57.03.

319. Conditioning rights on the giving of proper notice is a common pattern in the statute. The tenant's right to damages and attorneys' fees for a landlord's violation of security deposit provisions is conditional upon providing the landlord with a forwarding address. OHIO REV. CODE ANN. § 5321.16(B) (Page Supp. 1974). The tenant's right to use the new remedies, *id.* § 5321.07, and the landlord's right to evict, *id.* § 1923.02(H), and to receive notice of rent withholding, *id.* § 5321.08, are all dependent on giving some form of notice. *See* notes 375-88 *infra* and accompanying text.

320. OHIO REV. CODE ANN. §§ 5321.12, .16(C) (Page Supp. 1974). Although this "double damage" approach may appear harsh, this provision is less harsh than other proposals before the legislature. Two of the bills would have set minimum damages at three times the security deposit. S.B. 103, § 1923.24 (B); H.B. 796, § 5315.16(C). Even the bill sponsored by the Ohio Board of Realtors provided minimum triple damages to be determined after a setoff from the withheld security deposit of actual damages sustained by the landlord. H.B. 277, § 5315.16(B).

321. OHIO REV. CODE ANN. § 5321.12 (Page Supp. 1974).

322. *See* Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79, 102 n.179 (1974).

application of this severe penalty. The award of damages is wholly subject to the discretion of the court.³²³ Thus, the court may take into account the landlord's substantial good faith attempts to comply with the notice requirements and withhold the award of damages accordingly.³²⁴

Another critical issue in the area of security deposits is the effect of the landlord's sale of the leased property upon his statutory obligation to return a deposit at the termination of the tenancy.³²⁵ Ohio common law has traditionally viewed the relationship of the landlord and the tenant with regard to the deposit as that of a pledgee to pledgor, since the title to the deposit does not pass to the landlord.³²⁶ This makes the obligation a personal one between the parties. The tenant, therefore, has no right against the purchaser of the landlord's interest unless the purchaser receives a credit on the purchase price to reflect the liability for the deposit.³²⁷

Unlike some other landlord-tenant laws,³²⁸ the Ohio statute does not specifically identify who has the obligation to repay the tenant as between the landlord and the purchaser. Although the statute is apparently deficient in this regard, there is a strong argument that in reality no void exists. According to the statute, the person who must comply with all the provisions of the law, including those regulating the security deposit, is the landlord. "Landlord" is defined

323. See note 318 *supra*.

324. In discussing a security deposit statute similar to Ohio's, a New Jersey court said: "The intent of the security deposit law is to alleviate certain practices engaged in by unscrupulous landlords and not to punish landlords who act in good faith." *Burnstein v. Liberty Bell Village, Inc.*, 120 N.J. Super. 54, 59, 293 A.2d 238, 240 (Dist. Ct. 1972).

325. 1 AMERICAN LAW OF PROPERTY § 3.73; ABA, *Security Deposits*, *supra* note 312, at 420-21.

326. *Cain v. Brown*, 105 Ohio St. 264, 136 N.E. 916 (1922); *Reveille to Lessees*, *supra* note 312, at 420. A lack of title change affects the landlord's responsibilities for the deposit in that he is not subject to any rules against the commingling of assets. This view was also accepted by New Jersey courts at one time. See *Kaufman v. Williams*, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918). In 1968, however, New Jersey by statute changed its view of the relationship to that of a trust relationship. See N.J. STAT. ANN. § 46:8-19 (Supp. 1974-75).

327. *Kaufman v. Williams*, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918).

328. See, e.g., CAL. CIVIL CODE § 1950.5(a)(1) (West 1954) (requiring notice to the tenant of the sale in order to avoid liability); URLTA §§ 2.101 (e), .105(a) (imposing liability on both the old and the new owners). *But see* Strum, *The Proposed Uniform Residential Landlord and Tenant Act: A Departure From Traditional Concepts*, 8 REAL PROP. PROBATE & TRUST J. 495, 496-97 (1973) (criticizing the URLTA treatment of the problem).

by the statute as the owner or anyone authorized by the owner to receive rents.³²⁹ Since the purchaser would be both the owner and the one authorized by the original landlord to receive rents at the time the issue of refund arises, he could be considered the landlord for the purposes of fulfilling all refund obligations imposed by the new law. The force of this argument may be considerably diminished, however, by the provision that imposes on a purchaser or other transferee of the property the duty to fulfill only those obligations of the landlord set forth in the provisions governing the condition of the premises.³³⁰

A primary consideration in reconciling the obligations of the "landlord" with those of a purchaser on the question of security deposits should be the respective abilities of the parties to protect themselves in the sale transaction. Both immediately before and immediately after the sale, the tenant is extremely vulnerable. If the new purchaser is not responsible for the return of the deposit, the tenant may be left in the unpleasant position of having to locate his former landlord in order to reclaim his deposit. It is also quite possible that the tenant will not even be informed of the change in ownership since the law does not explicitly require that tenants be so informed. Moreover, the purchaser, upon assuming the ownership of the structure, might demand a deposit to secure the tenant's obligations to him, doubling the amount of the tenant's capital that is tied up. The purchaser, on the other hand, can alleviate these problems by requiring the liability for the security deposits to be deducted from the purchase price as part of the sale transaction. At this point he is in a better position to receive the amount of the security deposits from the landlord than the tenant would be after the sale. The concession in price having been obtained, there would be no hardship in imposing the liability for return of the deposit on the purchaser. Since the purchaser is in the position to remove the problem by simple drafting of the agreement, the law should require him to do so.

B. *Unenforceable Terms in Landlord-Tenant Agreements*

It is well-established that a lease or rental agreement is a contract

329. OHIO REV. CODE ANN. § 5321.01(B) (Page Supp. 1974). " 'Landlord' means the owner, lessor or sublessor of residential premises, his agent, or any person authorized by him to manage the premises or to receive rent from a tenant under a rental agreement." *Cf. id.* § 5321.13(E), discussed in text accompanying notes 368-70 *infra*.

330. *Id.* § 5321.13(E).

as well as a conveyance of an interest in land.³³¹ The contractual aspect of the lease has often been a weapon in the hands of the landlord that enables him to defeat legislative and judicial mandates in the name of free negotiation.³³² In order that the allocation of rights, remedies, and responsibilities established by the Act may remain effective, limitations have been placed on the power of the parties to contract as they wish.

