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# Special Project: Public Housing

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# SPECIAL PROJECT

*The Special Project section appears for the first time in this issue of the Vanderbilt Law Review. The primary purpose of this section is to provide a vehicle for extensive discussion of an important and changing area of the law. Topics too broad to be covered in the standard student note are treated by a coordinated student writing team over the course of the school year. The Special Project provides students with a unique writing experience and readers with a valuable source of information. The current need for an examination of the public housing system and its relationship to the poor community led to the selection of this year's topic.*

# PUBLIC HOUSING

*Millions of families live in indescribable squalor. Slums and blighted areas are common to every American community. The sight of slums has become so familiar that the eye is dulled and the mind has long accepted slum housing as unavoidable even if unattractive.*

N. STRAUS, TWO-THIRDS OF A NATION 6 (1952).

*Proper homes for those who are unable to pay an economic rent is in my opinion as important a Government responsibility as it is for the Government to provide free schools, free parks, free highways and free health services.*

Remarks of Rep. Higgins, 81 CONG. REC. 4545 (1937)

TABLE OF CONTENTS


I. INTRODUCTION . . . . . . . . . . . . . . . . . . 879
II. THE SETTING . . . . . . . . . . . . . . . . . . 879
*A. The Problem* . . . . . . . . . . . . . . . . . 879
1. *Housing Conditions in the United States* . . . . . . 879
2. *Effect of Inadequate Housing* . . . . . . . . . 880
(a) *Crime* . . . . . . . . . . . . . . . . 880
(b) *Riots* . . . . . . . . . . . . . . . . 880
(c) *Health* . . . . . . . . . . . . . . . . 881

(d) *Morals* . . . 881
(e) *High Cost of Public Services in Ghetto Areas* . . 881
B. *Public Housing in the United States* . . . 882
1. *The Beginnings: 1867-1936* . . . 882
2. *The Housing Act of 1937* . . . 885
3. *The Aftermath: 1938-1948* . . . 888
4. *1949-1969* . . . 889
C. *The Goals of Public Housing* . . . 892
1. *Goals Primarily Benefitting the Non-Tenant* . . . 892
2. *Goals Which Benefit the Tenant* . . . 894
D. *Evaluation* . . . 895
1. *Adequate Housing* . . . 895
2. *Rehabilitation* . . . 896
E. *Why the Public Housing Need Has Not Been Met* . . . 897
1. *Group Views of Public Housing* . . . 898
(a) *Lack of Popular Support* . . . 898
(b) *Opposition to Public Housing* . . . 899
2. *Public Housing and American Values* . . . 900
(a) *Myth of the Home* . . . 900
(b) *Individualism* . . . 900
(c) *Integration* . . . 900
(d) *Desire for Tangible Results* . . . 901
3. *Internal Discouragement of Public Housing* . . . 901
F. *The Mechanics of Public Housing Today* . . . 901
1. *Administration* . . . 901
2. *Site Selection* . . . 903
3. *Planning and Construction of a Project* . . . 904
4. *Annual Contributions Contract* . . . 905
III. DETERMINING THE ELIGIBLE APPLICANTS . . . 907
A. *A Survey of Eligibility Requirements* . . . 907
1. *Federal Requirements* . . . 907
(a) *The Federal Statute* . . . 907
(b) *Administrative Regulations* . . . 908
(c) *Other Sources* . . . 909
(i) *Civil Rights Act of 1964* . . . 909
(ii) *Gwinn Amendment* . . . 910
2. *State and Municipal Requirements* . . . 910
3. *Local Housing Authority Requirements* . . . 911
(a) *Technical Requirements* . . . 911
(i) *Family* . . . 912
(ii) *Income* . . . 912
(iii) *Net Assets* . . . 914
(iv) *Housing Conditions* . . . 914
(v) *Residency* . . . 915

(b) *"Desirability" Requirements* . . . . . . . . 915
B. *Evaluation of Eligibility Requirements* . . . . . . . 917
1. *Uniform Standards Versus Local Discretion* . . . . 918
2. *Desirability Requirements* . . . . . . . . . . 919
C. *Recommendations and Conclusions* . . . . . . . . . 923
IV. THE ADMINISTRATION OF ADMISSIONS AND ASSIGNMENTS IN PUBLIC HOUSING . . . . . . . . . . . . . . . . . . 923
A. *The Admissions Process* . . . . . . . . . . . . . 924
1. *The Federal Requirements* . . . . . . . . . . . 924
2. *Local Practices* . . . . . . . . . . . . . . . 925
B. *Evaluation of Case Law Developments* . . . . . . . 928
1. *The Required Procedural Safeguards* . . . . . . . 929
2. *The Fair Hearing* . . . . . . . . . . . . . . 931
(a) *Sufficiency of Notice* . . . . . . . . . . . 932
(b) *Personal Appearance* . . . . . . . . . . . 933
(c) *Right to Cross-Examination* . . . . . . . . 933
3. *Judicial Remedies to Secure Due Process* . . . . . 935
C. *Tenant Assignment and the Problem of Discrimination* . . 937
1. *Federal Requirements* . . . . . . . . . . . . 938
(a) *The Free Choice Plan* . . . . . . . . . . . 938
(b) *Alternative Plans* . . . . . . . . . . . . 939
(c) *Compliance Measures* . . . . . . . . . . . 940
2. *Local Experience and Federal Policy* . . . . . . . 940
V. TENANT'S RIGHTS TO REMAIN IN PUBLIC HOUSING . . . . . . 944
A. *Termination of Public Housing Tenancies* . . . . . . 945
1. *Over-Income* . . . . . . . . . . . . . . . . 946
2. *Misrepresentation* . . . . . . . . . . . . . . 948
3. *Termination of the Lease* . . . . . . . . . . . 949
(a) *Termination Provisions* . . . . . . . . . . 949
(b) *Scope of Housing Authorities' Power to Cancel Leases* . . . . . . . . . . . . . . . . 950
(c) *The Sufficiency of Reasons for Cancellation* . . . 953
4. *Non-Visible Decisions to Evict* . . . . . . . . . 955
B. *The Right to A Hearing* . . . . . . . . . . . . . 956
1. *Pre-Circular Law* . . . . . . . . . . . . . . 956
2. *Effect of the Circular* . . . . . . . . . . . . 957
3. *Thorpe v. Housing Authority* . . . . . . . . . . 958
4. *Procedural Hearing Standards* . . . . . . . . . 959
(a) *Prior Hearing* . . . . . . . . . . . . . . 959
(b) *Hearing Procedure* . . . . . . . . . . . . 961
(i) *Informal Conference* . . . . . . . . . . 962
(ii) *Evidentiary Standards* . . . . . . . . . 962
(iii) *Right to Counsel* . . . . . . . . . . . 963
5. *Enforcement of Fair Procedures* . . . . . . . . . 963

