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# Comment

## Implied Warranty of Habitability in Pennsylvania

The ancient canons of property law governing the mutual obligations of landlords and tenants of residential dwellings have suffered erosion, particularly in the past decade.<sup>1</sup> The principle that the lease covenants of tenants and landlords are independent has been rejected in many jurisdictions and replaced with the concept that leases are contracts containing mutual and dependent covenants.<sup>2</sup> The doctrine of caveat emptor, once unchallenged in leaseholds, is giving way to a doctrine that the lessor warrants the suitability for habitation of the leased dwelling, whether or not the lease so states,<sup>3</sup> and even if the parties have agreed to an express exclusion of any such warranty.<sup>4</sup> Recognizing changing urban expectations, the need for consumer protection, and the existence of chronic housing shortages, the courts and legislatures have fashioned a tool which tenants can apply either as a defense in an action for possession<sup>5</sup> or for rent due,<sup>6</sup> or affirmatively in a suit for rescission<sup>7</sup> of the lease or for equitable relief,<sup>8</sup> to enforce the implied obligation to provide decent, safe and sanitary housing. This tool has been termed the implied warranty of habitability.

The historical development and significance of the implied warranty of habitability have been traced by many writers.<sup>9</sup> The deci-

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1. See, e.g., RESTATEMENT (SECOND) OF PROPERTY §§ 5.1-.6, 10.1-11.3 (1977); Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 4-25 (1976) [hereinafter cited as Abbott]; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19 [hereinafter cited as Love].

2. See RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment b (1977).

3. *Id.*

4. *Id.* § 5.6

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

6. See *id.* See also *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

7. See *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

8. See *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (tenant allowed to apply rent to repair dwelling); RESTATEMENT (SECOND) OF PROPERTY § 5.1(2) (1977).

9. See, e.g., Abbott, *supra* note 1, at 6-12 & n.6; Love, *supra* note 1; Comment, *Tenants' Rights in Pennsylvania: Has the Middle Class Tenant Been Forgotten?*, 12 DUQ. L. REV. 48,

sions<sup>10</sup> and statutes<sup>11</sup> in jurisdictions other than Pennsylvania have been treated extensively in their literature and will not be examined here. This comment will be limited to discussion of the doctrine's uncertain status in Pennsylvania. While the doctrine has not yet been expressly adopted in the Commonwealth, both the supreme court<sup>12</sup> and the legislature<sup>13</sup> have given limited recognition to the policy considerations underlying the doctrine and appear to be on the verge of adopting the warranty. Yet, even as the warranty is being considered in Pennsylvania, a trend towards moderating its support has become discernible in literature.<sup>14</sup> This countertrend merits serious discussion because it reflects an increased awareness of the multiplicity of factors which must be considered when reviewing housing policies and tenants' rights, factors which ultimately suggest that the latter must be limited if they are not to become counterproductive.

The comment will, therefore, focus on the development of the warranty in Pennsylvania with particular emphasis on two legislative proposals which incorporate the warranty concept but provide different remedies for the tenant. The alternatives proposed will be examined in the context of the view of courts and commentators which have considered the warranty, especially as the proposals bear upon such matters as the proper standard, remedies, defenses, and policy justifications for the warranty itself. Finally, some suggestions will be made concerning the direction that Pennsylvania legislative action should take in establishing the warranty.

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62-63 (1973); Note, *The Uniform Residential Landlord and Tenant Act: Facilitation of or Impediment to Reform Favorable to the Tenant?*, 15 WM. & MARY L. REV. 845 (1974).

10. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. 1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

11. See, e.g., statutes cited at notes 32-35 *infra*.

12. See notes 44-82 and accompanying text *infra*.

13. See text accompanying notes 40-43 *infra*.

14. See, e.g., *Abbott*, *supra* note 1; *Meyers*, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975) [hereinafter cited as *Meyers*]; Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821 (1972); Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act—An Economic Analysis*, 17 VILL. L. REV. 886 (1972); 84 HARV. L. REV. 729 (1971).

## I. THE CONCEPT

The implied warranty of habitability holds the lessor to a stated standard of performance in delivering<sup>15</sup> and maintaining<sup>16</sup> premises. That standard, as well as the scope of, exceptions to, and remedies for breach of the warranty have not been interpreted uniformly in all jurisdictions, but some general parameters can be discerned. In most states, the warranty has been extended to dwelling units only,<sup>17</sup> and can be excluded or waived, if at all,<sup>18</sup> only in circumstan-

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15. See *RESTATEMENT (SECOND) OF PROPERTY* § 5.2 (1977). At common law, the landlord bore the risk of damage from the time the lease was signed until the tenant took possession. *Id.* § 5.2, Reporter's Note 2. Entry was a waiver of the tenant's rights under any express warranty in the lease. *Id.* § 5.3, Reporter's Note 2. The implied warranty cases hold that the tenant must know of the conditions upon entry before he can waive his rights. *Id.* § 5.3, Reporter's Note 4. See *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969) (latent defects discovered after entry); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971) (discovery of latent defects grounds for termination after entry). Those courts which have held that the implied warranty of habitability is defined by applicable building and housing code standards have seemingly circumvented the argument that entry by a tenant with knowledge of preexisting substandard conditions constitutes a waiver of rights under the warranty. Even if the tenant initially agreed to accept the substandard housing, the landlord's duty to repair to meet code standards would remain intact, unless the law authorized contrary express covenants. See notes 20-23 and accompanying text *infra*.

16. See *RESTATEMENT (SECOND) OF PROPERTY* § 5.5 (1977) which states in part:

### Obligation of Landlord to Keep Leased Property in Repair

- (1) Except to the extent the parties to a lease validly agree otherwise, the landlord, under a lease of property for residential use, is obligated to the tenant to keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes, unless the failure to meet those requirements is the fault of the tenant or is the consequence of a sudden non-manmade force or the conduct of third persons.
- (2) Except to the extent the parties to a lease validly agree otherwise, the landlord is obligated to the tenant to keep safe and in repair the areas remaining under his control that are maintained for the use and benefit of his tenants.
- (3) The landlord is obligated to keep the leased property in repair to the extent he has expressly or impliedly agreed to do so.

17. Professor Casner, the reporter for the Restatement, observes:

The policy grounds . . . are strongest where residential property is involved, and some courts have hesitated to extend these doctrines to leases of commercial property, e.g., *Kruvant v. Sunrise Market, Inc.*, 112 N.J. Super. 509, 271 A.2d 741 (1970). . . . But see *Petruzzi v. McCowie*, 88 Pa. D. & C. 476 (Phila. Mun. Ct. 1954) (rent application permitted for beauty parlor lease).

*RESTATEMENT (SECOND) OF PROPERTY* § 5.1, Reporter's Note 6 (1977).

18. The Restatement recognizes waiver or exclusion by the parties of the landlord's duty to maintain the premises. *RESTATEMENT (SECOND) OF PROPERTY* § 5.6 (1977). Professor Casner was displeased with § 5.6: "To impose a rule of implied warranty of fitness as this Chapter does, and to allow waiver by an imposed form lease is to reduce the rule to form, not substance." *Id.* § 5.6, Reporter's Note 2. But he was able to cite only one case in which a court actually had held that an express waiver was unenforceable: *Longenecker v. Hardin*, 130 Ill.

ces that indicate that the agreement was made in good faith.<sup>19</sup> The standard of warranty is usually either complete or substantial conformance with the local housing code.<sup>20</sup> Breach of the warranty may give the tenant grounds for terminating the lease,<sup>21</sup> for paying reduced or no rent for the period of nonconformity,<sup>22</sup> or for compelling the landlord to repair and maintain the dwelling properly.<sup>23</sup> Where the warranty was statutorily recognized,<sup>24</sup> legislatures have created additional remedies,<sup>25</sup> including rent withholding,<sup>26</sup> rent applica-

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App. 2d 468, 264 N.E.2d 878 (1970) (waiver unenforceable because lease was illegal since statute prohibited rental of substandard dwellings). Other cases cited by Professor Casner support his position only in dicta or by implication. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) (duties placed specifically upon lessor by housing code cannot be waived or shifted by agreement).

The Uniform Residential Landlord and Tenant Act (URLTA) contains a general prohibition of lease provisions by which a tenant "agrees to waive or forego rights or remedies under this Act." UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403. The Act contains an implied warranty of habitability, *id.* § 2.104(a)(b), but it also contains specific provisions allowing a shifting of certain landlord duties including rubbish removal, supplying of hot water, "and specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith and not for purpose of evading the obligations of the landlord." *Id.* § 2.104(c) (pertaining to single family residences). Stricter requirements are imposed for shifting repair responsibilities in leases of multiple unit buildings. Both §§ 1.403 and 2.104(c) and (d) have been enacted substantially intact by at least eleven states. See UNIFORM LAWS ANN. 312 (Supp. 1976).

19. See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104 (d)(1)-(3).

20. According to Professor Abbott, in almost every jurisdiction recognizing the implied warranty, the standard is based upon housing code provisions. However, the weight accorded proof of a housing code violation in determining breach of the warranty varies among the jurisdictions. Some states require substantial compliance, others, maintenance of "an adequate standard of habitability." Abbott, *supra* note 1, at 17-19.

21. See, e.g., *King v. Moorehead*, 495 S.W.2d 65, 70 (Mo. 1973) (landlord's breach of implied warranty impairs consideration for the lease; tenant may terminate the lease).

22. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) (tenant's obligation to pay rent is dependent on owner's performance of his obligations); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (1971) (20% reduction in rent); *Pines v. Persson*, 14 Wis. 2d 590, 597, 111 N.W.2d 409, 413 (1961) (breach of implied warranty absolves tenants of any liability except for reasonable rental value during time of actual occupancy).

23. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

24. See statutes cited at note 32 *infra*.

25. The landlord may be subjected to criminal sanctions—fines or imprisonment—civil fines levied on the landlord or on the building, receivership, or abatement orders as a result of prosecution by the local code enforcement body. Abbott, *supra* note 1, at 49-53. To the extent that such administrative intervention is triggered by tenant complaints to a code enforcement agency, it appears to be equivalent, for the purpose of effectuating public policies, to remedies available in private suits brought by tenants against landlords directly. In Pittsburgh and other cities, a special housing court has been established to handle violations of municipal housing-related ordinances. See notes 152 & 153 and accompanying text *infra*.

26. For a description of the Pennsylvania Rent Withholding Act, PA. STAT. ANN. tit. 35,

tion,<sup>27</sup> and rent abatement.<sup>28</sup> An award of damages in theory is either the difference between the fair rental value of the unit as warranted and as actually provided,<sup>29</sup> or the difference between the contract price and the fair rental value during the period of nonconformity.<sup>30</sup> In practice, it is usually a percentage reduction of the contract rent determined by the severity of the breach.<sup>31</sup>

## II. LEGAL STATUS OF THE IMPLIED WARRANTY CONCEPT

The implied warranty has been cast in many forms and the number of jurisdictions which have adopted the warranty in its entirety is uncertain. Moreover, varieties of the warranty have been adopted by statute in some states, by court decision in others, and shaped by both in still other states; the remedies for breach also vary considerably. A review discloses that about forty-one jurisdictions have statutes placing some duty on the residential landlord to repair at least certain kinds of defects arising or discovered during the lease term.<sup>32</sup> Thirty-three jurisdictions require the landlord to put leased

§ 1700-1 (Purdon Supp. 1976-1977) see text accompanying notes 40-43 *infra*.