1. *The General Limitation*

The threshold limitation on lease terms states that no provision of Chapter 5321 "may be modified or waived by any oral agreement."³³³ One broad exception to this general limitation is that the landlord may agree to assume any or all of the obligations of the tenant with respect to the condition of the premises.³³⁴ The reason for this exception is clear. Since the tenant begins negotiations at a disadvantage, whatever concessions he may be able to obtain from the landlord in the broad area of maintenance responsibilities will be upheld. Conversely, since the landlord possesses a pronounced advantage in the transaction, the further advantages he may gain will, in all likelihood, be achieved by his artificial advantage, rather than his bargaining abilities. Thus, the law will not recognize further concessions.

One major problem arises from the wording of the general prescription of waivers.³³⁵ By its literal terms, the provision does not apply to waivers of Chapter 1923 rights. Thus, it could be argued that a landlord could legally compel his tenant to agree to waiver of the notice³³⁶ or counterclaim³³⁷ rights granted by that chapter. There are indications, however, that other features of the statute preclude such a reading. The prohibition of warrants of attorney to confess judgments strongly suggests that the tenant cannot be denied the opportunity to present his side of the case in forcible entry and detainer proceedings.³³⁸ Furthermore, the nature of the interests involved would dictate a prohibition of such waivers. By allowing an overreaching landlord to secure waivers of counterclaim and notice,

331. See note 290 *supra*.

332. See note 306 *supra*.

333. OHIO REV. CODE ANN. § 5321.13(A) (Page Supp. 1974).

334. *Id.* § 5321.13(F).

335. *Id.* § 5321.13(A).

336. *Id.* § 1923.04.

337. *Id.* § 1923.061(B).

338. *Id.* § 5321.13(B); see notes 340-43 *infra* and accompanying text; *cf.* Jenkins v. Myers, 63 Ohio St. 101, 102, 57 N.E. 1089 (1900).

the law would be denying the tenant the chance to protect his right to possession, perhaps the paramount concern of the legislature.

2. Attorneys' Fees

At common law, there was limited authority to the effect that provisions for payment of legal fees were not enforceable.³³⁹ The Act codifies this rule by declaring unenforceable any lease provision whereby either the landlord or tenant agrees to pay the other's attorneys' fees.³⁴⁰ The reason for this prohibition lies in the general role of fees in the statutory framework. The new law uses the award of attorneys' fees basically for two purposes.³⁴¹ First, the award serves as an additional sanction against one who violates the more

339. *Midwest Properties Co. v. Renkel*, 38 Ohio App. 503, 176 N.E. 665 (1930).

340. OHIO REV. CODE ANN. § 5321.13(C) (Page Supp. 1974).

341. The legality of awarding attorneys' fees by statute is somewhat unsettled in Ohio. OHIO CONSTITUTION art. I, § 16 (1851) provides in part that: "All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and shall have justice administered without denial or delay." In *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N.E. 263 (1895), the Ohio Supreme Court held that a statute awarding attorneys' fees to an employee who was suing to collect back wages was violative of the spirit of the above provision of the Ohio Constitution since it unduly restricted the employer's access to the courts. The court, in obiter dictum, stated that the award also violated the equal protection clause of OHIO CONSTITUTION, art. I, § 2.

Although *Hocking Valley Coal* has not been overruled, it is doubtful that it remains good law. In *Missouri, K. & T. Ry. v. Cade*, 233 U.S. 642 (1914), the United States Supreme Court upheld a similar statute, which had been challenged on fourteenth amendment grounds. The Court pointed out that:

Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount involved is small . . .

[The award of attorneys' fees] imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand.

233 U.S. at 651. This case is cited in *Flory v. Cripps*, 132 Ohio St. 487, 493, 9 N.E.2d 500, 502 (1937), which may be read as impliedly overruling *Hocking Valley Coal* as regards the unconstitutionality of a statutory award of attorneys' fees.

Two other factors cast doubt on the vitality of *Hocking Valley Coal*. The first is that it has not been cited since *State ex rel. McCartney v. Hummell*, 52 Ohio L. Abs. 55, 57, 81 N.E.2d 799, 801 (Ct. App. 1948), where it was not cited for its holding regarding attorneys' fees. A further shadow is cast on its vitality by a case under the Ohio Fair Trade Act (OHIO REV. CODE ANN. § 1333.32 (Page 1962)), *Hudson Distributors, Inc. v. Upjohn Co.*, 117 Ohio App. 207, 176 N.E.2d 236 (1961), *aff'd*, 174 Ohio St. 487, 190 N.E.2d 460

important provisions of the new law, whether landlord or tenant.³⁴² Secondly, it provides incentive for the private bar to extend more active and extensive representation to the low and middle income tenants who normally cannot afford to pay the fees.³⁴³ This feature is critical in providing the tenant with access to the courts. If the tenant cannot afford his own legal fees, much less anyone else's, he has to think carefully about attempting to vindicate his rights in litigation. Hence, what rights he may have had to a trial would be foreclosed in the absence of the award of attorneys' fees.

3. *Exculpatory and Indemnification Clauses*

At common law the landlord and tenant were free to contract away any or all liability by imposing the risk on the other.³⁴⁴ The practical result was that, since the landlord had greater bargaining power, leases generally relieved the landlord of all liability by imposing the risk on the tenant.³⁴⁵ Typically, exculpatory clauses were directed at tort liability. Since the tenant shouldered most of the repair responsibilities, there was not a great deal for which to hold the landlord harmless. However, such clauses take on new significance under the Act. With the landlord's assumption of new statutory obligations of repair, his potential tort liability may be substantially increased.³⁴⁶ Indeed, the courts have held that the creation of tort liability based on statutory standards is a necessary sanction to ensure compliance with statutory duties and that removing the sanctions by contract is against public policy.³⁴⁷ The legislature has clearly rati-

(1963), which held that attorneys' fees awarded under the Fair Trade Act were constitutional. *See also* Fisher, *Ohio Fair Trade—Fair or Foul*, 28 OHIO ST. L.J. 565, 592 (1967).