C. *Judicial Prevention of Unjust Evictions* . . . . . . . 964
1. *Procedural Devices for Contesting Evictions* . . . . 965
(a) *Injunctions* . . . . . . . . . . . . . . 965
(b) *"Summary" Hearings* . . . . . . . . . . 966
2. *Legal Barriers to Avoiding Evictions* . . . . . . . 967
(a) *Confessed Judgments* . . . . . . . . . . 968
(b) *Bond Requirements* . . . . . . . . . . 969
3. *Constitutional Theories for Preventing Evictions* . . . 971
(a) *Fourteenth Amendment Theories* . . . . . . 971
(i) *Due Process* . . . . . . . . . . . 971
(ii) *Equal Protection* . . . . . . . . . . 972
(b) *First Amendment Guarantees* . . . . . . . 973
(i) *Gwinn Amendment* . . . . . . . . . 974
(ii) *Association-Related Evictions* . . . . . . 974
D. *Conclusion* . . . . . . . . . . . . . . . . . 975
VI. REMEDIES FOR TENANTS IN SUBSTANDARD PUBLIC HOUSING . . 975
A *Some New Approaches to Traditional Concepts* . . . . . 976
1. *Property Law* . . . . . . . . . . . . . . . 976
(a) *Traditional Landlord-Tenant Relationships* . . . 976
(b) *Constructive Eviction* . . . . . . . . . . 976
(i) *Constructive Eviction Without Abandonment* . 977
(ii) *Equitable Constructive Eviction* . . . . . 977
(c) *Implied Warranty of Habitability* . . . . . . 977
2. *Contract Law* . . . . . . . . . . . . . . . 979
(a) *Failure of Consideration* . . . . . . . . . 979
(b) *Illegal Contract* . . . . . . . . . . . . 979
(c) *Adhesion Contract* . . . . . . . . . . . 980
(d) *Tenants as Third Party Beneficiaries* . . . . . 981
3. *Tort Law* . . . . . . . . . . . . . . . 984
4. *Statutory Law* . . . . . . . . . . . . . . 986
B. *Administrative Law* . . . . . . . . . . . . . . 987
1. *Federal Law* . . . . . . . . . . . . . . . 987
2, *Housing Code Enforcement* . . . . . . . . . . 989
C. *Tenant Organizations* . . . . . . . . . . . . . . 991
1. *Unions* . . . . . . . . . . . . . . . . . 991
2. *Rent Strikes* . . . . . . . . . . . . . . . 992
D. *Conclusion* . . . . . . . . . . . . . . . . . 994

## I. Introduction

Despite the general prosperity of this country, a cursory survey of any American town or city will reveal that many Americans live in housing which is "substandard." Frequently one sees unpainted houses characterized by broken windows and inadequate sanitary facilities. In urban areas, the ever present tenement is often filled with too many people and not enough toilets; stairs are dangerous and refuse lies uncollected in the halls. Rooms without windows are common, while those blessed with windows frequently receive little light—the only view is another window of another building. Disease and discomfort are everywhere.

These conditions, however, are neither new nor unnoticed. Throughout American history, individuals as well as various levels of government have attempted to remedy, or at least alleviate, the housing problem. This study will explore one such effort—the federally-financed, locally-administered public housing program created by the Housing Act of 1937.[1] Consequently, throughout this study, the term "public housing," describing any period after 1937, refers only to the product of this Act, unless otherwise indicated. This study does not concern federally-funded housing programs such as Federal Housing Authority mortgage guarantees, rehabilitation of existing dwellings, and self-help programs.

## II. The Setting

### A. *The Problem*

1. *Housing Conditions in the United States.*—Although there is no clear definition of "adequate housing," it would seem that American housing is adequate only if each dwelling unit contains ample heating, hot and cold water, sanitary and cooking facilities and affords each inhabitant a degree of privacy. In addition, modern expectations demand accessibility to schools and playgrounds, public transportation and shopping facilities.[2] Even under these admittedly vague standards, however, it is obvious that many American families are presently living in inadequate housing. The Kerner Commission, for example, estimates that there are six million substandard housing units currently occupied in this country.[3] The 1960 census showed that

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1. United States Housing Act of 1937, 42 U.S.C. § 1401 *et seq.* (1964). This Act is commonly called the Wagner-Steagall Housing Act.

2. Everett & Johnston, *Forward*, 32 LAW & CONTEMP. PROB. 187 (1967).

3. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 468, 475 (1968) (Bantam ed.) [hereinafter cited as KERNER COMMISSION REPORT].

24 per cent of all occupied housing units were deteriorating, dilapidated or lacking some or all plumbing facilities, and one of every six dwelling units within metropolitan areas was deficient.[4]

It is obvious that the private enterprise system has failed to provide adequate housing for the low-income American. The desire for profit, combined with high construction and maintenance costs, has inflated rents for satisfactory housing units beyond the practical means of many low-income families.[5] Even where the financial ability to find better housing is present, however, racial and class barriers may prevent a move to better quarters. In addition, low-income families are too often unaware of possible alternatives and continue to live in substandard housing when better accommodations are available.