27. See text accompanying notes 90-93 *infra* for one version of the concept.

28. Rent abatement is the cancellation of all or part of a tenant's obligation to pay rent for the period in which the landlord is in default on his obligations. RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1977).

29. See, e.g., *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973).

30. See, e.g., *Kline v. Burns*, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971); *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973).

31. See *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (1971). Expert testimony as to fair market value has not been used in such cases; the percentage is usually an intuitive determination by the judge. A thorough analysis and critique of the problem of measuring damages for breach of implied warranty is found in *Abbott*, *supra* note 1, at 20-25.

32. Casner has identified 41 implied warranty jurisdictions. RESTATEMENT (SECOND) OF PROPERTY, Statutory Note to ch. 5, at 150 (1977). Thirteen states have adopted the Uniform Residential Landlord and Tenant Act's implied warranty of habitability. See 1975 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 334. The text of the URLTA can be found at 7 UNIFORM LAWS ANN. 328 (Supp. 1977). See ALASKA STAT. §§ 34.03.010 - .380 (1975); ARIZ. REV. STAT. § 33-1364 (1974); FLA. STAT. ANN. §§ 83.51, .55, .56 (West Supp. 1975); HAWAII REV. STAT. §§ 521-42, -61 to -76 (Supp. 1975); KAN. STAT. ANN. §§ 58-2545 to -2553 (Supp. 1976); KY. REV. STAT. §§ 383.595, .635, .640, .645, .655 (Cum. Supp. 1976); NEB. REV. STAT. §§ 76-1415, -1419, -1425 (Cum. Supp. 1976); N.M. STAT. ANN. §§ 70-7-20, -29 to -32 (Supp. 1975); OR. REV. STAT. §§ 91.770, .800 (1975); TENN. CODE ANN. §§ 64-2813, -2824, -2841 (1976); VA. CODE §§ 55-248.13, .21 (Cum. Supp. 1976). See also MICH. COMP. LAWS § 554.139 (Cum. Ann. Supp. 1976-1977) (implied warranty); WASH. REV. CODE ANN. §§ 59.18, .060, .090, .100, .110 (1976) (substantially similar to URLTA, but adding greater tenant protection).

premises into a condition fit for their intended use or into "fit and habitable condition."<sup>33</sup> Thirty-two grant tenants the right to terminate the lease upon the landlord's breach of his duty to repair.<sup>34</sup> Rent abatement is statutorily recognized in nineteen jurisdictions, rent application in twenty-four, and rent withholding in twenty-three.<sup>35</sup> In at least seventeen states, there has been decisional law supporting the doctrine of the implied warranty of habitability;<sup>36</sup> in most of these jurisdictions there is some kind of statutory recognition of the warranty as well. Thirteen states have enacted the Uniform Residential Landlord and Tenant Act,<sup>37</sup> which incorporates the warranty.

### III. STATUS IN PENNSYLVANIA

#### A. Current Law

Statutory development of the doctrine in Pennsylvania has thus far been minimal. The Landlord and Tenant Act of 1951<sup>38</sup> contains no reference to any duty of a lessor to deliver and maintain leased premises in good condition.<sup>39</sup> The primary statutory recognition of the principle underlying the implied warranty concept in Pennsylvania is found in the 1966 Rent Withholding Act.<sup>40</sup> This Act, which applies only to the cities<sup>41</sup> of the Commonwealth, suspends a ten-

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33. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 2.103, .104(a)(2). See, e.g., DEL. CODE ANN. tit. 25, § 5303(a) (1975). See also RESTATEMENT (SECOND) OF PROPERTY, Statutory Note to ch. 5, at 150-52 (1977) (listing other state statutes).

34. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 1.403, 2.104, 4.101, .103, .104. See, e.g., S.D. COMPILED LAWS ANN. §§ 43-32-8, -9, -19 (1967). See also RESTATEMENT (SECOND) OF PROPERTY, Statutory Note to ch. 5, at 155-56 (1977) (listing other statutes).

35. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.103, .106. See, e.g., PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976-1977).

36. See RESTATEMENT (SECOND) OF PROPERTY § 5.1, Reporter's Note 2 (1977).

37. See note 32 *supra*. Two states, Michigan and Washington, are listed as having adopted the URLTA, although they have made significant alterations to it. 1975 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 334.

38. PA. STAT. ANN. tit. 68, §§ 250.101 - .602 (Purdon 1965).

39. In 1974, the legislature adopted a new section to the act, imposing on the landlord of a tenement or other multiple dwelling "the duty of reasonable care for safety in use" of common areas such as stairways and passages. But the language apparently only provides for the imposition of tort liability for injuries attributable to the landlord's negligence. PA. STAT. ANN. tit. 68, § 250.552 (Purdon Supp. 1976-1977).

40. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976-1977).

41. This includes cities of the first, second, or third classes and the counties in which such cities are located. Boroughs and townships, regardless of size, are excluded. *Id.*

ant's duty to pay rent when his dwelling is certified as unfit for human habitation by the local code enforcement agency.<sup>42</sup> If the dwelling is certified as unfit, the tenant is obliged to pay his rent into an escrow account approved by the agency; if the landlord makes the premises fit for human habitation within six months, the rent withheld is paid to him, but if he does not, the money is returned to the tenant.<sup>43</sup> Thus the Act, while not specifically referring to the warranty, does recognize it in principle and provides one typical remedy.

In addition to this limited legislative recognition, judicial acceptance of the concept has been inconclusive. The Pennsylvania Supreme Court has not yet overruled *Kearse v. Spaulding*,<sup>44</sup> a 1962 decision which held that a landlord's failure to comply with the housing code standards did not constitute a breach of the lease. However, a trend toward the rejection of that holding can be detected and traced to the court's opinion in *Reitmeyer v. Sprecher*,<sup>45</sup> where the issue was whether a landlord's oral promise to repair the premises, made prior to and in consideration of a tenant's signing of the lease, rendered the landlord liable in tort for injuries sustained by the tenant as a result of the defect. While this issue was not appropriate for an implied warranty argument because of the express promise and the resulting injury, in overruling precedent denying landlord liability in such circumstances, the court took note of several policy reasons which have been used by other courts to justify the implied warranty: (1) the inability of tenants to make the necessary repairs<sup>46</sup> and the absence of incentives for them to maintain the property in good condition for the lessor and subsequent

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42. *Id.*

43. Funds deposited in the escrow account may be used for repairs and utility bills which the landlord is obliged to pay, but cannot or will not. The tenant cannot be evicted while rent is being deposited in escrow. *Id.*

44. 406 Pa. 140, 176 A.2d 450 (1962).

45. 431 Pa. 284, 243 A.2d 395 (1968). See also *Galligan v. Arovitch*, 421 Pa. 301, 219 A.2d 463 (1966)(form leases are adhesionary)(dicta); *Boyd v. Smith*, 372 Pa. 306, 94 A.2d 44 (1953)(landlord exculpatory clause void).

46. 431 Pa. at 288, 243 A.2d at 397. The court used language from the RESTATEMENT (SECOND) OF TORTS § 356 Comment a (1965), dealing with exceptions to the general rule that a lessor of land is not liable in tort for physical harm caused by dangerous conditions present when the tenant took possession. *Accord, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) ("low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property").



tenants;<sup>47</sup> (2) the justice of expecting the landlord who receives rent for his apartment to assume, in turn, some responsibility for keeping it in safe condition;<sup>48</sup> and (3) the disparity of bargaining power between the parties.<sup>49</sup> The court found that the landlord had "a duty which, though founded in contract, is cognizable in tort."<sup>50</sup> In adopting section 357 of the Restatement (Second) of Torts,<sup>51</sup> the court explained that "it is not the contract per se which created the duty [to repair]; it is the law which imposes the duty because of the nature of the undertaking in the contract."<sup>52</sup> In so holding, the court seemed to be suggesting that landlord responsibility could be read into the contract either by analogy to the Uniform Commercial Code's implied warranty in sales of goods,<sup>53</sup> or by the doctrine that a contract incorporates all applicable law in force at the time of its execution—including tort liability and housing codes.

In dicta, both approaches were more clearly asserted by the supreme court in *DePaul v. Kauffman*.<sup>54</sup> *DePaul* was a challenge to the constitutionality of the Rent Withholding Act of 1966.<sup>55</sup> It was claimed that the Act impaired contractual obligations<sup>56</sup> and effected a taking of property without due process of law.<sup>57</sup> The court upheld the Act as a reasonable exercise of the state's police power; the Act's substantial relationship to the public interest in preserving an ade-

47. 431 Pa. at 288, 243 A.2d at 397. See RESTATEMENT (SECOND) OF TORTS § 356, Comment a (1965); accord, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) ("[t]he landlord . . . has much greater opportunity, incentive, and capacity to inspect and maintain the condition of his building").

48. 431 Pa. at 289, 243 A.2d at 397.

49. *Id.* at 290, 243 A.2d at 397. See RESTATEMENT (SECOND) OF TORTS § 356, Comment a (1965).

50. 431 Pa. at 289, 243 A.2d at 398; accord, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) ("[t]he tenants have very little leverage to enforce demands for better housing").

51. Section 357 provides that the lessor is liable for physical harm caused by a condition of disrepair existing on the land before or arising after the lessee has taken possession if the lessor breached an express covenant to repair, thereby creating an unreasonable risk. RESTATEMENT (SECOND) OF TORTS § 357 (1965).

52. 431 Pa. at 290-91, 243 A.2d at 398.

53. See U.C.C. §§ 2-314, -315.

54. 441 Pa. 386, 272 A.2d 500 (1971).

55. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976-1977).

56. Appellants alleged that the Act violated U.S. CONST. art. I, § 10, and PA. CONST. art. I, § 17, which reads: "No ex post facto law, nor any law impairing the obligation of contracts . . . shall be passed." The Act was also attacked as unconstitutionally vague, and as an excessive delegation of legislative authority. 441 Pa. at 391, 272 A.2d at 503.