342. Attorneys' fees are awarded to the tenant in the following provisions of the Ohio Revised Code: § 5321.02 (retaliatory conduct); § 5321.04 (abuse of access); § 5321.15 (self-help evictions); § 5321.16 (security deposits). The landlord may receive attorneys' fees under § 5321.05 (tenant's breach of statutory duty) and § 5321.09 (abuse of rent withholding). *See also* AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 3-402, Commentary (Tent. Draft 1969).

343. Gittes & Marshall, *A Guide to Ohio's New Tenant-Landlord Law*, 3 LAW & HOUSING NEWSLETTER, 2, 28 (Jan. 1975). Affluent landlords, however, have been well represented. *Id.*

344. *Mansfield Mut. Ins. Co. v. Cleveland, C.L. & St. L.R. Co.*, 74 Ohio St. 30, 77 N.E. 269 (1906); *George H. Dingley Lumber Co. v. Erie R. Co.*, 102 Ohio St. 236, 131 N.E. 723 (1921); 6A A. CORBIN, CONTRACTS § 1472 (1962).

345. Mueller, *supra* note 306; Comment, *id.*

346. *Compare* *Rose v. King*, 49 Ohio St. 213, 30 N.E. 267 (1892), with *Branham v. Fordyce*, 103 Ohio App. 379, 145 N.E.2d 471 (1957). *See also* *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

347. *American States Ins. Co. v. Hannan Constr. Co.*, 283 F. Supp. 988

fied the development of parallel tort liability by making unenforceable any clause by which the landlord's liability or related costs are transferred to the tenant.³⁴⁸

4. *Warrants of Attorney to Confess Judgment*

The prohibition against warrants of attorney in leases is a curious one. At common law a warrant of attorney in a lease was effective to obtain possession in an eviction proceeding.³⁴⁹ The Act apparently leaves that rule intact, since there is no direct reference to warrants to gain possession. Under the statute, however, courts may no longer enforce warrants of attorney to confess judgment that are contained in "any rental agreement or in any other agreement between the landlord and tenant for recovery of rent or damages to the residential premises."³⁵⁰

The coexistence of the common law and statutory rules gives rise to a provocative interpretation of the statute. If the phrase "for recovery of rent or damages" is read as a description of the recoveries for purposes of which the warrant is unenforceable regardless of where it appears, then warrants for use in obtaining possession may be enforceable. Such warrants would be for possession, not for rent or damages.³⁵¹

The problem with such a construction, however, is that it may conflict with other provisions of the statute. The law provides that in any action under the law any party may recover any amount of damages due him.³⁵² By using a warrant to obtain possession, the landlord could deprive the tenant of the opportunity to assert by way

(N.D. Ohio 1966), *aff'd*, 392 F.2d 171 (6th Cir. 1968); *Boyd v. Smith*, 372 Pa. 306, 94 A.2d 44 (1953).

348. OHIO REV. CODE ANN. § 5321.13(D) (Page Supp. 1974). A prohibition of exculpatory clauses in all leases except those "in which any municipal corporation, governmental unit, or corporations regulated by a State or Federal Commission or agency" was a party has been struck down as violative of the equal protection doctrine of the state and federal constitutions since the classification of the exceptions was unreasonable, *Sweney Gas & Oil Co. v. Toledo P. & W.R. Co.*, 42 Ill. 2d 265, 247 N.E.2d 603 (1969). It has been suggested that a law distinguishing between residential and commercial rentals would also be vulnerable to such an attack. Comment, *supra* note 306, at 528-29.

349. *Milthoff v. Columbus Lodge*, 8 Ohio Dec. 700, 7 Ohio N.P. 630, 34 Weekly L. Bull. 277 (C.P. Franklin County 1895); Hunter, *The Warrant of Attorney to Confess Judgment*, 8 OHIO ST. L.J. 1, 4 n.11 (1941).

350. OHIO REV. CODE ANN. § 5321.13(B) (Page Supp. 1974).

351. See Klein, *Highlights of Recent Changes in Landlord-Tenant Law*, 46 LAW & FACT 5 (Cuyahoga County Bar Ass'n, Nov. 1974).

352. OHIO REV. CODE ANN. § 5321.12 (Page Supp. 1974).

of counterclaim any damages that he might recover. The tenant would not, therefore, be permitted to recover in "any action." The tenant would be deprived of the right to use the landlord's retaliatory motive as a defense³⁵³ and to avoid eviction by resorting to the setoff provision.³⁵⁴ In these situations the warrant would act as a waiver or modification of the rights granted in two provisions of the new law. And yet the Act provides in absolute terms that no provision can be waived or modified,³⁵⁵ with none of the available exceptions covering waivers effectuated by warrants of attorney.

Internal consistency can be preserved by a different construction of the provision. The phrase "for rent or damages" may be read as limiting the type of "other agreement" in which warrants for any purpose are unenforceable. Thus construed, the provision first prohibits all warrants in any rental agreement, and further prevents them in any other agreement, that has any effect upon the landlord's right to recover rent or damages.³⁵⁶

Not only does such a construction avoid conflict with other provisions of the landlord-tenant law, but it is also consistent with expressions of legislative policy in other areas. In the area of consumer transactions, for example, warrants of attorney are unenforceable for any purpose.³⁵⁷ The broader prohibition would also further the policy of consolidation of litigation, which is intimately related to elimination of delay and unnecessary judicial expense.³⁵⁸ Indeed, it is this policy of avoiding a multiplicity of lawsuits that pervades the statutory reform in the closely related area of forcible entry and detainer.³⁵⁹ The effect of voiding a warrant of attorney for all

353. *Id.* § 5321.03(B)(1).

354. *Id.* § 1923.061(B); see notes 213-22 *supra* and accompanying text.

355. *Id.* § 5321.13(A); see note 323 *supra* and accompanying text.

356. This construction is consistent with the rule that referential or qualifying words and phrases, where no contrary intention appears, should refer solely to the last antecedent. See *Carter v. Division of Water*, 146 Ohio St. 203, 65 N.E.2d 63 (1946); 2A SUTHERLAND § 47.33.

A possible explanation for not prohibiting warrants of attorney in "other agreements" as absolutely as in rental agreements is that the landlord and tenant may be engaged in a sale of chattels or in an employment contract where other laws might control or where the use of the warrant might be appropriate. In such agreements the warrant would only be unenforceable where it concerned rent or damages to the rental premises.