2. *Effect of Inadequate Housing.*—At one time or another, inadequate housing has been blamed for most of the ills of the ghetto. As with any social phenomenon, however, causation is difficult, if not impossible, to prove, since other factors such as poverty, ignorance and heredity must be weighed.[6] Nevertheless, correlations between poor housing and crime, riots, poor health, moral decay and high governmental expenditures cannot be ignored.

(a) *Crime.*—As early as 1910 a prominent reformer called for a consideration of the relation between substandard housing and crime.[7] Since then, numerous scholars have found correlations between poor housing, crime, and juvenile delinquency, although the exact role of substandard housing in breeding lawbreaking is unclear.[8]

(b) *Riots.*—Many scholars contend that bad housing is one of the most important factors in producing riots.[9] The Kerner Commission noted that "[i]n nearly every disorder city surveyed, grievances related

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4. Keith, *An Assessment of National Housing Needs*, 32 LAW & CONTEMP. PROB. 209, 210 (1967). The same census found 2,489,000 housing units without a bath or toilet. 1960 CENSUS OF HOUSING, Vol. II, pt. I, Table A-8.

5. *See, e.g.*, E. WOOD, RECENT TRENDS IN AMERICAN HOUSING 1 (1931); Keith, *supra* note 4, at 212-13.

6. Wood, *The Costs of Bad Housing*, 190 ANNALS 145-50 (1937).

7. L. VEILLER, HOUSING REFORM 43 (1910).

8. *See, e.g.*, E. WOOD, *supra* note 5, at 291-92; 1 J. FORD, SLUMS AND HOUSING 422-32 (1936); Ebenstein, *The Law of Public Housing*, 23 MINN. L. REV. 879, 882 (1939); Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508, 540 & sources cited 540 n.170 (1967).

9. *See, e.g.*, L. POST, THE CHALLENGE OF HOUSING 37 (1938); E. WOOD, *supra* note 5, at 7.

to housing were important factors in the structure of Negro discontent."[10] But as with crime, the relationship is not definite.[11]

(c) *Health.*—Inadequate housing has also been blamed for the high rates of morbidity, disease and infant mortality in areas where housing is substandard.[12] Conditions endemic to ghetto areas, such as the lack of adequate sunlight and ventilation, the presence of dampness, overcrowding and insanitary toilets and bathing facilities, are said to be major causes of poor health.[13] One author even speculates that the high noise level of overcrowded living conditions may lead to emotional instability.[14] Once again, however, the impact of such factors as malnutrition, filth, and heredity make it difficult to attribute poor health and high death rates solely to inadequate housing.[15] It is certain, however, that inadequate construction, safety features and repairs, characteristic of poor housing, are the cause of injuries from physical sources such as fires, broken glass, unsafe stairs and leaky roofs.

(d) *Morals.*—Substandard housing has also been charged with causing various moral problems. Authors have found a correlation between slum dwelling and incest, family disruption, the "evils of intemperance," and crowding and commotion.[16]

(e) *High cost of public services in ghetto areas.*—Studies have found that the tax revenues collected from slum residents do not cover the cost of such public services as fire and police protection, court and imprisonment costs and free hospital care provided ghetto residents.[17] It has been suggested that improving substandard housing units would decrease these costs so that slum areas would no longer impose such a financial burden on local governments.[18] It has not been shown,

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10. KERNER COMMISSION REPORT, *supra* note 3, at 472-73.

11. R. FISHER, TWENTY YEARS OF PUBLIC HOUSING 64-65 (1959).

12. *See, e.g.*, L. POST, *supra* note 9, at 42-47; 1 J. FORD, *supra* note 8, at 361-74, 392-93 (noting probable relationship between poor housing and tuberculosis); Ebenstein, *supra* note 8, at 882-83. The policy statement prefacing the 1937 Housing Act declared that the national policy is to replace inadequate dwellings which "are injurious to the health, safety, and morals" of the citizens of the nation. 42 U.S.C. § 1401 (1964).

13. *See* C. ABRAMS, THE FUTURE OF HOUSING 30 (1946); E. WOOD, *supra* note 5, at 4.

14. Wood, *supra* note 6, at 147.

15. *See generally* 1 J. FORD, *supra* note 8, at 374-97.

16. E. WOOD, *supra* note 5, at 6 (no statistics were given to support this statement); *see* 1 J. FORD, *supra* note 8, at 421-22.

17. *See, e.g.*, THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS 151-54 (1953) (citing results of many studies); C. ABRAMS, *supra* note 13, at 34-35; Wood, *supra* note 6, at 147-50; Note, *The Housing Act of 1949*, 44 ILL. L. REV. 685, 686 n.4 (1949).

18. *Cf.* R. FISHER, *supra* note 11, at 67.

however, that merely providing better living accommodations for ghetto dwellers would, in fact, bring a reduction in public services supplied to the ghetto.

### B. *Public Housing in the United States*

1. *The Beginnings: 1867-1936.*—As early as 1867, New York City passed the first Tenement Housing Law, designed to alleviate overcrowding and insanitary conditions in privately owned housing.[19] Twenty-five years later, Congress passed a joint resolution authorizing the Secretary of State to investigate the "slums of cities" of 200,000 or more people.[20] Although some states passed regulations setting minimal standards for such conditions as sanitation and overcrowding,[21] public housing was virtually nonexistent before World War I, as the prevalent laissez-faire philosophy confined efforts to provide housing for low-income families to limited-dividend companies run mainly by private concerns.[22] The federal housing effort was miniscule and mainly confined to federal employees.[23]

World War I brought a change in the prevailing attitude toward federal efforts in housing.[24] The grave housing shortage stimulated federal programs to house families of persons working in private defense industries.[25] Under the authority of the Shipping Act of 1916[26] the Shipping Emergency Fleet Corporation was created. One of its functions was to lend money to limited-dividend private companies to build low-rent housing for employees of shipyards.[27] Pursuant to authority granted by a 1918 law,[28] the President created the United States Housing Corporation to build housing and transportation

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19. Note, *supra* note 17, at 686 n.6.