57. 441 Pa. at 391, 272 A.2d at 503.

quate supply of housing outweighed the private property interests involved.<sup>58</sup> In addition to citing *Reitmeyer's* observations about the housing shortage, tenants' unequal bargaining power, and landlords' superior ability to make repairs, the court observed that "[l]andlords have a duty to maintain their properties in a condition fit for human habitation not only after that property has been certified as unfit but *at all times*."<sup>59</sup> Breach of this duty imposed by the local housing code gives the tenant a private right of action, since "the laws in force when a contract is entered into become part of the obligation of contract 'with the same effect as if expressly incorporated in its terms.'"<sup>60</sup> These statements are clearly irreconcilable with the court's refusal in *Kearse* to recognize the implied warranty of habitability, at least with respect to cases arising in communities with housing codes. Another reference to an implied warranty was made in *Elderkin v. Gaster*,<sup>61</sup> when the supreme court decided that an implied warranty of habitability exists when a new house is sold by its builder-vendor. The reason offered for this erosion of caveat emptor was that the purchaser of a new home must rely upon the skill of the builder and his superior opportunity to examine the suitability of the home site.<sup>62</sup>

The most recent pronouncement of the court on the subject of residential leases does not indicate any lessening of its concern for the plight of the tenant, although that case did not deal with implied warranties. In *Commonwealth v. Monumental Properties, Inc.*,<sup>63</sup> the court interpreted the Pennsylvania Consumer Protection Law<sup>64</sup> as including the leasing of housing in its proscription of "unfair or deceptive acts or practices in the conduct of any trade or commerce";<sup>65</sup> it justified such a liberal construction of the statute by stressing the consumer protection needs of tenants,<sup>66</sup> their unequal bargaining power,<sup>67</sup> and the ongoing housing crisis.<sup>68</sup>

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58. *Id.* at 394, 272 A.2d at 504.

59. *Id.* at 397, 272 A.2d at 506 (emphasis in original).

60. *Id.* at 398, 272 A.2d at 506, citing *Beaver County Bldg. & Loan Ass'n v. Winowich*, 323 Pa. 483, 489, 187 A. 481, 484 (1936).

61. 447 Pa. 118, 288 A.2d 771 (1972).

62. *Id.* at 128, 288 A.2d at 776.

63. 459 Pa. 450, 329 A.2d 812 (1974).

64. PA. STAT. ANN. tit. 73, §§ 201-1 to -9 (Purdon 1971).

65. 459 Pa. at 467, 329 A.2d at 820. See PA. STAT. ANN. tit. 73, § 201-3 (Purdon 1971).

66. 459 Pa. at 467-72, 329 A.2d at 820-22.

67. *Id.* at 474-78, 329 A.2d at 824-26.

68. *Id.*

The Pennsylvania Supreme Court's decisions, then, have shown a decided movement toward recognition of the warranty since its pronouncement in *Reitmeyer*. The reasoning employed in that case was used to support the recognition, in dicta, of the warranty in *DePaul*. *Elderkin* made the warranty a reality with respect to the sale of new homes, and *Monumental* reasserted the policy considerations usually advanced in support of an implied warranty. Indeed, the court would find it difficult to distinguish these cases and reaffirm *Kearse*, which it has never cited.

Lower courts, in general, have reinforced the trend. Following *Elderkin*, the Washington County Court of Common Pleas in *Spencer v. Leo S. Firanski & Son, Inc.*,<sup>69</sup> extended the implied warranty in sales of housing to remote purchasers. It reasoned that insistence on privity in such contract actions served no purpose other than to insulate the builder from the consequences of defects for which he was responsible; in the court's view, there was no meaningful basis for distinguishing real property transactions from others in products liability law.<sup>70</sup> The Delaware County Court of Common Pleas, in a similar case,<sup>71</sup> more cautiously limited its extension of the right of action to the first *user-purchaser*, not merely to a realty company that serves as a middleman.<sup>72</sup> But it agreed that the abolition of the horizontal privity requirement in products liability cases<sup>73</sup> ought to apply to real property transactions as well.<sup>74</sup>

With respect to leaseholds, the lower courts have responded circumspectly to the Pennsylvania Supreme Court's dicta in *DePaul* concerning the warranty of habitability. Following *DePaul*, the

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69. 55 Wash. Co. 7, 67 Pa. D. & C.2d 235 (1974).

70. *Id.* at 9, 67 Pa. D. & C.2d at 237.

71. *Skretvedt v. Maple Corp.*, 62 Del. Co. 86, 72 Pa. D. & C.2d 637 (1974).

72. *Id.* at 88, 72 Pa. D. & C.2d at 640.

73. "Horizontal privity" limits the right to bring an action to persons in privity with the defendant. In *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974), the requirement of horizontal privity was eliminated in products liability cases involving breach of warranty.

74. 62 Del. Co. at 87, 72 Pa. D. & C.2d at 639. The United States District Court for the Eastern District of Pennsylvania has extended the *Elderkin* holding to sales by a "reconditioner" of housing who, in the case at issue, was the Department of Housing and Urban Development (HUD). *City of Philadelphia v. Page*, 363 F. Supp. 148, 152 (E.D. Pa. 1973). Because it insured the mortgage of the buyers as well, HUD was obliged by statute to warrant that the residence conformed to local housing codes. 12 U.S.C. § 1715l(d)(2) (1970). The agency was determined to have breached the resulting implied warranty by permitting lead based paint to remain on the walls of the house. 363 F. Supp. at 155.

Bucks County Court of Common Pleas in *Northchester Corp. v. Soto*,<sup>75</sup> considered a tenant's implied warranty defense in an action for possession, despite his explicit covenant in the lease to do maintenance and repairs himself. The court followed *Kearse*, recognizing that "[i]n the absence of any provision in the lease, a landlord is under no obligation to repair the leased premises, to see to it that they are fit for rental or to keep the premises in repair."<sup>76</sup> The court also referred, however, to the contrary dicta of *DePaul* and the D.C. Circuit's landmark decision of *Javins v. First National Realty Corp.*,<sup>77</sup> which held that housing regulations imply a warranty of habitability.<sup>78</sup> It resolved the conflict in authority by refusing to apply the *DePaul* dicta on a technicality: the tenant had failed to specify in his pleadings the applicable housing code.<sup>79</sup>

Since the *Monumental* decision in 1974, two lower Pennsylvania courts<sup>80</sup> have taken the final step and endorsed the implied warranty while one has followed *Kearse v. Spaulding*.<sup>81</sup> Attorneys for the Neighborhood Legal Services Association in Pittsburgh and elsewhere in the state are presently seeking an opportunity to force the issue for decision by the supreme court.<sup>82</sup> The prognosis appears to be that the warranty will be recognized.

### B. House Bills 402 and 600

While there are indications of implicit acceptance of the concept of the warranty, since it has not yet been clearly adopted judicially recent efforts to provide statutory recognition have been prompted. In 1974, an ad hoc committee of Pittsburgh attorneys drafted a new landlord-tenant bill for Allegheny County which won the support of members of the Apartment Owner's Association and the Greater Pittsburgh Board of Realtors.<sup>83</sup> This proposed legislation was intro-

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75. 23 Bucks Co. 86, 58 Pa. D. & C.2d 256 (1972).

76. *Id.* at 91, 58 Pa. D. & C.2d at 265.

77. 428 F.2d 1071, 1081-82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

78. 23 Bucks Co. at 92, 58 Pa. D. & C.2d at 267.

79. *Id.* at 93, 58 Pa. D. & C.2d at 268.

80. *See Derr v. Cangemi*, 66 Pa. D. & C.2d 162 (C.P. Phila. Co. 1974); *Edwards v. Watt*, No. 74-197 (Pa. C.P. Columbia Co. Aug. 19, 1975).

81. *Beasley v. Freedman*, 88 York Co. 102, 70 Pa. D. & C.2d 751 (1974).

82. Interview with Michael Kearney, Esq., Neighborhood Legal Services Association of Allegheny County in Pittsburgh (Sept. 30, 1976).

83. The committee consisted of the President of the Allegheny County Bar Association, the Director of the Neighborhood Legal Services Association, the Magistrate of the Pittsburgh

duced as House Bill 600 by Representative K. Leroy Irvis and 27 other representatives on February 26, 1975, and was passed by the House of Representatives, with amendments, on October 2, 1975.<sup>84</sup> In the Senate, however, the bill was radically amended by Senator Thomas Nolan<sup>85</sup> and then allowed to die in the Senate's Urban Affairs Committee. The Irvis version was reintroduced in 1977 as House Bill 402.

The Irvis bill is most notable for its provisions on landlord obligations and tenant remedies. Section 403 reads:

landlord to maintain fit premises.

(a) The landlord shall, with reasonable promptness:

(1) Comply with the requirements of applicable building, fire prevention, and housing codes materially affecting health, safety, and security.

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

(3) Keep all common areas of the premises in a clean and safe condition.

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators and security systems, supplied or required to be supplied by him by law or the rental agreement.<sup>86</sup>

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Housing Court, and an attorney for the Allegheny County Health Department. Interview with Alan Penkower, Pittsburgh Housing Court Magistrate in Pittsburgh (Feb. 7, 1977). See Pa. House Bill 600, Printer's No. 669 (Feb. 26, 1975).

84. COMBINED HISTORY OF SENATE AND HOUSE BILLS, SESSIONS OF 1975 AND 1976, at A-82.

85. *Id.* The text of the Nolan amendments of June 14, 1976 was taken from Pa. Senate Bill 753, Printer's No. 815 (June 5, 1975), a landlord-tenant bill introduced by Senator Nolan.

86. Section 403 of Pa. House Bill 402, Printer's No. 441 (March 1, 1977) adopts with minor modifications the text of the UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 2.104(a)(1)-(4). The words "with reasonable promptness" are an addition to the bill. The Nolan bill, Pa. House Bill 600, Printer's No. 3473 (June 14, 1976), at § 405, includes the same text with minor changes; in place of "with reasonable promptness" it interpolates "if the tenant shall meet all of his obligations as provided in Article V [Tenant Obligations] and elsewhere in this Act." In addition, House Bill 600 incorporates the remainder of the UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 2.104. This addition to § 405 in the Nolan bill requires the landlord to provide for garbage removal and to supply hot and cold running water and reasonable heat except where it is generated by an installation within the exclusive control of the tenant and/or supplied by a direct public utility connection.

Subsections (B)-(D) provide:

(B) The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties specified in subsection (A) (5) and (6) and

Chapter VI of the Irvis bill provides four basic kinds of tenant remedies for landlord violations of section 403: termination of lease, rent application, rent withholding, and specific performance—an action in equity to restore essential services.<sup>87</sup> Under section 601(a) of the bill, the tenant has the right to terminate a lease with 30 days' notice if a section 403 violation "materially affecting health, safety or security," or a material noncompliance with the lease, goes uncorrected for fourteen days after notice is given. Inspection by a code enforcement agency is not required to exercise this right, but conditions caused by "the deliberate or negligent act or omission" of the tenant, his family, or his guests are not grounds for termination.<sup>88</sup> If the same violation by the landlord recurs within six months, absent a showing of due care by the landlord, the tenant may terminate the lease on fourteen days' notice, specifying the breach and date of termination.<sup>89</sup>

Two procedures for "self-help" on rent application are provided as remedies for violations of section 403. These provisions allow the tenant to make repairs himself and deduct their cost from subsequent rent payments, up to a maximum amount equal to two months rent or \$300, whichever is greater. Section 603 sets forth the

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also specified repairs, maintenance tasks, alterations and remodeling, but only if the transaction is entered into in good faith and in accordance with the rental agreement.

(C) The landlord and tenant of any dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

- (1) the agreement of the parties is entered into in good faith and in accordance with the rental agreement and is set forth in a separate writing signed by the parties and supported by adequate consideration;
- (2) the work is not necessary to cure noncompliance with section 406 (A) (1) [sic]; and
- (3) the agreement does not diminish or affect obligations of the landlord to other tenants in the premises.