357. OHIO REV. CODE ANN. § 2323.13(E) (Page Supp. 1974). This provision defines a consumer transaction as a sale or lease of goods, services, or intangibles "for purposes that are primarily personal, family, educational, or household." *Id.* § 2323.13(E)(2).

358. OHIO R. CIV. P. 1(B).

359. The new law allows the landlord to join all of his claims, whether for

purposes is to guarantee that the landlord's claim to possession and the tenant's defenses and claims will be considered in one proceeding.

5. *Unconscionability*

The landlord-tenant law includes an unconscionability provision similar to that found in the commercial transactions chapter of the Ohio Revised Code.³⁶⁰ This provision permits the court to examine the full commercial environment surrounding the making of any rental agreement to determine if either party was under any disability that would preclude meaningful bargaining.³⁶¹ There are obviously many variables that are relevant to such an inquiry. The respective bargaining positions and abilities of the landlord and the tenant are critical.³⁶² A court would probably examine the agreement itself to see if its terms were grossly unbalanced in favor of one of the parties.³⁶³ The court could also narrow its inquiry and examine any one clause to see if its presence would unfairly surprise the other party.³⁶⁴ As in the commercial transaction chapter, the unconscionability provision of the landlord-tenant statute provides for a flexible judicial response if the court finds the agreement or some part of it to have been "unconscionable at the time it was made."³⁶⁵ The court may refuse to enforce the entire lease, refuse to enforce separate provisions, or enforce the lease in a manner that avoids an unconscionable result.

On its face the unconscionability provision is an important pro-

possession or damage, in a forcible entry and detainer action. OHIO REV. CODE ANN. § 1923.081 (Page Supp. 1974). The tenant may also assert all defenses and counterclaims. OHIO REV. CODE ANN. § 1923.061(A) (Page Supp. 1974). URLTA § 4.105(a) is identical to OHIO REV. CODE ANN. § 1923.061 (Page Supp. 1974). The Comment to that provision states that the provision is meant to be "consistent with modern procedure reform . . . to the end that all issues between the parties may be disposed of in one proceeding."

360. OHIO REV. CODE ANN. § 1302.15 (Page 1962). See *Leff, Unconscionability and the Code: The Emperor's New Clause*, 111 U. PENN. L. REV. 485 (1967), for an analysis and critique of the provision. It is obvious upon a comparison of the two provisions that in the one contained in the Act revisions have been made only to the extent necessary to make the provision specifically applicable to residential rental agreements. See *id.* § 5321.14.

361. *Leff, supra* note 360.

362. See note 306 *supra*.

363. UCC § 2-302, Comment 1; *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Leff, supra* note 360, at 537-40.

364. UCC § 2-302.

365. OHIO REV. CODE ANN. § 5321.14(B) (Page Supp. 1974).

tection. Practically, however, the comprehensiveness of the rest of the statutory protections precludes the widespread use of an unconscionability attack. Most of the rights and obligations in the residential rental relationship are set up by express statutory authority;³⁶⁶ the arrangement cannot be disturbed by the agreement.³⁶⁷ There are, however, certain areas that the legislature chose not to enter. The Act does not impose restrictions on the amount of rent or security deposit or in any way regulate the rules that the landlord may impose on the tenant's use of the premises. It is only in these unregulated areas that the unconscionability provision could serve as an effective curb on contractual rights.

6. *Right to Receive Rent*

The Act provides that "[a] rental agreement, or the assignment, conveyance, trust deed, or security instrument of the landlord's interest in the rental agreement may not permit the receipt of rent free" of the landlord's obligations regarding the condition of the premises.³⁶⁸ The objective of this provision is to frustrate attempts to avoid the new law by various technical changes in legal or equitable ownership, specifically the separation of the obligations and responsibilities of the landlord from his rights and assets. There could be additional positive repercussions. The provision could discourage over-financing or pyramiding second and third mortgages, since those holding the subordinate security interests could only rely on assignments of rents as additional security at substantial risk. By discouraging such financing, this provision reduces the opportunity for landlords to abuse the release-of-rents provision in a rent withholding action.³⁶⁹ On the other hand, this provision may have the unfortunate side effect of limiting the availability of initial construction financing or repair financing because of the risks that would accompany an assignment. No institution would be eager to extend large amounts of capital on a mortgage transaction where the mortgagor's default might result in the mortgagee's being forced to assume the repair responsibilities of the landlord when he receives the rental income. At the very least, this additional risk may have some impact on the interest rates charged for repairs of multiple dwellings.³⁷⁰

366. *See id.* §§ 5321.04, .05.

367. *Id.* § 5321.13(A).

368. *Id.* § 5321.13(E).

369. *See* note 189 *supra* and accompanying text.

370. *See* Subcommittee on the Model Landlord-Tenant Act of the Commit-

C. Notice Requirements

The giving of notice plays an important role in the new landlord-tenant law. Wherever some form of notice is required, the giving of that notice is a condition precedent to obtaining a benefit or exercising a right.³⁷¹ By requiring notice, the Act may help to alleviate some of the common problems of the residential tenancy: the anonymous landlord to whom the tenant cannot complain,³⁷² the lackadaisical tenant who would postpone complaining until problems are virtually beyond correction,³⁷³ or the inconsiderate landlord who would terminate a tenancy on short notice.³⁷⁴ The following notice requirements have, for the most part, already been discussed in relation to the benefits or rights with which they are connected. They are reiterated here for convenient reference.

1. Notice from the Landlord

At the beginning of the tenant's term of occupancy, the landlord must give the tenant:

- 1) the name and address of the owner, and
- 2) the name and address of the owner's agent, if any.³⁷⁵

Where either of these is a corporation or other organization or business entity, the address given must be either:

- 1) the principal place of business in the county in which the premises are located, or,
- 2) if there is none, then the principal place of business within the state.³⁷⁶

In addition, the name of the person in charge of the principal place of business must be supplied. This information must be contained in every written rental agreement. Even if the agreement is oral this information must be given to the tenant in writing.³⁷⁷ The consequences to the landlord for failing to provide the information are serious. If he fails to provide this notice, he is deemed to have waived his own right to notice from the tenant as to defects in the

tee on Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROBATE & TRUST J. 104, 109 (1973), discussing a similar provision in the URLTA, § 1.404.