20. 27 Stat. 399 (1892). Congress appropriated $20,000 to finance this study. *Id.*

21. E. WOOD, *supra* note 5, at 10-12.

22. *See* C. ABRAMS, *supra* note 13, at 173-87; E. WOOD, *supra* note 5, at 11-12. These limited-dividend undertakings were encouraged by state laws which, although no longer in use, are still on the books in several states. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 88-90 (1968).

23. R. FISHER, *supra* note 11, at 73.

24. For a general history of this era, see TWENTIETH CENTURY FUND, HOUSING FOR DEFENSE 1-30 (1940); E. WOOD, *supra* note 5, at 66-82.

25. R. FISHER, *supra* note 11, at 74-79.

26. Shipping Act of 1916, ch. 451, 39 Stat. 728.

27. Act of March 1, 1918, ch. 19, 40 Stat. 438. The Emergency Fleet Corporation also supervised the construction and design of these projects. Most of the buildings were permanent. Of the 150,000 persons originally scheduled to be housed, only 40,000 were accommodated by the end of the war. C. ABRAMS, *supra* note 13, at 297.

28. Act of May 16, 1918, ch. 74, 40 Stat. 550, *as amended*, Act of June 4, 1918, ch. 92, 40 Stat. 594, 595.

facilities for defense workers.[29] These corporations were responsible for the total construction of 15,183 family units and 14,745 single units in 24 eastern locations.[30] In addition, the Ordnance Department founded 16 new communities, housing 45,000 persons who manufactured explosives for the Department.[31] Clearly these housing programs were not designed to provide accommodations for the poor, but rather were the product of the national policy of expediting the war effort.

The armistice brought both a return to the pre-war reliance on private housing and a severe housing shortage, since little housing had been erected during the War.[32] During the 1920's, despite the acute need for better housing, public housing was again philosophically and politically unacceptable, although a small group of social workers studied this problem and vigorously advocated a national effort to alleviate it.[33] A number of states, led by New York, did pass laws regulating rent and encouraging limited-dividend corporations to invest in low-rent housing.[34] The federal government, however, seemed unconcerned.

The stock market crash of 1929 increased the interest in housing as dramatically—if not as rapidly—as it decreased the value of stocks. During the ensuing depression, the lack of adequate housing and the decrease in housing construction became a major concern.[35] In response to this need, in 1931 President Hoover called the President's Conference on Home Building and Home Ownership in which 3,700 persons participated.[36] In addition to its recommendations for the encouragement of private housing, the Conference's report contained a prescient statement by the Secretary of the Interior.

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29. Unlike the Emergency Fleet Corporation which loaned money to private concerns, the United States Housing Corporation actually built housing facilities. R. FISHER, *supra* note 11, at 74-79. At the end of hostilities Congress required these units to be sold. Act of July 19, 1919, ch. 24, 41 Stat. 163, 224.

30. R. DAVIES, HOUSING REFORM DURING THE TRUMAN ADMINISTRATION 5 (1966).

31. E. WOOD, *supra* note 5, at 71.

32. *See* R. FISHER, *supra* note 11, at 78-79; E. WOOD, *supra* note 5, at 84; Frayne, *Labor's Position on the Housing Question*, NATIONAL HOUSING ASSOCIATION, HOUSING PROBLEMS IN AMERICA, 5 (1923).

33. R. DAVIES, *supra* note 30, at 5-6.

34. *See* L. FRIEDMAN, *supra* note 22, at 96-99; Chamberlain, *A Legislative Attack on Slums*, 12 A.B.A.J. 849 (1926); Note, *Recent Trends in Housing Legislation*, 8 TEMP. L.Q. 99, 102-05 (1933-34).

35. It has been argued that housing became important at this time because of the needs of the middle classes rather than the lower classes. L. FRIEDMAN, *supra* note 22, at 100-01 (1968).

36. R. DAVIES, *supra* note 30, at 7.

> If the interest of business groups cannot be aroused to the point where they will work out a satisfactory solution of these problems through adequate measures for equity financing and large-scale operations, *a further exercise of some form of governmental powers may be necessary* in order to prevent these slums from resulting in serious detriment to the health and character of our citizens.[37]

In 1932, Congress created the Reconstruction Finance Corporation.[38] This corporation made loans to limited-dividend housing corporations formed to provide housing for low-income families and regulated by state or local governments. In addition, this federal action stimulated state lawmakers to pass laws regulating housing companies and established the idea of housing as part of a public works program.[39]

In 1933, Congress passed the National Industrial Recovery Act (NIRA),[40] authorizing, for the first time, both federal grants for the construction of low-rent housing under local government supervision and actual federal construction of housing for low-income families. Pursuant to this Act, the President created the Federal Emergency Administration of Public Works (PWA) which contained a Housing Division to administer the housing programs. In 1934, as the result of unsatisfactory progress by state and local governments and private housing groups, the Housing Division abandoned its policy of granting loans to limited-dividend corporations and began constructing projects.[41]

Although the PWA was severely criticized for general inefficiency, indifference and poor leadership,[42] it set the stage for the Housing Act of 1937 in two ways. First, it focused attention on the critical housing situation and demonstrated that the federal government was committed to do something about it.[43] Second, the PWA relied on local authorities for much of the direction of the housing programs[44] and encouraged the passage of state enabling

37. *Quoted in* C. ABRAMS, *supra* note 13, at 212 (emphasis added).

38. Act of Jan. 22, 1932, ch. 8, 47 Stat. 5, *as amended*, Act of July 21, 1932, ch. 520, 47 Stat. 709.

39. Smith, *The Government's Housing Program to Date*, 22 A.B.A.J. 631 (1936).

40. National Industrial Recovery Act, ch. 90, 48 Stat. 195, 201-02 (1933).

41. R. FISHER, *supra* note 11, at 85-91; Smith, *supra* note 39, at 631-32.

42. *See, e.g.*, C. ABRAMS, *supra* note 13, at 251-55; Ebenstein, *supra* note 8, at 885.