(D) The landlord may not treat performance of the separate agreement described in subsection (C) as a condition to any obligation or performance of any rental agreement.

87. Pa. House Bill 402, Printer's No. 441 (March 1, 1977). All of these remedies are supported in the RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1977). All but rent withholding are included in UNIFORM RESIDENTIAL LANDLORD TENANT ACT art. IV.

88. PA. HOUSE BILL 402, PRINTER'S NO. 441, § 601(a) (March 1, 1977).

89. *Id.* The language employed is almost identical to UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.101(a). Both URLTA and the Irvis bill contain a parallel provision allowing a landlord to terminate the lease for breach by a tenant. Compare Pa. House Bill 402, Printer's No. 441, § 701(a) (March 1, 1977), with UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.201(a). The Nolan bill contains neither provision, limiting both parties to damages and injunctive relief. See Pa. House Bill 600, Printer's No. 3473, §§ 601, 701 (June 14, 1976).

general self-help procedure.<sup>90</sup> The tenant must first request an inspection by the appropriate enforcement agency. If the agency finds section 403 violations, it notifies the landlord of the need to correct them and sends a copy of a list of the violations to the tenant. It is hoped that voluntary compliance by the landlord will resolve the problem. However, if the landlord cannot be reached, fails to commence the repairs within fifteen days, or fails to make a good faith effort to correct the violations at any time thereafter, the tenant may give notice of his intention to repair and deduct. He must submit cost estimates to both the landlord and the enforcement agency if he intends to proceed; the estimates may include a charge for his own time if he will do the work himself. Before proceeding to make the repairs, he must await authorization from the enforcement agency which is to be forthcoming within ten days of the submission of estimates by the tenant, provided the estimated repair costs refer only to violations mentioned in the inspection report.<sup>91</sup> Once authorized, the tenant must proceed to repair within thirty days<sup>92</sup> and subsequently may deduct the cost, up to the stated limit, from rental payments.<sup>93</sup> In emergency situations, a second self-help provision under the Irvis bill<sup>94</sup> empowers the code enforcement agency to demand correction of the violation within 48 hours of receipt of notice. In either case, the remedy is not available if the defect was caused by deliberate or negligent acts of the tenant, his family, or invitees.<sup>95</sup>

The rent withholding provision, section 605, is basically a reiteration of the current Rent Withholding Act described earlier.<sup>96</sup> It differs in that the section applies only to Allegheny County and its municipalities, and not to Philadelphia, Erie, and the third-class counties.<sup>97</sup> Injunctive relief is authorized by section 601(b) for "any material noncompliance by the landlord with the rental agreement

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90. Section 603 is similar to UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.103, except that the latter does not contemplate the involvement of any administrative agency. There is no counterpart to the section in the Nolan bill.

91. If the agency withholds authorization, the tenant may revise and resubmit his estimates. Pa. House Bill 402, Printer's No. 441, § 603(b)(3) (March 1, 1977).

92. *Id.* § 603(b)(4).

93. *Id.* § 603(b)(5).

94. *Id.* § 604.

95. There is no comparable provision in URLTA, nor in the Nolan version of the bill.

96. See notes 40-43 and accompanying text *supra*.

97. Pa. House Bill 402, Printer's No. 441, § 605 (March 1, 1977).

or section 403, as well as damages for any noncompliance thereof.”<sup>98</sup> In situations where the landlord has deliberately or negligently failed to supply heat, water, hot water, electricity, or other essential services, an equity action to restore such services may be brought immediately and may be brought *ex parte* if reasonable efforts to notify the landlord have been made.<sup>99</sup> If the landlord’s action was willful and deliberate, he may be liable for civil penalties not exceeding \$500.<sup>100</sup>

The Nolan amendments retained the Irvis bill’s language of implied warranty of habitability, but added some exceptions and eliminated certain tenant remedies. Section 405 of House Bill 600, as amended on June 14, 1976, establishes the landlord’s duty to maintain fit premises in much the same language as the original section 403 in the Irvis bill, except that the landlord’s duty is conditioned upon the tenant’s having met all of his obligations.<sup>101</sup> Section 405 of the Nolan amendments allows the parties, by a good faith written agreement, to shift specified maintenance and repair responsibilities to the tenant.<sup>102</sup> The bill’s revised article VI, covering tenant remedies, eliminated the provisions for termination, self-help—emergency or otherwise—and rent withholding,<sup>103</sup> as well as *ex parte* injunctive relief.<sup>104</sup> Under the Nolan amendments, the tenant

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98. A similar provision is found in the UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.101(b), and appears in § 601 of the Nolan version as well.

99. Pa. House Bill 402, Printer’s No. 441, § 606 (March 1, 1977). This provision differs from URLTA, which in such situations allows the tenant, without consulting any public agency to (1) procure the needed essential service and deduct its cost from the rent; (2) recover damages based on the diminution of the fair rental value of the unit; or (3) procure reasonable substitute housing for the duration of the landlord’s noncompliance, for which time he is excused from paying rent and may recover the cost of the substitute lodging (up to the amount of his usual periodic rent) and attorney’s fees. UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 4.104. None of these remedies is included in the Nolan bill. It is noteworthy that § 4.104 specifies a method of measuring damages for breach of duty to repair or maintain premises. Neither Pennsylvania legislative proposal contains such a measure.

100. Pa. House Bill 402, Printer’s No. 441, § 606(b) (March 1, 1977). Other provisions of the Irvis bill provide tenant remedies for a landlord’s failure to deliver possession, § 602, fire or casualty damage, § 607, and willful and deliberate ouster, exclusion, or diminution of essential services, § 608. The Nolan version provides similar remedies in the two former situations, but weaker remedies in the one last mentioned. *See* Pa. House Bill 600, Printer’s No. 3473, §§ 602, 604, 605 (June 14, 1976).

101. *See* note 86 *supra*.

102. *Id.*

103. The Nolan bill specifically repeals the Rent Withholding Act of 1966. Pa. House Bill 600, Printer’s No. 3473, § 1202 (June 14, 1976). *See* note 87 and accompanying text *supra*.

104. *See* note 99 and accompanying text *supra*.



is left with two remedies for breaches of the lease or implied duties by the landlord: a suit for injunctive relief and damages,<sup>105</sup> and notification of the code enforcement agency.<sup>106</sup>

A comparison of the warranty provisions of the Irvis and Nolan landlord-tenant bills shows that the former provides substantially greater remedies for tenants than the latter:

(1) The Nolan version permits the shifting of specified landlord duties to the tenant, if done in good faith, while the Irvis version does not. However, both set essentially the same standard for the warranty—compliance with code provisions materially affecting health and safety.

(2) The Nolan version relies solely upon judicial remedies—injunctive relief, damages, and criminal penalties—whereas the Irvis version adds administratively supervised self-help provisions, allowing the tenant to apply rent to repairs or to withhold rent under supervised procedures.

(3) Only the Irvis bill makes specific provision for meeting emergency situations involving life-threatening code violations.

(4) The Nolan version removes the existing remedy of rent withholding, while the Irvis bill adds new remedies: rent application and termination of the lease, as well as injunctive relief.

(5) The Nolan bill does not allow a tenant to terminate the lease for breach by the landlord of his duty to repair.<sup>107</sup>

#### IV. THE IMPLIED WARRANTY RECONSIDERED

Since both the Nolan and the Irvis versions adopt the implied warranty of habitability, the Pennsylvania legislature will probably join the national trend and enact a warranty provision regardless of how it reconciles the differences between the versions regarding remedies. A review of recent literature concerning the warranty, however, suggests that the legislature might do well to take heed

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105. Pa. House Bill 600, Printer's No. 3473, § 601 (June 14, 1976).

106. *Id.* § 603.

107. There are other significant differences between the two Pennsylvania bills that will not be examined here. For example, the Nolan bill contains a section on security deposits, § 402; the Irvis version does not. The Irvis proposal has provisions barring retaliatory action by the landlord, § 901, whereas the Nolan bill does not.

and evaluate the reasons why disillusionment with the warranty and its underlying assumptions has begun to appear.

### A. *The Housing Shortage and Disparity of Bargaining Power*

One justification for establishing an implied warranty is that the shortage of code-standard, low-income housing places the prospective tenant in a grossly inferior bargaining position. The opinion in *Javins v. First National Realty Corp.*<sup>108</sup> concluded that this disparity forces the tenant to accept lease terms and conditions that no one would accept if alternatives were available. One such term is the placing of the burden of making repairs on the tenant, a burden which the warranty prevents. Critics of the implied warranty acknowledge that there may be a housing shortage, but argue that the shortage is substantially aggravated by abandonment of residential properties by landlords. Public policies which oblige landlords, even if they are wealthy, to make uneconomic investments—that is, expenditures which reduce their earnings below the minimum that makes continuance in business worthwhile—encourage disinvestment, leading to abandonment and a reduction in the supply of low-rent housing.<sup>109</sup> Studies indicate that in neighborhoods experiencing considerable abandonment, code enforcement hastens the occurrence of this chain of events.<sup>110</sup> The acceptance of an implied warranty, which often includes private code enforcement, has the same effect.

Critics question the “disparity of bargaining power” assumption

108. 428 F.2d 1071, 1079 (D.C. Cir. 1970).

109. Abbott, *supra* note 1, at 66-86; Meyers, *supra* note 14.

110. For example, one study concluded:

By the time a neighborhood has degenerated to this extent . . . the enforcement of housing codes . . . may merely accelerate the abandonment process. The investor then faces the choice of making the expenditures necessary to bring his property up to code standards, and possibly, losing this additional investment or abandoning his property and thereby losing its capital value. If the present capital value is small compared with the expenditures required to satisfy code standards, he may well discover that the optimal strategy is to walk away from the property.

G. PETERSON, A. SOLOMON, H.M. MADJID & W. APGAR, *PROPERTY TAXES, HOUSING AND THE CITIES* 43 (1973). See G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* xix (1973) (“[c]ode enforcement, for example, when private owners are fleeing the market, becomes self-defeating”); CENTER FOR COMMUNITY CHANGE & NATIONAL URBAN LEAGUE, *THE NATIONAL SURVEY OF HOUSING ABANDONMENT* 64 (3d ed. 1972): “In many instances, code enforcement in Detroit acts as the ‘tipping point’ in the decision to abandon a property and as such it is reducing rather than increasing the supply of housing available to the poor.”

as well. The phenomenon of abandonment may reflect the reality that many landlords in low-income areas are scarcely better off financially than their tenants; the popular stereotype of the wealthy slumlord is the exception rather than the rule.<sup>111</sup> It has been argued that, in effect, the implied warranty is a redistribution of income from landlords to tenants for which there is no basis in justice or equity. If income is to be redistributed, it should be taken from all persons above a certain income, not merely from those who, rich or poor, are distinguished only by ownership of rental property.<sup>112</sup> But overriding this ethical objection is the pragmatic one that few will continue to invest in low-rent housing once it becomes clear that they will operate at a loss.