371. See note 319 *supra*.

372. See notes 375-78 *infra* and accompanying text.

373. See notes 388-89 *infra*.

374. See notes 379-81 *infra*.

375. OHIO REV. CODE ANN. § 5321.18(A) (Page Supp. 1974).

376. *Id.*

377. *Id.* § 5321.18(B).

premises and waived notice from the court as to the initiation of a rent-withholding action.³⁷⁸

Notice is also necessary when the landlord intends to pursue those statutory remedies available to him. The landlord must give the tenant 30 days' notice of his intent to terminate the tenancy for the tenant's violation of a statutory obligation.³⁷⁹ The landlord must also give notice of termination of a month-to-month periodic tenancy at least 30 days prior to the date on which the next rent falls due.³⁸⁰ In the case of a week-to-week tenancy the notice must be given at least 7 days prior to the date on which the termination is to occur.³⁸¹

Furthermore, unless there is an emergency or giving notice is impractical,³⁸² the landlord must give at least 24 hours' notice before exercising his right of entry.³⁸³ Finally, the landlord must give an itemized list of deductions made from a security deposit within 30 days of the tenant's surrender of possession and termination of the rental agreement.³⁸⁴

2. *Notice from the Tenant*

At the time when he vacates the premises, the tenant must give the landlord an address to which the list of damages and security deposit may be sent.³⁸⁵ Failure to give the notice will bar the tenant from obtaining damages or attorneys' fees for the landlord's failure to supply the notice or return the deposit.³⁸⁶ The tenant does not, however, forfeit his right to the unclaimed portion of the deposit.³⁸⁷

As a condition to using the new remedies provided by the Act the tenant must give the landlord a written notice of any alleged breach of obligations imposed on him by either the law or the rental agreement.³⁸⁸ This notice must be given within 30 days or a reasonable time (considering the severity of the defect or condition), whichever is shorter, of taking other action.³⁸⁹

378. *Id.* § 5321.18(C).

379. *Id.* § 5321.11.

380. *Id.* § 5321.17(B).

381. *Id.* § 5321.17(A).

382. *Id.* § 5321.05(B).

383. *Id.* § 5321.04(A)(8).

384. *Id.* § 5321.16(B).

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* § 5321.07(A).

389. *Id.* § 5321.07(B).

VI. ACTION FOR FORCIBLE ENTRY AND DETAINER

Prior to the enactment of the new law, the only issue considered in an action for forcible entry and detainer was who held the right to the present possession of the premises.³⁹⁰ Under the new law³⁹¹ the landlord may join his claim for possession with any other claim he might have against the tenant arising out of the rental agreement, including a claim for past due rent.³⁹²

The most significant benefits of the expanded form, however, accrue to the tenant. Under the Act he may assert at trial any defense he has to the landlord's claims.³⁹³ Moreover, if the landlord's claim for possession rests on nonpayment of rent, the tenant may counterclaim for any damages that he might recover under either the law or the agreement and use them as a setoff against the rent due. If after the setoff is completed there remains no rent due, the tenant retains possession of the premises.³⁹⁴ The effect of this modification is to make the tenant's duty to pay rent dependent upon the landlord's performance of both his statutory and contractual obligations. To the extent that the landlord has damaged the tenant by failing to perform his obligations, the tenant is relieved of the duty to pay rent.³⁹⁵ If the tenant is willing to take the chance that the court's evaluation of his damages will equal or exceed that of the landlord, he may refuse to pay rent and counterclaim against the landlord when the landlord proceeds in court to evict him.³⁹⁶ Although the

390. *Carroll v. O'Conner*, 25 Ohio St. 617 (1874); *Sexton v. Sugar Creek Packing Co.*, 38 Ohio App. 2d 32, 67 Ohio Op. 2d 187 (1974). The parties to an action of forcible entry and detainer were entitled to a jury trial on request. The landlord was required to send a written demand that the tenant vacate the premises at least 3 days before he could file a complaint. A summons had to be served at least 3 days prior to trial. OHIO REV. CODE ANN. § 1923.10 (Page 1968); *Bonham v. Mills*, 39 Ohio St. 534 (1883).

391. The modifications in the forcible entry and detainer provisions have been given an excellent and knowledgeable discussion in *Gittes and Marshall, A Guide to Ohio's New Tenant-Landlord Law*, 3 LAW & HOUSING NEWSLETTER 2, 14-18 (Jan. 1975).

392. OHIO REV. CODE ANN. § 1923.081 (Page Supp. 1974).

393. *Id.* § 1923.061(A).

394. *Id.* § 1923.061(B). A court in equity had powers analogous to these. For example, where there was a debt relating to the premises and owed by the landlord to the tenant, the tenant could deduct the debt from the rent and equity would enjoin the forfeiture. *Milbourn v. Aska*, 81 Ohio App. 79, 77 N.E.2d 619 (1946). Instead of giving the court new power to prevent a forfeiture the Act may be interpreted merely to expand the ground on which the old powers may be exercised.

395. See notes 212-35 *supra* and accompanying text.

396. OHIO REV. CODE ANN. § 1923.061 (Page Supp. 1974).

tenant risks eviction if he withholds too great a portion of his rent, his willingness to speculate on the damage award of the court creates a type of self-help rent-withholding remedy.³⁹⁷

The court itself has been granted new powers by the amended law. A court may order the tenant to pay all or part of his rent into the court.³⁹⁸ This is in addition to the power given the court to order a full or partial rent abatement.³⁹⁹ The court may also forbid the landlord to re-rent vacated premises until repairs have been made to bring it up to the standards required by the law.⁴⁰⁰ The court may order a government agency to inspect the residential premises for violations of any of the landlord's statutory duties and then act on the agency's findings.⁴⁰¹

As was the case at common law, the amended procedure requires that a demand for vacation be given the tenant before an action can be initiated. However, the law requires in addition that specific language be used to inform the tenant of his legal rights and possible need for legal advice.⁴⁰² The length of time between service of process and trial has been extended to 5 days.⁴⁰³ Furthermore, the summons must include specific language informing the tenant of his rights.⁴⁰⁴ This information is more extensive than that required in the demand to vacate.