43. *See, e.g.*, R. FISHER, *supra* note 11, at 89; L. POST, *supra* note 9, at 143-47.

44. The reliance on local authorities was made necessary by United States v. Certain Lands in the City of Louisville, 9 F. Supp. 137 (W.D. Ky. 1935), *aff'd* 78 F.2d 684 (6th Cir. 1935), *petition for cert. dismissed*, 294 U.S. 735 (1936), holding that the federal government could not use the power of eminent domain to acquire property for public housing and slum clearance. Thus, if eminent domain was to be used, local authorities would have to use it. *See* New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Ledbetter,

legislation authorizing local authorities to become involved with housing.[45] By 1937, 30 states, the District of Columbia and Hawaii had passed enabling legislation, and approximately 50 local authorities had been established.[46] Both the enabling legislation and local authorities were again used in the Housing Act of 1937.[47]

Despite the impact of PWA, it was felt that more concentrated and expanded programs were necessary. Consequently in 1935, Senator Robert Wagner, Sr. (D-N.Y.), an ardent advocate of public housing and sponsor of the earlier NIRA in the Senate, introduced a bill to make public housing a permanent federal policy based on relief rather than employment as it was under the NIRA.[48] This bill died in a House committee.

Congress was not entirely inactive in the housing area in 1936, however, passing the George-Healey Act,[49] which authorized the PWA to set rent for its projects at a level which would repay administrative expenses for operating the project plus 55 per cent of initial costs and interest within 60 years. This Act limited tenants to those families who lacked sufficient income to enable them to live in "decent, safe, and sanitary" dwellings and whose income did not exceed five times the rent. These requirements were adopted in the more expansive Housing Act of 1937.

2. *The Housing Act of 1937.*—By 1937, the housing shortage was acute. In the Presidential campaign of 1936, President Roosevelt, recognizing the need for and appeal of housing reform, promised that housing would be a key interest of his administration.[50] Senator Wagner submitted a revised version of his 1935 bill[51] and this time he was more successful because the exigencies of the depression had dampened most opposition to an increased federal role in housing.[52]

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*Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490, 492 (1967).

45. *See, e.g.*, R. FISHER, *supra* note 11, at 89; Ebenstein, *supra* note 8, at 884-85.

46. R. FISHER, *supra* note 11, at 89.

47. In addition, the PWA was important for the housing it provided for 22,000 families in 49 projects. Ebenstein, *supra* note 8, at 884-85.

48. S. 2393, 74th Cong., 1st Sess. (1935). *See* L. POST, *supra* note 9, at 196-99.

49. Act of June 29, 1936, ch. 860, 49 Stat. 2025.

50. L. POST, *supra* note 9, at 199-201.

51. The revised version of Wagner's 1935 bill was first submitted unsuccessfully in 1936. For the text of this bill, see S. 4424, 74th Cong., 2d Sess. (1936).

52. Unfortunately, Harold Ickes of the PWA led the opposition to this bill which would create an independent agency not subject to his control. For an account of other opposition, see L. FRIEDMAN, *supra* note 22, at 104-06. Partly because of their dislike for Ickes and his

The Housing Act of 1937, as finally enacted, declared that the policy of the United States was to provide both employment and "decent, safe and sanitary" dwellings.[53] To implement this policy, the statute created a permanent United States Housing Authority (USHA) under the Department of the Interior.[54]

To finance new housing, Congress authorized the USHA to issue tax-exempt obligations totalling 500 million dollars guaranteed by the credit of the United States.[55] The USHA was then to make loans to local authorities to assist in the "development, acquisition, or administration" of low-rent housing projects or slum clearance at one-half per cent above the going federal interest rate, to be repaid within 60 years. In no case could these loans exceed 90 per cent of the development and acquisition costs of the project.[56]

To maintain the low-rent character of the housing units to be constructed, the USHA was to subsidize local authorities[57] through either annual contributions or capital grants. The annual contribution, the only significant subsidy,[58] is a federal gift to local authorities to be given annually for up to 60 years[59] in order to make up the difference

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overcentralization, local housing authorities led the support for the new bill. C. ABRAMS, *supra* note 13, at 256-57.

53. "It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural and urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation." United States Housing Act of 1937, ch. 896, § 1, 50 Stat. 888. The espoused goals today are virtually the same. *See* 42 U.S.C. § 1401 (Supp. III, 1965-67). *See generally* T. MCDONNELL, THE WAGNER HOUSING ACT (1957).

54. United States Housing Act of 1937, ch. 896, § 3, 50 Stat. 888, 889. Executive powers were vested in an Administrator.

55. *Id.* § 20, 50 Stat. 888, 898.

56. *Id.* § 9, 50 Stat. 888, 891. A 1949 amendment reduced the time to 40 years and the minimum interest to the going federal rate. 42 U.S.C. § 1409 (Supp. III, 1965-67).

57. Loans to local authorities with no subsequent subsidy would not permit rents substantially lower than that available in the private housing market, as the rent would have to be large enough to pay back the maintenance costs plus the loan and interest. By a subsidy, however, the federal government was in effect paying off the loan it had made to the local authorities so that rent would only have to cover operation costs.