Actually, the housing shortage is not uniform; what is in short supply in most areas is code-standard, low-rent housing.<sup>113</sup> In most areas there is an adequate supply of decent housing at higher rents, and substandard low-rent housing.<sup>114</sup> National housing policy recognizes that only if the existing housing stock is conserved can new construction eventually bring about a reduction in the proportion of substandard housing.<sup>115</sup> Policies aimed at conserving decent housing

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111. For example, in one study of abandonment in Newark, N.J., 47.2% of the landlords interviewed said they earned \$11,000 a year or less, 31.1% earned \$8,000 or less. G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* 312 (1973), cited in Meyers, *supra* note 14, at 881 n.9.

112. Abbott asserts:

[M]any slum landlords have not deliberately purchased substandard housing to squeeze profits out of wretched, low income tenants. They bought or inherited sound units in sound neighborhoods and have been caught in rapid neighborhood transition and filtering. They are not earning large profits and would sell if any market existed for their units.

Abbott, *supra* note 1, at 114. See also G. STERNLIEB, *THE URBAN HOUSING DILEMMA: THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING* 452-503 (1972); G. STERNLIEB, *THE TENEMENT LANDLORD* 121-84 (1966); G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* 53-133 (1973); M. STEGMAN, *HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE* 27-49 (1972).

113. Nearly 20% of the 63.4 million households in the country experience some form of housing deprivation. Physically inadequate units and high rent burdens each affect 6.9 million households, while overcrowding affects 1.2 million. Abbott, *supra* note 1, at 96, citing JOINT CENTER FOR URBAN STUDIES OF M.I.T. & HARVARD UNIVERSITY, *AMERICA'S HOUSING NEEDS: 1970 to 1980*, at 4-7, 9 (1973).

114. See Abbott, *supra* note 1, at 35. See also authorities cited at note 110 *supra*.

115. A national policy of housing conservation is expressed in the Housing and Community Development Act of 1974:

The Congress further finds that policies designed to contribute to the achievement of the national housing goal have not directed sufficient attention and resources to the preservation of existing housing and neighborhoods, that the deterioration and aban-

in economically viable neighborhoods may have contrary effects in marginal neighborhoods. Obliging a landlord in a viable neighborhood to repair may successfully deter him from neglecting his property since it will be possible for him to recover his outlay from his property's income.<sup>116</sup> In a poorer, marginal neighborhood, requiring landlords to repair regardless of whether it is economically rational for them to do so is likely to encourage landlords with large holdings to sell out, and smaller landlords to abandon their properties. Statutory provisions based on an implied warranty must take these considerations into account if they are not to operate counterproductively.

### B. *Derivation of the Standard of Habitability*

An important issue in considering the implied warranty is the standard of habitability it imposes on the landlord. To some courts, "habitability" is synonymous with housing code standards. In recognizing the implied warranty for the first time in Pennsylvania, the Court of Common Pleas of Philadelphia cautioned that the warranty "does not require the landlord to insure that the leased premises are in perfect, aesthetically pleasing condition; but it does mean that the bare living requirements must be maintained."<sup>117</sup> The court added, however, that "the very least the landlord should do is to comply with the standards set by the local housing code."<sup>118</sup> The court apparently equated the housing code standards with those required to maintain bare living standards.

Other courts have approached this problem with greater flexibil-

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donment of housing for the Nation's lower income families has accelerated over the last decade . . . and has partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction. Housing and Community Development Act of 1974, § 801(1)(b), 42 U.S.C.A. § 1441a(b) (West Supp. 1977).

116. According to some commentators, a likely effect of strict code compliance in sound neighborhoods will be to pass on compliance costs to tenants and home buyers; thus, the supply of low-cost housing would not increase. See Abbott, *supra* note 1, at 69; Meyers, *supra* note 14, at 889-93.

117. Derr v. Cangemi, 66 Pa. D. & C.2d 162, 167 (C.P. Phila. Co. 1974).

118. *Id.* at 167. See Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969), in which a landlord was held to have breached an implied warranty of habitability because rats had invaded luxury rental housing from adjacent property. The landlord immediately called in an exterminator upon receiving the tenant's complaint but the tenant vacated after three days and recovered all rent previously paid.

ity. For example, in *Berzito v. Gambino*,<sup>119</sup> a case which upheld a tenant's defense of breach of covenant<sup>120</sup> of habitability in an action for unpaid rent, the New Jersey Supreme Court stated: "Not every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The conditions complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person."<sup>121</sup>

Violations of applicable housing, building, or sanitary regulations were "factors. . . meriting consideration" in determining whether the covenant had been breached, but the court mentioned others as well: whether the nature of the deficiency or defect is such as to affect a vital facility; the potential or actual effect upon safety and sanitation; the length of time the defect persisted; the age of the structure; the amount of rent; whether the tenant could be said to have waived the defect or was estopped to complain; and whether the tenant was in any way responsible for the defective condition.<sup>122</sup> *Berzito* clearly suggests that code standards and habitability standards are not necessarily and invariably synonymous.

Moreover, studies of housing codes have concluded that there is little empirical basis for the proposition that housing code standards achieve their stated purposes of protecting health and safety,<sup>123</sup> and it has been argued that the codes represent an extension of subjective middle class housing expectations to the society at large.<sup>124</sup> The

119. 308 A.2d 17 (N.J. 1973).

120. The case dealt with a covenant that was express, not implied; however, the court said that the distinction was immaterial under the circumstances. *Id.* at 21. The New Jersey court had earlier recognized the implied warranty of habitability in *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

121. 308 A.2d at 17.

122. *Id.* at 22.

123. See E. MOOD, *THE DEVELOPMENT, OBJECTIVE, AND ADEQUACY OF CURRENT HOUSING CODE STANDARDS: THREE CRITICAL STUDIES* (National Comm'n on Urban Problems Research Rep. No. 19, 1969). Mood concluded:

A critical examination of existing data upon which housing codes and standards are based will reveal that little is known about the requirements for family life. A majority of present housing code provisions are usually a combination of rule-of-thumb, personal experience, and professional judgment with limited supportive scientific data. *Id.* at 13. "The state of the art today is such that currently there is no single, comprehensive evaluation procedure available that will clearly and concisely delineate the presence or absence of a relationship between the quality of housing and health." *Id.* at 18, cited in Abbott, *supra* note 1, at 46.

124. S. PARROTT, *HOUSING CODE ADMINISTRATION AND ENFORCEMENT* 126 (1970), cited in Abbott, *supra* note 1, at 48. See generally Abbott, *supra* note 1, at 45-48.

adoption of subjectively determined minimum standards of habitability which exceed the standards of the marketplace may have the effect not of ending housing deprivation, but of transmuting one type of housing deprivation into another, less visible type. By compelling increased maintenance and repair outlays the codes arguably result in rent increases and aggravate the shortage of low-rent housing. They thus oblige low-income tenants to spend a higher proportion of their income for rent.<sup>125</sup> It is by no means established that the latter form of housing deprivation is a less serious threat to health or safety than the former.

The tendency to rely on housing codes as the basis for determining compliance with the implied warranty is therefore unsatisfactory. There may be no necessary relation between these codes and the attainment of decent housing, and, in addition, their standards may have a subjective basis which is unrealistic in view of the nature of the housing problem and the adverse results which may occur. Accordingly, the implied warranty should set as standards of conformance only those which are convincingly related to the attainment of the over-all goals of housing policies, not simply conformance with a housing code. The implied warranty should be directed towards supporting the following policies:

- (1) Eliminating conditions posing *demonstrably imminent* threats to health and safety.
- (2) Discouraging abandonment of low-rent, marginally habitable units.
- (3) Encouraging the upgrading of marginal units to the extent possible, consistent with (2) above.
- (4) Discouraging structural neglect of presently sound, economically viable housing.
- (5) Discouraging the kinds of visible exterior deterioration that contribute to the decline of other owners' property values in economically sound neighborhoods.
- (6) Fostering the development of a range of remedial alternatives.
- (7) Placing the landlord and tenant on a more equal footing to the extent possible or desirable.<sup>126</sup>

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125. Meyers, *supra* note 14, at 889-90.

126. Abbott reaches the conclusion that only those code provisions which bear an *empirically demonstrated* relationship to public policy objectives should be enforced. Because

Of course, these objectives are intended to be only supplementary to broader housing policies, beyond the scope of landlord-tenant law, aimed at increasing the supply of low-cost housing. A set of housing standards that served the above ordering of public policies would have to be strict enough to prevent the onset of deterioration in sound neighborhoods and lenient enough not to drive marginal properties off the market. Alternatively, the necessary flexibility might be supplied by the enforcement procedure rather than by the standards themselves. Administrative and judicial enforcement of a strict code might admit the defense of economic infeasibility as a bar to requiring full code compliance, except when violations seriously threaten health and safety.<sup>127</sup> This defense would mitigate the harsh effect that critics think the implied warranty would have on

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existing codes are not based on empirically demonstrated relationships, he favors discarding existing codes and developing bare minimal standards for housing facilities and services which are clearly necessary for health or safety. He also advocates a similarly simplified "neighborhood conservation code aimed at deterring exterior deterioration of dwellings and its neighborhood effects." Abbott, *supra* note 1, at 117-26. Allowing the internal decay of a house in a sound neighborhood might not immediately cause the "neighborhood effects" Abbott describes. But present codes with their admittedly subjective standards may encourage preventive maintenance inside the dwelling as well and may thereby prevent the building up of a financially infeasible backlog of repair work. Cf. 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). The Landman article is criticized in Abbott, *supra* note 1, at 104-08.

127. In *City of St. Louis v. Brune*, 515 S.W.2d 471 (Mo. 1974), municipal authorities sought to compel the owner of two derelict six-unit apartment buildings, located in a severely deteriorated neighborhood, to comply with an ordinance requiring facilities for a hot shower or bath in each unit. The owner contended that the estimated repair cost of \$7,800 per building was unreasonable since the buildings had no sale or loan value. The court found the "hot bath ordinance" unconstitutional as applied to the defendant's buildings because it did not bear a reasonable relationship to the public health, safety, morals or general welfare, and therefore exceeded the limitations on the police power, was confiscatory and a violation of due process. *Id.* at 476-77. The court also pointed out that the repairs would actually be harmful to the tenants because the resulting rent increase would necessitate their moving out. Thus, the evidence suggested that the purpose of the ordinance would not be served because the building would become vacant and vandalized. *Id.* at 477 (Henley, J., concurring). As one writer has pointed out, "the impact of the decision may be substantial. If economic imposition upon an owner is deemed controlling, then it is conceivable that landlords may seek to challenge other code provisions by pleading, as in *Brune*, that their property is not worth saving." Comment, *Economic Inequity as a Defense to the Housing Code: City of St. Louis v. Brune*, 10 *URB. L. ANN.* 335 (1975). Another commentator appraised the Missouri Supreme Court's decision as typifying "judicial beginnings to understand, but not really to articulate, the broad ramifications of the abandonment problem." Freilich, *Housing Code Enforcement or Abandonment: An Impossible Choice for the Courts*, 7 *URB. LAW.* ix, x (Spring 1975).

marginal landlords. Allowing good faith, knowing waiver by the tenant of portions of the implied warranty standard would serve the objective of allowing tenants a range of options in allocating their scarce resources, provided that the bargaining process is protected by judicial alertness to unconscionable or adhesionary terms.