VII. CONCLUSION

The new Ohio landlord-tenant law makes three significant changes in the residential rental relationship. The first is in the allocation of responsibility for the condition of the premises. Instead of basing duties on present possessory rights and protection of the reversion, the Act assigns responsibilities commensurate with the abilities and interests of the parties to a lease. The second significant change is the grant of extensive new protections to the tenant. These protections range from the negotiation of the lease to the final judicial vindication of legal rights. Most impressive, though, is the battery of remedies created by the new law. Whereas the common law would allow only money damages and, under certain restricted

397. See notes 223-35 *supra* and accompanying text.

398. OHIO REV. CODE ANN. § 1923.061(B) (Page Supp. 1974).

399. *Id.* § 5321.07(B)(2).

400. *Id.* § 1923.15.

401. *Id.*

402. *Id.* § 1923.04.

403. *Id.* § 1923.06(A).

404. *Id.* § 1923.06(B).

circumstances, termination, the Act provides the tenant with the legal tools to secure a safe and habitable dwelling from the most uncooperative landlord.

The third major change effected by the law is perhaps the most significant. It is not set forth as a provision of the new law, but it pervades the entire statutory scheme. This change will be reflected in the day-to-day relations of landlords and tenants throughout the state. Burdened with new obligations and faced with tenants armed with new and powerful remedies, landlords will be forced to become more receptive to the needs of their tenants. Thus, the new law will to a significant degree equalize the balance of legal power between the landlord and tenant so that both will hopefully realize the futility of maintaining adversary positions and work together to achieve adequate housing.

JOHN E. CAMPION

APPENDIX

*Ohio Revised Code Chapter 1923.—1974 Revisions*⁴⁰⁵

Sec. 1923.02. Proceedings under Chapter 1923. of the Revised Code, may be had:

.....

(H) Against tenants of residential premises who have breached an obligation imposed by section 5321.05 of the Revised Code which materially affects health and safety. Prior to the commencement of an action under this division, notice must be given to the tenant and compliance secured with section 5321.11 of the Revised Code.

(I) Against tenants of residential premises who have breached an obligation imposed upon them by a written rental agreement.

.....

As used in this Chapter, "landlord," "tenant," "residential premises," and "rental agreement" mean the same as defined in section 5321.01 of the Revised Code.

Sec. 1923.04.

.....

Every notice given under this section by a landlord to recover residential premises shall contain the following language printed or written in a conspicuous manner: "You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance."

Sec. 1923.06. (B) Every summons issued under this section to recover residential premises shall contain the following language printed in a conspicuous manner: "A complaint to evict you has been filed with this court. No person shall be evicted unless his right to possession has ended and no person shall be evicted in retaliation for the exercise of his lawful rights. If you are depositing rent with the clerk of this court you shall continue to deposit such rent until the time of the court hearing. The failure to continue to deposit such rent may result in your eviction. You may request a trial by jury. You have the right to seek legal assistance. If you cannot afford a lawyer, you may contact your local legal aid or legal service office. If none is available, you may contact your local bar association."

Sec. 1923.061. (A) Any defense in an action under Chapter 1923. of the Revised Code may be asserted at trial.

(B) In an action for possession of residential premises based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or under Chapter 5321. of the Revised Code. In that event the court from time to time may order the tenant to pay into court all or part of the past due rent and rent becoming due during the pendency of the action. After trial and judgment, the party to whom a net judgment is owed shall be paid first from the money paid into court, and any balance shall be satis-

405. OHIO REV. CODE ANN. §§ 1923.02, .04, .061, .081, .15 (Page Supp. 1974).

fied as any other judgment. If no rent remains due after application of this division, judgment shall be entered for the tenant in the action for possession. If the tenant has paid into court an amount greater than that necessary to satisfy a judgment obtained by the landlord, the balance shall be returned by the court to the tenant.

Sec. 1923.081. A trial on an action in forcible entry and detainer for residential premises pursuant to Chapter 1923. of the Revised Code may also include a trial on claims of the plaintiff for past due rent and other damages under a rental agreement, unless for good cause shown the court continues the same. For purposes of this section, good cause includes the request of the defendant to file an answer or counterclaim to the claims of the plaintiff or for discovery, in which case the proceedings shall be the same in all respects as in other civil cases. If, at the time of the trial, the defendant has filed an answer or counterclaim, the trial may proceed on the claims of the plaintiff and the defendant.

Sec. 1923.15. During any proceeding involving residential premises under this Chapter, the court may order an appropriate governmental agency to inspect the residential premises. If the agency determines and the court finds conditions which constitute a violation of section 5321.04 of the Revised Code, and if the premises have been vacated or are to be restored to the landlord, the court may issue an order forbidding the re-rental of the property until such conditions are corrected. If the court finds that the tenant may remain in possession, the court may order such conditions corrected. If the conditions have been caused by the tenant, the court may award damages to the landlord equal to the reasonable cost of correcting such conditions.

*Ohio Revised Code Chapter 5321.*⁴⁰⁶

Sec. 5321.01. As used in Chapter 5321. of the Revised Code:

(A) "Tenant" means a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others.

(B) "Landlord" means the owner, lessor or sublessor of residential premises, his agent, or any person authorized by him to manage the premises or to receive rent from a tenant under a rental agreement.

(C) "Residential premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances therein, and the grounds, areas, and facilities for the use of tenants generally or the use of which is promised the tenant. "Residential premises" does not include:

(1) Prisons, jails, workhouses, and other places of incarceration or correction, including halfway houses or residential arrangements which are used or occupied as a requirement of probation or parole;

(2) Hospitals and similar institutions with the primary purpose of providing medical services and "homes" licensed pursuant to Chapter 3721. of the Revised Code;

(3) Tourist homes, hotels, motels, and other similar facilities where circumstances indicate a transient occupancy;

(4) Boarding schools, where the cost of room and board is included as part of the cost of tuition, but not college and university approved housing and private college and university dormitories;

(5) Orphanages and similar institutions;

(6) Farm residences furnished in connection with the rental of land of a minimum of two acres for production of agricultural products by one or more of the occupants;

(7) Dwelling units subject to the provisions of sections 3733.41 to 3733.48 of the Revised Code;

(8) Occupancy by an owner of a condominium unit.

(D) "Rental agreement" means any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of residential premises by one of the parties.

(E) "Security deposit" means any deposit of money or property to secure performance by the tenant under a rental agreement.

(F) "Dwelling unit" means a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household.