58. C. ABRAMS, *supra* note 13, at 260.

59. An annual contribution was originally limited to 1% above the going federal rate of interest on the development or acquisition cost of the project. United States Housing Act of 1937, ch. 896, § 10(b), 50 Stat. 888, 892. The total amount of annual contributions authorized in 1937 was $5 million for the first year and $7.5 million more for each of the next two years. *Id.* at § 10(e). Currently, annual contributions may be given for 40 years at 2% above the going federal interest rate. 42 U.S.C. § 1410(c) (Supp. III, 1965-67).

between the rent the dwellings would bring in the open market and that which the low-income tenants could afford. The state or local government, in addition, was required to contribute at least twenty per cent of the annual contributions.[60] This amount could be, and usually was, funded by granting the projects exemption from local taxes. To avoid competition with private enterprise, tenants in these federally-funded projects were limited to families whose net income at admission did not exceed five times the rent (including utilities and fuel).[61]

In order to promote slum clearance, Congress prohibited annual contributions unless an equivalent number of unsafe or insanitary housing units were destroyed or repaired as new units were built.[62] In localities where there was an acute shortage of decent housing for low-income families, however, this "equivalent elimination" requirement could be deferred at the discretion of the USHA.[63]

The Act also regulated construction by limiting the costs of projects to not more than 4,000 dollars per family dwelling unit or 1,000 dollars per room (excluding land, demolition and nondwelling facilities) for cities with a population less than 500,000. For larger cities, the maximum limits were 5,000 dollars per unit and 1,250 dollars per room.[64]

The Housing Act of 1937, the most expansive federal housing effort ever undertaken by this country, thus established "decent, safe, and sanitary" housing as a goal of the federal government and set up a permanent body to achieve this goal. It also followed earlier bills in decentralizing the housing program by utilizing local housing authorities for both initiative and daily management of the federally-funded housing projects. Local governmental bodies were burdened with a financial responsibility amounting to at least ten per cent of the total cost of twenty per cent of the annual contributions. Finally, the Act was significant in that it authorized the construction of housing units desparately needed by low-income Americans.[65]

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60. United States Housing Act of 1937, ch. 896, § 10(a), 50 Stat. 888, 891. This requisite was omitted in 1949. Housing Act of 1949, ch. 338, § 305(b), 63 Stat. 413, 428.

61. United States Housing Act of 1937, ch. 896, § 2(1), 50 Stat. 888. The ratio was increased to six to one for families with three or more dependents. *Id.* This provision was deleted in 1949. Housing Act of 1949, ch. 338, § 306, 63 Stat. 413, 429.

62. 42 U.S.C. § 1410(a) (Supp. III, 1965-67).

63. *See* 81 CONG. REC. 7962 (1937); R. FISHER, *supra* note 11, at 95.

64. United States Housing Act of 1937, ch. 896, § 15(5), 50 Stat. 888, 896. Today the limits are higher. *See* note 181 *infra* and accompanying text.

65. By 1941, over 168,000 housing units were occupied or being built, and 131,000 substandard units removed from the housing market, primarily as the result of the Housing Act

3. *The Aftermath: 1938-1948.*—The Housing Act of 1937 raised expectations among public housing advocates that the end of inadequate housing was finally a possibility. Yet the appropriations for the USHA were small in relation to the total need, and the next twelve years brought few nonwar efforts.[66]

The Reorganization Plan of 1939,[67] for example, in which the USHA was transferred from the Interior Department to the new Federal Works Agency, only made the coordination of the various housing programs easier; it did not increase the amount of housing to be built.

As the possibility of war increased, Congress amended the 1937 Housing Act to channel unused housing funds into housing for persons associated with national defense activities.[68] Low-rent housing in slums, the focal point of public housing since 1937, became of secondary importance. Congress passed the Lanham Act in 1940 which provided 150,000 dollars for the housing of war-related persons and their families.[69] Projects provided for under this Act were carried out without the use of the local housing authorities,[70] and as the result of typical opposition by real estate concerns, this Act specifically required the disposition of the property acquired or constructed when the state of emergency called by the President had ceased. Therefore, these units were not retained as public housing after the war.[71]

In 1942, in order to expedite the war effort, all federal housing programs were centralized in the National Housing Agency,[72] and public housing was placed in a division—the Public Housing Agency (PHA). Not until this date had the USHA and its network of local housing authorities been utilized in the national effort to provide housing for defense workers.[73] By the termination of hostilities, the federal government had financed 197,000 permanent housing units and 583,000 temporary ones.[74]

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of 1937. Robinson & Weinstein, *The Federal Government and Housing*, 1952 WIS. L. REV. 581, 604-05.

66. N. STRAUS, TWO-THIRDS OF A NATION 267 (1952). In 1938, the Housing Act of 1937 was amended to permit $28 million in annual contributions per year and the USHA was authorized to borrow up to $800 million. Act of June 21, 1938, ch. 554, §§ 601-02, 52 Stat. 809, 820.

67. Reorganization Plan No. 1, 53 Stat. 1423, 1426-27 (1939).

68. Act of June 28, 1940, ch. 440, § 201, 54 Stat. 676, 681.

69. Act of Oct. 14, 1940, ch. 862, 54 Stat. 1125. *See* Note, *supra* note 17, at 688.

70. *See generally* C. ABRAMS, *supra* note 13, at 297-307.

71. R. DAVIES, *supra* note 30, at 11.

72. Exec. Order No. 9070, 3 C.F.R. 1095 (1938-43 Comp.).

73. C. ABRAMS, *supra* note 13, at 297-307.

74. *Id.* at 305.

The end of World War II, like its predecessor, brought both a halt in the construction of permanent public housing units[75] and a critical housing shortage. Little was done to alleviate this problem, however, until 1949. In 1947 Congress did establish the Housing and Home Finance Agency, which included the Public Housing Administration as well as several other agencies with an interest in housing.[76] But this change amounted to little more than a reorganization of existing agencies.

4. *1949-1968.*—By 1949, Congress was again ready to commit the nation to an increased role in public housing. In the Housing Act of 1949,[77] Congress declared the national policy to be "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . ."[78] Despite the new commitment, however, this Act did not drastically alter the machinery established by the 1937 Act. Title III of the 1949 Act, which amended the 1937 Housing Act, was a partial response to pressure by the real estate lobby and local governments, requiring the approval of the local governing body before federal funds could be spent for public housing in any locality.[79] The Act also required a twenty per cent gap between the upper rental limits for admission to the public housing project and the lowest rent available in private housing.[80] The 1937 Act was also amended to give preference in admission to future projects to veterans and to families displaced by urban redevelopment.[81]

The most important contribution of the 1949 Act was its authorization of 810,000 housing units to be constructed between 1949 and 1954.[82] These units were to be built at an annual rate of 135,000 units, subject to a decrease to 50,000 units or an increase to 200,000 units per year if the President and the Council of Economic Advisers found that an adjustment was in the public interest.[83] Finally, this Act

75. *See* Robinson & Weinstein, *supra* note 5, at 605-08.