### C. *Relative Ability to Repair*

The *Javins* court justified its recognition of the warranty, in part, by asserting that the landlord is better situated to perform repair and maintenance duties. In its view, the modern urban tenant "is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee."<sup>128</sup> In addition, the court observed that the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling, repair may require access to equipment and areas in the control of the landlord. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts to repair, nor to enable him to obtain financing for major repairs even if he were interested in making them.<sup>129</sup> Express lease provisions, by which the parties attempted to shift the landlord's duty to repair, according to the *Javins* court, would be "illegal and unenforceable";<sup>130</sup> such an agreement would "be inconsistent with the current legislative policy concerning housing standards."<sup>131</sup> There is, however, little evidence to support the assertion that landlords are more able to make repairs themselves than are the tenants,<sup>132</sup> or that landlords achieve economies of scale.<sup>133</sup>

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128. 428 F.2d at 1078.

129. *Id.* at 1078-79.

130. *Id.* at 1082 n.58.

131. *Id.* at 1082.

132. Interviews of owners of slum housing in Newark, New Jersey, in 1971 showed that 62.4% rarely or never did repairs themselves, whereas 23.1% did practically all their own repairs. G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* 85 (1973), cited in Meyers, *supra* note 14, at 880 n.7. Abbott believes that historically, landlords did the repairs themselves despite contrary provisions they placed in their leases. "The de facto assumption of the burden. . . apparently ceases when neighborhood change, declining demand, racial confrontations, or increased operating costs threaten the landlord with a loss." Abbott, *supra* note 1, at 28.

133. Meyers has stated: "[A]llocating the duty to repair . . . depending on the availability of scale economies, assumes that repairs *should* be made and hence assumes the conclusion sought to be proved." Meyers, *supra* note 14, at 880 n.7 (emphasis in original).



More fundamentally, the problem with establishing the implied warranty is not who must do the repair work but whether marginally profitable units should be made uneconomic by statutorily imposed repair requirements. When the continued viability of the unit is questionable, the tenant with the necessary knowledge and skills may actually be the one better situated to make repairs because only he possesses the ability to absorb their cost in kind rather than in cash. Allowing the parties to agree in good faith to shift some of the landlord's maintenance and repair duties to the tenant in these circumstances effectively increases the tenant's purchasing power. Assuming that his landlord would ultimately pass on to him most of the cost when the landlord accepts the responsibility for repairs, the tenant saves a portion of the difference between the cost of professionally done repairs and the value to him of his own work.<sup>134</sup>

It is difficult to justify voiding *all* express waivers of warranty without regard to the multiplicity of fact patterns that can arise, and without concern for the precarious financial situation of many landlords and tenants. The danger that waivers will circumvent the purposes of implied warranty can be greatly reduced by requiring that they conform to requirements such as those stated in section 405 of the Nolan version of House Bill 600.<sup>135</sup> Furthermore, a statutory provision might be added requiring that leases be written in language intelligible to the layman and disclose the tenant's basic rights under the proposed landlord-tenant law, including the landlord's duties under the implied warranty.<sup>136</sup> The defense of unconscionability might be made available to the tenant, but only if that

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134. See G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT* 231 (1973)(table showing "typical" zero cash flow posture of a two-family parcel in Newark).

135. Pa. House Bill 600, Printer's No. 1785, § 601(a) (June 23, 1975).

136. The Pennsylvania Supreme Court has strongly intimated that the law requires affirmative disclosure of a tenant's statutory rights. In considering "whether the Consumer Protection Law requires a landlord to notify a tenant in a lease of the tenant's statutory rights, because allegedly the absence of this notification is misleading or confusing to the tenant as a consumer of housing services," the court in *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 483, 329 A.2d 812, 829 (1974), acknowledged that a lower court had "already held that the Consumer Protection Law contemplates that in 'appropriate circumstances' a court may require affirmative disclosures by a seller to prevent misrepresentation and deception." *Id.* at 484, 329 A.2d at 829. The lower court decision referred to was *Commonwealth v. Foster*, 57 Pa. D. & C.2d 203, 208 (C.P. Allegh. Co. 1972). See Consumer Protection Act, PA. STAT. ANN. tit. 73, §§ 201-1 to -9 (Purdon 1971). The court in *Monumental* concluded that the authorities it cited undermined the opinion of the commonwealth court "that no law exists requiring affirmative disclosure of the tenant's statutory rights." 459 Pa. at 486, 329 A.2d at 830. However, it remanded the issue for further consideration by the commonwealth court.

term is given a fairly specific meaning. It might extend, for example, to agreements by tenants to be responsible for making capital improvements likely to last well beyond their leasehold, or to waive landlord responsibility for services basic to the health or safety of dwellers, such as the installation of a gas heater.<sup>137</sup> A further tenant safeguard would be judicial inquiry into whether the waiver clause was freely bargained for or was adhesionary despite statutory protection.

#### D. *Consumer Protection*

Many courts upholding the implied warranty of habitability maintain that no valid reason exists to deny to the consumer of housing the same measure of legal protection as that given to the consumer of less expensive or essential goods.<sup>138</sup> Following this argument, landlord-tenant law should be consistent with the general thrust of consumer protection statutes which recognize the need to protect the consumer who necessarily relies upon the seller's superior knowledge and control over the product.<sup>139</sup> There are, however, significant differences between the markets for rental housing and consumer products.<sup>140</sup> Performance standards of the type imposed by the Consumer Product Safety Act,<sup>141</sup> for example, make sense

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137. It can plausibly be argued, however, that the unconscionability defense is not necessary if the proposed requirements designed to assure that waiver agreements are knowingly and freely entered into are effective. A response is that perhaps those requirements will not be effective. The capital improvements-operating expense distinction might borrow language from the tax code. See I.R.C. § 263; Treas. Reg. § 1.263(a)-1 (1976).

138. See, e.g., *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 468, 329 A.2d 812, 821 (1974) (the tenant "is as much a consumer as is the purchaser of an automobile, household appliance, or any other consumer good"); *Elderkin v. Gaster*, 447 Pa. 118, 128, 288 A.2d 771, 776 (1972) ("[t]he caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices"); accord, *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795, 799 (Mo. 1972).

139. See, e.g., *Consumer Product Safety Act of 1972*, 15 U.S.C.A. §§ 2051-2081 (West 1974); *Truth in Lending Act of 1968*, 15 U.S.C. §§ 1601-1665 (1970); *Federal Hazardous Substances Act of 1960*, 15 U.S.C. §§ 1261-1274 (1970).

140. Demand for housing is unlike demand for consumer products. Housing is a major expense; its consumption is not easily definable, and the price varies infinitely with variations in the many characteristics that determine the desirability of a house. See Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act: An Economic Analysis*, 17 VILL. L. REV. 886, 895-97 (1972); text accompanying notes 141-43 *infra*.

141. The *Consumer Product Safety Act of 1972*, 15 U.S.C.A. §§ 2051-2081 (West 1974) is designed to protect consumers from injurious or hazardous products. It accomplishes this in a variety of ways, including the promulgating of performance standards; ordering the recall of harmful products or banning them altogether; requiring product certification and labeling; providing civil and criminal penalties for manufacturing, selling or distributing in commerce

only for mass-produced items. The manufacturer of such a consumer product is in a better position to prevent defects from occurring and to spread the cost of complying with the standards than is, for example, the third-hand owner of several units of slum housing. The imposition of liability on dealers and intermediaries by the Consumer Product Safety Act<sup>142</sup> has the effect of encouraging them to select only conscientious suppliers. Applying such a policy to second-hand housing—a commodity with a long life and a high likelihood of rapid deterioration under certain neighborhood conditions—would be analogous to making the seller of a second-hand, thirty year old automobile responsible for its proper functioning forever. Careful selection of the used car would have little or no impact on the quality of new cars being built.<sup>143</sup>

Even if it is proper to hold landlords to the same standard as other sellers of goods, critics of the implied warranty maintain that the use of a warranty standard based upon housing codes will not achieve that result. Furthermore, because the Uniform Commercial Code authorizes waiver of implied warranties by selling goods “as is”<sup>144</sup> and sets an implied warranty standard of “fair average quality,”<sup>145</sup> it actually provides less protection to consumers in general than a nonwaivable warranty of habitability, as usually defined, would provide to tenants. It would seem that the consumer protection argument can thus be turned on its head to justify recognition of “as is” leases in order to equalize tenants and other consumers. Yet such a conclusion would ignore the other objectives that housing code standards enforced by private warranty actions may serve, such as neighborhood conservation. The fact that the warranty of habitability is potentially more burdensome than Uniform Commercial Code warranties of fitness should not be ignored, however, and offers further justification for explicitly recognizing the defense

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products not in conformance with the applicable performance standards; and providing injunctive relief, damages, and private enforcement.

142. Consumer Product Safety Act of 1972, § 19(a), 15 U.S.C.A. § 2068(a) (West 1974).

143. See Abbott, *supra* note 1, at 130-31. It has been suggested to this writer that an analogy to a lessor of a second-hand car would be more appropriate. No one finds it commercially feasible to lease used cars; landlords appear to be reaching the conclusion that leasing apartments is not commercially feasible either.

144. U.C.C. § 2-316(3)(a) (1972 version) (“unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like ‘as is’”). See Abbott, *supra* note 1, at 30-34; Meyers, *supra* note 14, at 882.

145. U.C.C. § 2-314(2)(b).

of economic infeasibility and allowing in some circumstances express waiver of the warranty in residential leases.

E. *Enforcement of Code Standards by Private Right of Action*

Some courts have felt that the existence of housing codes means that "the housing code must be read into housing contracts."<sup>146</sup> They reason that the code is evidence of legislative intent that code standards be implemented by judges as well as by code enforcement agencies even when there is no statutory provision for recourse by the tenant to the courts. Thus, when a tenant pleaded code violations as a defense to nonpayment of rent, the Illinois Appellate Court upheld the defense, notwithstanding an express provision in the lease that the tenant had inspected the premises and found them satisfactory despite the violations.<sup>147</sup> The court concluded that such a lease provision was either "against public policy or . . . prohibited by public law," and refused "to aid either party" by enforcing it.<sup>148</sup> Moreover, in *Javins*, the D.C. Circuit Court of Appeals, noting that housing code enforcement "has been far from uniformly effective,"<sup>149</sup> quoted from an earlier Wisconsin decision where it was observed: "to follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards."<sup>150</sup>

It has been argued that this judicial view distinguishes provisions regarding standards from those concerning enforcement. If the apparent intent behind the code standards is to be honored, so should the intent behind the enforcement provisions, which typically limit enforcement authority to a designated municipal code enforcement agency. Presumably, the intent is to have the codes enforced with some administrative discretion, perhaps in order to avoid literal-minded interpretations that would worsen rather than improve housing conditions in certain neighborhood situations.<sup>151</sup> Code legislation, under this view, gives the enforcement agency a right of

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146. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

147. *Longenecker v. Hardin*, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970).