Sec. 5321.02. (A) Subject to section 5321.03 of the Revised Code, a landlord may not retaliate against a tenant by increasing the tenant's rent, decreasing services that are due to the tenant, or bringing or threatening to bring an action for possession of the tenant's premises because:

(1) The tenant has complained to an appropriate government agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety;

(2) The tenant has complained to the landlord of any violation of section 5321.04 of the Revised Code;

(3) The tenant joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement.

(B) If a landlord acts in violation of division (A) of this section the tenant may:

(1) Use the retaliatory action of the landlord as a defense to an action by the landlord to recover possession of the premises;

(2) Recover possession of the premises; or

(3) Terminate the rental agreement.

In addition, the tenant may recover from the landlord any actual damages together with reasonable attorneys' fees.

(C) Nothing in division (A) of this section shall prohibit a landlord from increasing the rent to reflect the cost of improvements installed by the landlord in or about the premises or to reflect an increase in other costs of operation of the premises.

Sec. 5321.03. (A) Notwithstanding section 5321.02 of the

Revised Code, a landlord may bring an action under Chapter 1923. of the Revised Code for possession of the premises if:

(1) The tenant is in default in the payment of rent;

(2) The violation of the applicable building, housing, health, or safety code that the tenant complained of was primarily caused by any act or lack of reasonable care by the tenant, or by any other person in the tenant's household, or by anyone on the premises with the consent of the tenant;

(3) Compliance with the applicable building, housing, health, or safety code would require alteration, remodeling, or demolition of the premises which would effectively deprive the tenant of the use of the dwelling unit;

(4) A tenant is holding over his term.

(B) The maintenance of an action by the landlord under this section does not prevent the tenant from recovering damages for any violation by the landlord of the rental agreement or of section 5321.04 of the Revised Code.

Sec. 5321.04. (A) A landlord who is a party to a rental agreement shall:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in a safe and sanitary condition;

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;

(5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit, and arrange for their removal;

(6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;

(7) Not abuse the right of access conferred by division (B) of section 5321.05 of the Revised Code;

(8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.

(B) If the landlord makes an entry in violation of division (A)(8) of this section, or makes a lawful entry in an unreasonable manner, or makes repeated demands for entry otherwise lawful

which have the effect of harassing the tenant, the tenant may recover actual damages resulting therefrom and obtain injunctive relief to prevent the recurrence of the conduct, and if he obtains a judgment reasonable attorneys' fees, or terminate the rental agreement.

Sec. 5321.05. (A) A tenant who is a party to a rental agreement shall:

(1) Keep that part of the premises that he occupies and uses safe and sanitary;

(2) Dispose of all rubbish, garbage, and other waste in a clean, safe, and sanitary manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by tenant as clean as their condition permits;

(4) Use and operate all electrical and plumbing fixtures properly;

(5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes;

(6) Personally refrain, and forbid any other person who is on the premises with his permission, from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises;

(7) Maintain in good working order and condition any range, refrigerator, washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement;

(8) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.

(B) The tenant shall not unreasonably withhold consent for the landlord to enter into the dwelling unit in order to inspect the premises, make ordinary, necessary, or agreed repairs, decorations, alterations, or improvements, deliver parcels which are too large for the tenant's mail facilities, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

(C) If the tenant violates any provision of this section, the landlord may recover any actual damages which result from the violation together with reasonable attorneys' fees. This remedy is in addition to any right of the landlord to terminate the rental agreement, to maintain an action for the possession of the premises, or injunctive relief to compel access under division (B) of this section.

Sec. 5321.06 A landlord and a tenant may include in a rental agreement any terms and conditions, including any term relating to rent, the duration of an agreement, and any other provisions governing the rights and obligations of the parties that are not inconsistent with or prohibited by Chapter 5321. of the Revised Code or any other rule of law.

Sec. 5321.07. (A) If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code or by the rental agreement, or the conditions of the premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or a governmental agency has found that the prem-

ises are not in compliance with building, housing, health, or safety codes which apply to any condition of the residential premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations which constitute noncompliance with such provisions. Such notice shall be sent to the person or place where rent is normally paid.

(B) If a landlord receives the notice described in division (A) of this section and after receipt of such notice fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy such condition, or within thirty days, which ever is sooner, and if the tenant is current in rent payments due under the rental agreement, the tenant may do one of the following:

(1) Deposit all rent that is due and thereafter becomes due the landlord with the clerk of court of the municipal or county court having jurisdiction in the territory in which the residential premises are located;

(2) Apply to the court for an order directing the landlord to remedy the condition. As part thereof, the tenant may deposit rent pursuant to division (B)(1) of this section, and may apply for an order reducing the periodic rent due the landlord until such time as the landlord does remedy the condition, and may apply for an order to use the rent deposited to remedy the condition. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B)(1) of this section.

(3) Terminate the rental agreement.

(C) This section does not apply to any landlord who is a party to any rental agreements which cover three or fewer dwelling units and who provides notice of such fact in a written rental agreement or, in the case of an oral tenancy, delivers written notice of such fact to the tenant at the time of initial occupancy by the tenant. This section does not apply to any private college and university dormitories.

Sec. 5321.08. (A) Whenever a tenant deposits rent with the clerk of a court as provided in section 5321.07 of the Revised Code, the clerk shall give written notice of this fact to the landlord and to his agent, if any.

(B) The clerk shall place all rent deposited with him in a separate rent escrow account in the name of the clerk in a bank or building and loan association domiciled in this state.

(C) The clerk shall keep in a separate docket an account of each deposit, with the name and address of the tenant, and the name and address of the landlord and of his agent, if any.

(D) For his cost, the clerk may charge a fee of one per cent of the amount of the rent deposited, which shall be assessed as court costs.

Sec. 5321.09. (A) A landlord who receives notice that rent due him has been deposited with a clerk of court pursuant to section 5321.07 of the Revised Code, may:

(1) Apply to the clerk of court for release of the rent on the ground that the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code has been remedied. The clerk shall forthwith release the rent, less costs, to the landlord if the tenant gives written notice to the clerk that the condition has been remedied;

(2) Apply to the court for release of the rent on the grounds that the tenant did not comply with the notice requirement of division (A) of section 5321.07 of the Revised Code, or that the tenant was not current in rent payments due under the rental agreement at the time the tenant initiated rent deposits with the clerk of courts under division (B)(1) of section 5321.07 of the Revised Code;

(3) Apply to the court for release of the rent on the grounds that there was no violation of any obligation imposed upon the landlord by section 5321.04 of the Revised Code or by the rental agreement, or by any building, housing, health, or safety code, or that the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code has been remedied.