76. Reorganization Plan No. 3 of 1947, 61 Stat. 954. The other constituents were the Home Loan Bank Board and the Federal Housing Administration.

77. Housing Act of 1949, ch. 338, 63 Stat. 413.

78. *Id.* § 2.

79. 42 U.S.C. § 1415(7)(a) (Supp. III, 1965-67).

80. *Id.* § 1415(7)(b).

81. Housing Act of 1949, ch. 338, § 302(a), 63 Stat. 413, 423.

82. *Id.* § 305(a), 427-28.

83. *Id.*

prohibited federal annual contributions unless the project was to be exempt from state and local property taxes. However, to placate state and local governments, Congress authorized local authorities to pay these taxing bodies "payments in lieu of taxes" of up to ten per cent of the rents. Where local or state constitutional limitations prevented tax exemption, projects were authorized only if the political subdivision made a cash contribution to the project equal to twenty per cent of the federal annual contribution.[84] In 1949 the public housing program was subject to another administrative change, as the National Housing Agency, active since 1942, became the Housing and Home Finance Agency (HHFA), which included the PHA.[85]

Once again America had begun a vast housing program, and once again war intervened. During the Korean War, the housing program languished. The original authorization of 135,000 units per year was reduced to 50,000 units or less.[86] Projects were selected because of their role in the war effort rather than their impact on the low-income family. After the Korean War, Congress succumbed to local pressures and amended the 1937 Act to require local authorities to sell low-rent housing units to private interests if required by the local governing body or a referendum of local voters.[87]

The Housing Act of 1956 indicated the popularity of housing for the elderly by giving priority in public housing projects to families or individuals over 65 years of age.[88] This Act also opened the doors of public housing to persons who had previously been excluded because of the requirement that only "families" could live in public housing. The 1959 Housing Act[89] gave local authorities more flexibility in setting income limits and rents for public housing tenants. Between 1959 and 1965, Congress began encouraging private investment in low-rent housing for low and middle income families and for the elderly.[90] Increased emphasis was placed on housing for persons displaced by urban renewal or new housing developments.[91]

84. *Id.* § .305(b), 428-29. Today, where local governments must tax the project because of constitutional requirements, HUD will give an annual contribution only if the taxing body "contributes" 10% of the rent. 42 U.S.C. § 1410(h) (Supp. III, 1965-67).

85. Reorganization Plan No. 3 of 1947, 61 Stat. 954.

86. R. DAVIES, *supra* note 30, at 130-32.

87. 42 U.S.C. § 1410(l) (Supp. III, 1965-67).

88. Housing Act of 1956, ch. 1029, § 404(b), 70 Stat. 1091, 1104. This provision was repealed in 1961. Housing Act of 1961, Pub. L. No. 87-70, § 205(b), 75 Stat. 149, 164.

89. Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 654.

90. *See id.*; Housing Act of 1961, Pub. L. No. 87-70, §§ 201-03. 75 Stat. 149, 162-63; Senior Citizens Housing Act of 1962, Pub. L. No. 87-723, 76 Stat. 670; Housing Act of 1964, Pub. L. No. 88-560, 78 Stat. 769.

91. *E.g.*, Housing Act of 1964, Pub. L. No. 88-560, 78 Stat. 769.

The Housing and Urban Development Act of 1965[92] transferred the PHA to the new cabinet-level Department of Housing and Urban Development (HUD). In addition to administrative changes, this Act also introduced new programs to federal housing. "Section 23" housing[93] authorized local authorities, upon approval by the local governing body, to utilize vacancies in existing private dwellings[94] to house low-income families. The local authority, with financing by federal annual contributions, pays the private landlord the difference between rent, including profit, set by the landlord and the local authority, and the amount the low-income tenant can afford. Unlike most public housing, these accommodations are not exempt from property taxes.

The second innovation of the 1965 Act was the "rent supplement."[95] This provision gives federal mortgage insurance to private nonprofit or limited-dividend landlords who construct housing for low-income tenants. Like section 23 housing, the federal government then pays the landlord the difference between the rent and the amount the low-income family can afford to pay. Unlike section 23 housing, however, the rent supplement is administered by the FHA and does not amend the 1937 Housing Act. The Housing and Urban Development Act of 1965 also amends the 1937 Act to give elderly, displaced and disabled persons better access to public housing.[96]

In 1968, Congress again amended the 1937 Act. The most important addition was the increase in annual contributions from 554 million dollars to 954 million dollars by 1970.[97] It is estimated that this will permit the start of 375,000 units, an increase of more than fifty per cent in the total number of public housing units.[98]

92. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified in scattered sections of 12, 15, 20, 31, 33, 38, 40, 42, 49 U.S.C. For a description of the organization of HUD, see Ink, *The Department of Housing and Urban Development—Building a New Federal Department*, 32 LAW & CONTEMP. PROB. 375 (1967).

93. 42 U.S.C. § 1421b (Supp. III, 1965-67). *See generally* Friedman & Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. PA. L. REV. 611 (1968); Note, *supra* note 8, at 512.

94. Congress recommends that no more than 10% of the units in any structure be rented under § 23. 42 U.S.C. § 1421b(c) (Supp. III, 1965-67).

95. 12 U.S.C. § 1701s (Supp. I, 1965). *See generally* Welfeld, *Rent Supplements and the Subsidy Dilemma*, 32 LAW & CONTEMP. PROB. 465 (1967); Smith, *The Implementation of the Rent Supplement Program—A Staff View*, *id.* at 482; Note, *supra* note 8, at 518.

96. *See* text accompanying note 194 *infra*.