148. *Id.* at 473, 264 N.E.2d at 880, *citing* *Estate of Smythe v. Evans*, 209 Ill. 376, 383, 70 N.E. 906, 909 (1904).

149. 428 F.2d at 1082.

150. *Id.*, *citing* *Pines v. Persson*, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 411-12 (1961).

151. *See* Meyers, *supra* note 14, at 901-02. ("[t]he Restatement bifurcates the code, preserving the standards and discarding the remedies").

action against the lessor of substandard premises; it does not confer by implication such a right upon the lessee.

Since the implied warranty issue is currently before the Pennsylvania legislature, discussion of previously expressed legislative intent is less significant than it might otherwise be. Whether the legislature should presently provide for private housing code enforcement through implied warranty actions ought to depend on the likely impact of enforcement alternatives on the policies that the standards are intended to serve. It has already been suggested that a private right of action based on substantial noncompliance with the housing code is likely to encourage abandonment of marginal dwelling units unless the defense of economic infeasibility is permitted. With such a defense, abandonment might still be encouraged if attorneys' fees and lengthy delays result from the judicial process, or if economic infeasibility is construed too narrowly by the courts. Nevertheless, private enforcement might facilitate settlement of disputes by the parties themselves, who could agree on a mutually acceptable trade-off between rent reductions and shifted maintenance duties which a code enforcement agency might be reluctant to propose or permit since it is obligated to enforce the applicable code provision. Resort by the tenant to enforcement by the health department or a similar agency has both the advantages and risks of binding arbitration.

If extra cost and excessive delays can be avoided, a private right of action based on the implied warranty can be reconciled with the policies underlying standards of habitability. In urban areas, costs and delays can probably best be reduced by creating and expanding the jurisdiction of special housing tribunals like the Pittsburgh Housing Court,<sup>152</sup> which presently is limited to hearing cases

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152. PITTSBURGH, PA., ORDINANCE 375 (Aug. 7, 1967) (established the Housing Court as "a single magistrate's court before which may be brought all violations of statutes, ordinances and regulations relating to housing whether enforced by the City of Pittsburgh or the Allegheny County Health Department." Action by the Pennsylvania legislature was required to expand the jurisdiction of the preexisting police magistrates of the city to include prosecutions of violations of health and housing ordinances throughout Allegheny county, PA. STAT. ANN. tit. 53, § 22267 (Purdon Supp. 1976-1977), and to authorize the county health department to bring actions before the housing court. PA. STAT. ANN. tit. 16, § 12027 (Purdon Supp. 1976-1977). Cf. PA. CONST. art. V, § 21 (schedule to the judiciary article). The housing court has been described as

a court of limited jurisdiction, not of record, and a part of the Minor Judiciary System of Pennsylvania . . . [and] it exercises summary criminal jurisdiction. . . . [A]ll of the cases take the form of prosecutions of municipal ordinances, of either the City of

brought by the Allegheny County Health Department, the Fire Department, and the Bureau of Building Inspection of the City of Pittsburgh. Submitting implied warranty actions to adjudication by a specialized court seems preferable to purely administrative resolution; the administrative body would otherwise be both prosecutor and judge of housing code violations, and it would be difficult to maintain both prosecutorial zeal on behalf of tenants and judicial recognition of the landlord's situation under one administrative aegis. Reliance on nonspecialized tribunals would sacrifice the advantages of expertise. Allowing private actions in a housing court, subject to the defense of economic infeasibility, would provide at least as much flexibility as purely administrative enforcement, with more, rather than less, concern for the economic consequences of enforcement.<sup>153</sup> It must be admitted, however, that often the advantages of allowing the tenant to bring suit rather than requiring him to contact the code enforcement agency which would then bring the action are not great, especially where the agency responds promptly and vigorously to tenant complaints. However, where the code enforcement agency is demoralized, understaffed and under-financed, poorly trained, or corrupt, the private action would be of greater utility.<sup>154</sup>

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Pittsburgh or the County of Allegheny. All of the relevant ordinances provide for fines upon conviction in a summary proceeding, and permit imprisonment in default of payment of a fine.

A. Penkower, *The Housing Court of the City of Pittsburgh* (1976)(unpublished speech in Health and Welfare Planning Association Library, Pittsburgh, Pa.). See also Comay, *The City of Pittsburgh Housing Court*, 30 U. PITT. L. REV. 459 (1969).

153. The Pittsburgh Housing Court's magistrate has observed that [t]he Court's output (decisions rendered) is measurably influenced by, and in turn influences, related governmental and civil housing programs, as well as aspects of the private housing market. The Court's decision whether to order demolition of a dilapidated house, for example, will be affected not only by the condition of the house as appears from the evidence, but also by the availability of substitute housing and relocation facilities for the tenant's family. Conversely, the extent to which increased Code enforcement and Housing Court decisions take unfit housing off the rental market has a significant effect on the already thin supply of low income housing and ever-inadequate facilities for relocation.

Comay, *The Housing Court*, 30 U. PITT. L. REV. 459, 462-63 (1969). Comay recommended that the court be given equity power, in rem jurisdiction, and discretionary jurisdiction over actions for rent, distraint, and eviction. *Id.* at 478-79. For an evaluation of the court's performance, see SCHOOL OF URBAN & PUBLIC AFFAIRS, CARNEGIE-MELLON UNIVERSITY, *THE PITTSBURGH HOUSING COURT AND THE CODE ENFORCEMENT PROCESS* (1976).

154. For a review of the extensive literature on the widespread inadequacy of administrative enforcement of housing codes see Abbott, *supra* note 1, at 49-56.

### F. *Specific Remedies*

Remedies which are substantially similar to those in the Irvis bill recently introduced as House Bill 402, are acknowledged in the Restatement (Second) of Property, which justifies giving the tenant the right to terminate the lease and sue for damages for breach of warranty on the basis of the contractual nature of the lease and the mutual dependency of covenants.<sup>155</sup> The Second Restatement admits that termination is not apt to be a viable remedy for a tenant because of the difficulty of finding better housing elsewhere;<sup>156</sup> it proposes rent withholding and rent application, as well as rent abatement, as alternative remedies.<sup>157</sup> Rent abatement is not included in the Irvis bill, and has been described by one court as giving the tenant the option of "terminating the cause of the constructive eviction where . . . the cause is the failure to make reasonable repairs."<sup>158</sup> Rent withholding has the same underlying rationale, but requires the landlord to control the performance of repairs, rather than allowing the tenant to do so. The use of the escrow account in rent withholding facilitates concerted action by numerous tenants in one building; at the same time, it creates a fund which serves as security to the landlord for the unpaid rent due.<sup>159</sup> Another remedy included in the bill is the mandatory injunction, which is often effective when legal remedies are not, such as when emergency repairs are needed; it enables a court to deter delaying tactics by ordering the landlord to actively perform his obligations.<sup>160</sup>

Criticism of these implied warranty remedies has been directed primarily at their effect on the landlord of marginal dwelling units. The awarding of damages has been attacked for the potentially punitive awards that certain proposed measuring procedures would yield.<sup>161</sup> A defect in rent application is that it permits the tenant to determine the extent, quality, and price paid for repairs;<sup>162</sup> rent

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155. RESTATEMENT (SECOND) OF PROPERTY §§ 10.1-.2 (1977).

156. *Id.* § 5.1, Comment b, at 170.

157. *Id.* § 5.1.

158. *Marini v. Ireland*, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970).

159. See Pennsylvania Rent Withholding Act, PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976-1977); Abbott, *supra* note 1, at 59.

160. See Abbott, *supra* note 1, at 64, 135-36.

161. See Meyers, *supra* note 14, at 883. Abbott, too, finds damage provisions for breach of the landlord's implied warranty generally punitive. Abbott, *supra* note 1, at 20-25.

162. For criticism of rent application see Abbott, *supra* note 1, at 57-58.

withholding, on the other hand, has been criticized from the tenant's perspective since it allows lengthy delays during which he must pay full rent without obtaining the repairs he is seeking.<sup>163</sup>

Remedies such as rent withholding and rent abatement should also be judged by how well they effectuate the policies underlying housing standards. To the extent they are punitive or require expenditures that exceed the landlord's resources, they may contribute to abandonment. If they serve to motivate the negligent landlord to make reasonable expenditures to maintain his property, they are of positive value. It would appear that the \$300 limit on expenditures under the "self-help" rent application procedure<sup>164</sup> of the Irvis bill would preclude large, forced, uneconomic investments. However, \$300 (or the equivalent of two months' rent) may be a great deal of money for some landlords, especially if rent application is repeatedly invoked; the weakness of the self-help provisions is that they do not allow the landlord to assert the defense of economic infeasibility. The required intervention of the code enforcement agency to authorize the repairs will do nothing to encourage a gradual, phased program of compliance that takes into account the landlord's ability to pay. Similarly, rent withholding will not be enforced to attain mere compliance with essential standards; the withheld rent will finance substantial code compliance.<sup>165</sup> By the end of six months the marginal landlord will perhaps have decided to abandon the property.<sup>166</sup> These considerations suggest that although rent

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163. See Abbott, *supra* note 1, at 58-60 for a discussion of the effects of rent withholding.

164. Pa. House Bill 402, Printer's No. 441, §§ 603-604 (March 1, 1977).

165. See BUREAU OF ENVIRONMENTAL HEALTH, ALLEGHENY COUNTY HEALTH DEPARTMENT RENT WITHHOLDING AND HOUSING CODE ENFORCEMENT (1970). The Department's regulations contain a point system for weighing the seriousness of each possible violation of the code.

166. See, e.g., Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821 (1972). Abbott summarized findings concerning a low-income, minority neighborhood, in which from July, 1970, to February, 1972:

"[O]ver fifteen percent of the dwelling units . . . were declared unfit and eligible for the escrow procedure. But the percentage of closed escrow accounts in which compliance had been obtained was only 31.4 percent of the units for which rent withholding had commenced. For the entire period from the enactment of the withholding statute in 1968 through February 1972, compliance was only forty-one percent. Most disturbing, of all of the units entering escrow during the period, some thirty-nine percent were vacant by February 1972. The conclusion seems inescapable that the escrow procedure forced units off the market. The low compliance percentage suggests that many landlords were unable, rather than unwilling, to make repairs when faced with loss of rent revenues."

Abbott, *supra* note 1, at 60. More recent data from the Allegheny County Health Department,



withholding and rent application may be viable remedies in some instances, they should be subject to the supervision of a housing court, which should be empowered to grant equitable relief and to recognize economic infeasibility as a partial or total defense.