(B) The tenant shall be named as a party to any action filed by the landlord under this section, and shall have the right to file an answer and counterclaim, as in other civil cases. A trial shall be held within sixty days of the date of filing of the landlord's complaint, unless for good cause shown the court may continue the same.

(C) If the court finds that there was no violation of any obligation imposed upon the landlord by section 5321.04 of the Revised Code or by the rental agreement, or by any building, housing, health, or safety code, or that the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code has been remedied, or that the tenant did not comply with the notice requirement of division (A) of section 5321.07 of the Revised Code, or that the tenant was not current in rent payments at the time the tenant initiated rent deposits with the clerk of court under division (B)(1) of section 5321.07 of the Revised Code, the court shall order the release to the landlord of rent on deposit with the clerk, less costs.

(D) If the court finds that the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code was the result of an act or omission of the tenant, or that the tenant intentionally acted in bad faith in proceeding under section 5321.07 of the Revised Code, the tenant shall be liable for damages caused to the landlord, and for costs, together with reasonable attorneys' fees if the tenant intentionally acted in bad faith.

Sec. 5321.10. (A) If a landlord brings an action for the release of rent deposited with a clerk of court, the court may, during the pendency of the action, upon application of the landlord, release part of the rent on deposit for payment of the periodic interest on a mortgage on the premises, the periodic principal payments on a mortgage on the premises, the insurance premiums for the premises, real estate taxes on the premises, utility services, repairs, and other customary and usual costs of operating the premises as a rental unit.

(B) In determining whether to release rent for the payments described in division (A) of this section, the court shall consider the amount of rent the landlord receives from other rental units in the

buildings of which the residential premises are a part, the cost of operating those units, and the cost which may be required to remedy the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code.

Sec. 5321.11. If the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code that materially affects health and safety, the landlord may deliver a written notice of this fact to the tenant specifying the act and omission that constitutes noncompliance with such provision and that the rental agreement will terminate upon a date specified therein not less than thirty days after receipt of the notice. If the tenant fails to remedy the condition contained in the notice, the rental agreement shall then terminate as provided in the notice.

Sec. 5321.12. In any action under Chapter 5321. of the Revised Code, any party may recover damages for the breach of contract or the breach of any duty that is imposed by law.

Sec. 5321.13. (A) No provision of Chapter 5321. of the Revised Code may be modified or waived by any oral or written agreement except as provided in division (F) of this section.

(B) No warrant of attorney to confess judgment shall be recognized in any rental agreement or in any other agreement between a landlord and tenant for the recovery of rent or damages to the residential premises.

(C) No agreement to pay the landlord's or tenant's attorney fees shall be recognized in any rental agreement for residential premises or in any other agreement between a landlord and tenant.

(D) No agreement by a tenant to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or its related costs shall be recognized in any rental agreement or in any other agreement between a landlord and tenant.

(E) A rental agreement, or the assignment, conveyance, trust deed, or security instrument of the landlord's interest in the rental agreement may not permit the receipt of rent free of the obligation to comply with section 5321.04 of the Revised Code.

(F) The landlord may agree to assume responsibility for fulfilling any duty or obligation imposed on a tenant by section 5321.05 of the Revised Code.

Sec. 5321.14. (A) If the court as a matter of law finds a rental agreement, or any clause thereof, to have been unconscionable at the time it was made, it may refuse to enforce the rental agreement or it may enforce the remainder of the rental agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(B) When it is claimed or appears to the court that the rental agreement, or any clause thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

Sec. 5321.15. (A) No landlord of residential premises shall initiate any act, including termination of utilities or services, exclu-

sion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises, other than as provided in Chapters 1923., 5303., and 5321. of the Revised Code.

(B) No landlord of residential premises shall seize the furnishings or possessions of a tenant, or of a tenant whose right to possession has terminated, for the purpose of recovering rent payments, other than in accordance with an order issued by a court of competent jurisdiction.

(C) A landlord who violates this section is liable in a civil action for all damages caused to a tenant, or to a tenant whose right to possession has terminated, together with reasonable attorneys' fees.

Sec. 5321.16. (A) Any security deposit in excess of fifty dollars or one month's periodic rent, whichever is greater, shall bear interest on the excess at the rate of five per cent per annum if the tenant remains in possession of the premises for six months or more, and shall be computed and paid annually by the landlord to the tenant.

(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's non-compliance with section 5321.05 of the Revised Code of the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys' fees under division (C) of this section.

(C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys' fees.

Sec. 5321.17. (A) The landlord or the tenant may terminate or fail to renew a week-to-week tenancy by notice given the other at least seven days prior to the termination date specified in the notice.

(B) The landlord or the tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty days prior to the periodic rental date.

(C) This section does not apply to a termination based on the breach of a condition of the rental agreement or the breach of a duty and obligation imposed by law.

Sec. 5321.18. (A) Every written rental agreement for residential premises shall contain the name and address of the owner and the name and address of the owner's agent, if any. If the owner or the owner's agent is a corporation, partnership, limited partnership, association, trust, or other entity, the address shall be the princi-

pal place of business in the county in which the residential property is situated or if there is no place of business in such county then its principal place of business in this state, and shall include the name of the person in charge thereof.

(B) If the rental agreement is oral, the landlord, at the commencement of the term of occupancy, shall deliver to tenant a written notice containing the information required in division (A) of this section.

(C) If the landlord fails to provide the notice of the name and address of the owner and owner's agent, if any, required under division (A) or (B) of this section, the notices to the landlord required under division (A) of section 5321.07 and division (A) of section 5321.08 of the Revised Code shall be waived by the landlord and his agent.

Sec. 5321.19. No municipal corporation may adopt or continue in existence any ordinance that is in conflict with Chapter 5321. of the Revised Code, or that regulates those rights and obligations of parties to a rental agreement that are regulated by Chapter 5321. of the Revised Code. The provisions of Chapter 5321. of the Revised Code do not preempt any housing, building, health, or safety codes of any municipal corporation.