## V. LEGISLATIVE BILLS RECONSIDERED

The preceding discussion provides a basis for assessing the relative merits of the Irvis and Nolan legislative proposals and their treatments of the implied warranty of habitability; a number of conclusions are suggested. First, the Nolan provisions allowing good faith modification in writing of the landlord's duties under the im-

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the code enforcement agency for the Pittsburgh area, shows that in 1975, in one of the county's five districts (District C), only 38.4% of the houses certified as eligible for rent withholding had their violations abated. Of the total, 7% of the houses were demolished, 5.7% were sealed, and over 48% of the 242 dwelling units were left vacant. In the rest of the county, the abatement rate was higher (66.9%) and the vacancy rate lower (21.3%). But from 1966 to 1975, of 3,724 disbursements from escrow accounts to owners or tenants, 49.9% went to owners. ALLEGHENY COUNTY HEALTH DEPARTMENT, RENT WITHHOLDING SUMMARY, 1966-1975. If it is assumed that most of the remaining 50.1%, or approximately 1,866 units were ultimately abandoned between 1966 and 1975, as seems probable, a figure remains that can be very roughly compared with the *total* estimated loss of housing stock (from demolitions, mergers, etc.) in the *entire* county for only the years 1970-74—20,570 units. ALLEGHENY COUNTY DEPARTMENT OF PLANNING AND DEVELOPMENT, HOUSING 1975, at 1.3. It thus appears that roughly 5% of the county's housing loss had some connection to the rent withholding program. The county's housing stock in 1975 consisted of 459,623 standard and 83,316 substandard units. *Id.*

The reasons explaining the inability of rent withholding to pressure close to 50% of affected landlords in Allegheny County to take steps to avoid forfeiting six months' rent have not been documented. The six month statutory period can be and is often extended indefinitely until the building is certified as fit for human habitation. See *Klein v. Allegheny County Health Dep't*, 441 Pa. 1, 269 A.2d 647 (1970). During the indefinite period, the tenant cannot be evicted. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976-1977).

If the landlord does not bring his building within the Department's classification of "fit for human habitation" by the end of six months, the total amount of rent collected is returned to the tenant less any deductions for utilities. *Klein v. Allegheny County Health Dep't*, *supra*. The seriousness of the economic impact upon the landlord depends on whether he has income from other properties or sources and can use the losses as a tax deduction. The administrator of the Allegheny County program points out that rent withholding can claim credit for inducing landlords to repair their property in 58.3% of the 319 cases in 1975, in which disbursements of monies withheld in the program were made to the landlord or the tenant; these repairs might not otherwise have been made. He believes that the program is beneficial despite deficiencies in the law, and that equity jurisdiction in the Pittsburgh Housing Court would help to avoid an overly mechanical enforcement of the housing code. Interview with Anthony Ovesney, Administrator, Rent Withholding Program, Allegheny County Health Department (Nov. 19, 1976). See BUREAU OF ENVIRONMENTAL HEALTH, ALLEGHENY COUNTY HEALTH DEPARTMENT, RENT WITHHOLDING AND HOUSING CODE ENFORCEMENT (1970).

plied warranty<sup>167</sup> should be preserved. Acceptance by the tenant of repair duties that were not freely assented to or that would constitute unjust enrichment of the landlord, however, should be judicially voidable as adhesionary or unconscionable; agreements to tolerate imminent, life-threatening hazards should be voidable on policy grounds.<sup>168</sup> Second, neither legislative proposal provides specifically for the defense of economic infeasibility. This defense should be statutorily established to put the tenant on notice that it exists and to avoid the cynicism that arises among tenants and housing inspectors when judges recognize it anyway, as happens in many jurisdictions.<sup>169</sup> It should be made clear, in the statute itself or through judicial interpretation, that economic infeasibility does not mean simply *some* expense or financial inconvenience. The term must be understood in terms of an investment analysis, taking into consideration the anticipated rate of return over time, risk, market conditions, and any other factors bearing upon the likelihood that the landlord will be compelled to abandon, not merely to sell, his property. Past earnings might be considered, but the temptation to punish the landlord for past "milking" of the property must be avoided. The social utility of punishing the landlord is less than that of encouraging him to maintain his property to the highest attainable standard in the future. Third, the defense of infeasibility should not be permitted when the alleged breach of warranty poses a substantial threat to the health or safety of the tenant. Economic problems of the landlord, no matter how severe, cannot justify perpetuation of life-threatening hazards; abandonment is preferable.

Fourth, the Irvis bill's remedies—especially rent application and rent withholding—should be supervised, particularly in urban

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167. Pa. House Bill 600, Printer's No. 3473, § 405(B), (C), (D) (June 14, 1976).

168. Another set of standards that should not be waivable, although it could be shifted to the tenant, concerns external cosmetic maintenance of properties which affects neighborhood property values. An unsightly yard or unpainted facade has a direct impact on the value of property on the block and, by extension, in the neighborhood. Poor maintenance thus tends to set in motion a snowballing process of neighborhood deterioration. The range of options open to a landlord and his tenant should not include alternatives which impose financial penalties on other neighbors. See note 126 *supra*.

169. Abbott, based on his review of literature concerning the ineffectiveness of housing code administration, argues that judicial recognition of the economic infeasibility of repair in some instances accounts for the court's reluctance to impose meaningful penalties on housing code violators. This failure to punish contributes, in turn, to low morale among code enforcement personnel. Abbott, *supra* note 1, at 50-51.

areas,<sup>170</sup> by a housing court in order to separate the police and judicial functions currently vested in the code enforcement agency and to allow flexible administration of the law. Fifth, to the extent that it is attainable without compromising the objectives of neighborhood conservation and prevention of abandonment, an effort should be made to equalize the bargaining power of landlords and tenants. The present incomprehensible form leases make a mockery of contract notions of bargained-for exchange;<sup>171</sup> more importantly, they obscure from the parties their true rights and duties, are deceptive, and encourage disputes.<sup>172</sup> House Bill 600 contains a limited disclosure provision;<sup>173</sup> this should be expanded to include disclosure of the implied warranty section of the act in the leases themselves. Section 405 of the Nolan bill contains the rules governing modifications of warranty obligations; these, too, should be disclosed in leases. Further encouragement of fair bargaining would come from enactment and disclosure in leases of the Irvis provisions concerning retaliatory actions by the landlord.<sup>174</sup> Finally, the standard of habitability established by legislation should not be equivalent to total compliance with the housing code. Such a standard is not sufficiently flexible and is unrealistic in view of the complexity of landlord-tenant problems.

## VI. OTHER APPROACHES TO NEIGHBORHOOD CONSERVATION AND HOUSING MAINTENANCE

Although the preceding analysis supports the implied warranty concept, it does so unenthusiastically since it is apparent that the warranty is not the answer to the housing shortage which initially created the impetus toward concern for tenant rights.<sup>175</sup> Policy mea-

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170. The Rent Withholding Act is not applicable to townships and boroughs of Pennsylvania. See note 41 and accompanying text *supra*.

171. In a survey of tenants in Toronto, 69% of the sample denied that their lease contained a covenant placing repair responsibility on them, when in fact all the standard lease forms used in the city contained such covenants. See Abbott, *supra* note 1, at 28 n.156, citing ONTARIO LAW REFORM COMM'N, INTERIM REPORT ON LANDLORD AND TENANT LAW APPLICABLE TO RESIDENTIAL TENANCIES app. A (1969).

172. See note 136 *supra*.

173. Pa. House Bill 600, Printer's No. 3473, § 404 (June 14, 1976).

174. Pa. House Bill 402, Printer's No. 441, § 901 (March 1, 1977).

175. A similar assessment is made of implied warranty remedies in Levy, *Adjusting the Economic Relationship of Landlord and Tenant—Rent Alteration Remedies*, 11 URB. L. ANN. 155 (1976).

asures outside the scope of landlord-tenant law, however, offer possibilities for increasing the supply of decent low-cost housing. Among these are housing assistance subsidies,<sup>176</sup> housing allowance programs,<sup>177</sup> subsidized home repair loans to moderate-income homeowners and landlords,<sup>178</sup> and tax incentives for home improvements. Such governmental programs, in effect, redistribute income from the non-housing to the housing sector of the economy in such a way as to improve the investment prospects of owners of low-rent housing. Moreover, local government agencies<sup>179</sup> that administer them are in a position to ask the beneficiaries for something in return. Among the conditions that might be requested in return for subsidies would be a reduction or elimination of exceptions to the landlord's duties, and a commitment to preventive maintenance. Just as the state requires that private automobiles be insured, for example, beneficiaries of subsidies might be required to contract for pre-paid home maintenance services. An experimental service of this kind conducted by the nonprofit Neighborhood Housing Services, Inc. of Pittsburgh (N.H.S.), charged a flat fee for a year's term of specified maintenance whenever these were needed. Although major capital expenses, such as new wiring or heating systems, were not provided by N.H.S., such an insurance mechanism could ease the burden of risk allocation that suffuses the problems of landlord warranties. Some limitation on rent increases may also be requested in return for assistance. However, all such proposals must be scrutinized carefully to make certain they do not have the effect of discouraging landlord participation in the subsidy or assistance program.

## VII. CONCLUSION

An examination of recent legislative proposals for landlord-tenant reform in Pennsylvania suggests that the growing literature on the economic implications of strict housing code enforcement has been

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176. See Housing and Community Development Act of 1974, 42 U.S.C.A. § 1437f (West Supp. 1977).

177. See *id.* § 1701z-3.

178. See CITY OF PITTSBURGH, 1976 SIX YEAR DEVELOPMENT PROGRAM 16-21 (1976).

179. The City of Pittsburgh's Urban Redevelopment Authority, for example, administers several low-interest rehabilitation loan funds. See *id.*

given insufficient attention. The implied warranty of habitability concept is correctly viewed by its sponsors as a means of achieving more effective code enforcement. Nevertheless, by viewing the implied warranty solely as an expansion of the rights of the dispossessed, unintended consequences to its intended beneficiaries are ignored. An increased supply of decent low-cost housing should be the principal objective of the tenants' rights movement, and the burden is now on tenants' rights advocates to show how the expansion of tenant remedies can be accomplished without reducing the supply of habitable low-income housing.

The recognition of an implied warranty of habitability can be a useful means of equalizing the bargaining power of landlord and tenant. To invalidate all lease provisions which voluntarily shift specific elements of the burden of compliance to the tenant, however, seems likely to have negative effects already discussed. The recognition of tenant self-help remedies can be useful in reducing unequal access to legal protection and in encouraging maintenance of presently sound rental housing, but these remedies should be administered with due regard for their effect upon the financial condition of the landlord.

It thus appears that a synthesis of the Irvis and Nolan proposals would be better than either alone, since each version by itself does not adequately provide for the competing interests involved in tenant rights and general housing policies. This combination should also incorporate provisions responding to the general considerations discussed herein which are currently absent from the bills, such as an expanded housing court jurisdiction and the economic infeasibility defense.

As was mentioned earlier, the implied warranty has been adopted by either judicial or legislative action in other jurisdictions, and Pennsylvania appears on the verge of adopting the warranty by one or the other method. It is suggested that it should be adopted by legislative action because the legislature is in a better position to coordinate the warranty with other housing policies. Moreover, only the state legislature can create housing courts with broad-reaching jurisdiction.

Finally, it must be emphasized that the implied warranty is not a panacea; no single program or concept will achieve the desired goals of protecting tenant rights and creating and maintaining adequate housing. Failure to recognize this fact can only frustrate attempts to meet the needs of citizens of the Commonwealth.

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