97. 42 U.S.C.A. § 1410(e) (Supp. 1969).

98. *See* Foard, *The Provisions of the 1968 Housing and Development Act*, 23 RECORD OF N.Y.C.B.A. 567, 591 (1968).

### C. *The Goals of Public Housing*

It is clear that the goals of public housing have changed since the depression. Indeed, one of the current problems with public housing is that its present objectives are uncertain. Perhaps one reason for this lack of direction is that politicians have purposely muddled the goals in order to secure wide-based support for the public housing program.[99] Yet, before the present program can be evaluated, the goals of the present system must be clarified.[100]

1. *Goals Primarily Benefiting the Non-Tenants.*—A number of goals of public housing which have been used as a rationale for the housing program are oriented toward the nontenant rather than the tenant. The primary goal of early public housing efforts, for example, was to boost the lagging economy[101] by creating jobs for the unemployed[102] and stimulating demand for supplies. The housing industry was the main beneficiary, while providing adequate housing for low-income families was secondary. A recent report by the National Commission on Urban Problems maintains that economic stimulation rather than improved housing is still an underlying rationale for the public housing program.[103] It is submitted, however, that in most areas of the country present economic conditions have removed economic stimulation as a valid goal of public housing, and the more vital needs of the individual slum dweller should guide the public housing program.

During World War II and the Korean War, the goal of public housing was the creation of housing for workers in defense activities.[104] Although in some areas there is still a shortage of housing for these workers, it is submitted that other needs, such as housing for the poor, are more pressing.

99. NATIONAL COMMISSION ON URBAN PROBLEMS, MORE THAN SHELTER 4 (1968) [hereinafter cited as MORE THAN SHELTER].

100. *See id.*; Ledbetter, *supra* note 44, at 521.

101. MORE THAN SHELTER *supra* note 99, at 1; Note, *Slum Clearance and Public Housing*, 3 J. PUB. L. 261, 263 (1954).

102. R. FISHER, *supra* note 11, at 229; Bauer, *The First Six Months of USHA*, NATIONAL ASSOCIATION OF HOUSING OFFICIALS, HOUSING YEARBOOK 1938, at 7-8; Bohn, *Housing as a Political Problem*, 1 LAW & CONTEMP. PROB. 176, 177 (1934).

103. MORE THAN SHELTER, *supra* note 99, at 38. The policy statement in the current statute, still basically the same as promulgated in 1937, lists the alleviation of "present and recurring unemployment" as one policy underlying the public housing program. 42 U.S.C. § 1401 (1964).

104. MORE THAN SHELTER, *supra* note 99, at 7. *See* note 72 *supra* and accompanying text.

Although the 1937 Housing Act required that a substandard unit be destroyed for every new unit built, until recently little emphasis has been put on slum clearance.[105] It is submitted that slum clearance as a goal of public housing has been sought, at least partially, to protect the more affluent areas from the evils accompanying the unsightly slum. As a result, one might expect an emphasis on form rather than substance, on appearance rather than effect. Slum clearance to benefit the nonslum dweller is a poor basis for a federal program. The emphasis of a slum clearance program should be on the slum dweller.

Still another goal of public housing is the elimination of social disorders by preventing dissatisfaction with the present economic system.[106] In this way public housing may serve as a tool for the preservation of the American political and economic systems.[107] It seems that this goal is a valid undertaking by a government. But it is hoped that public housing will breed satisfaction with the American political system just as it should serve as a vehicle for lower morbidity rates among slum dwellers; that is, as a side effect of a successful program of providing the tools to insure that the children of slum dwellers will not live in slums. In addition, some authors see the provision of housing, including public housing, as an indicia of the success of the nation.[108] To these observers public housing can both prevent dissatisfaction and show Americans and the world that the present American system is responsible and worthy of preservation.

There are also persons who envisage the goal of public housing to be the decrease of public expenditures in ghetto areas. According to these practical theorists, providing adequate accommodations will save the taxpayers money.[109] Unfortunately, some local government officials disagree.[110] It is submitted that public housing possesses too much potential for human improvement to be rationalized as an economic device. If public housing does result in monetary savings, so much the better, but the savings should be the by-product of a larger goal.

As the result of a number of cases,[111] an Executive Order,[112] and

105. *See* R. FISHER, *supra* note 11, at 217. For a discussion of this "equivalent elimination" in the 1937 Housing Act, see notes 62-63 *infra* and accompanying text.

106. *Id.* at 9.

107. *Cf.* L. POST, *supra* note 9, at 3.

108. *See* Note, *supra* note 101, at 261.

109. *Cf.* Ebenstein, *supra* note 8, at 883.

110. *See* note 141 *infra* and accompanying text.

111. *E.g.*, Vann v. Toledo Metropolitan Housing Auth., 113 F. Supp. 210 (N.D. Ohio 1953); Banks v. Housing Auth. , 120 Cal. App. 2d 1, 260 P.2d 668 (Cal. Dist. Ct. App. 1953),

the 1964 Civil Rights Act,[113] public housing today is theoretically run on a nondiscriminatory basis. It is submitted, therefore, that a valuable by-product of public housing is the encouragement of racial integration. Public housing can provide examples of accommodations in which various ethnic and racial groups live together in harmony.

2. *Goals Which Benefit the Tenant.*—Perhaps the most frequently expressed goal of public housing is merely to provide decent accommodations for those persons living in squalor,[114] and both the 1937 and 1949 Housing Acts adopted this as one of their goals. Concomitant with this is the desire to decrease the high rate of disease and morbidity found in the slums. Public housing, it is hoped, will give its tenants a longer, more disease-free existence in adequate and comfortable accommodations.

A number of the espoused goals of public housing concern the rehabilitation of the tenants.[115] Public housing, it is contended, is a panacea which will inspire its tenants to improve themselves so that by their increased efforts they will be able to afford a better environment.[116] Somehow the move into public housing is supposed to create a Horatio Alger-like ethic in the new dwellers so that both their values and income will change. Public housing, in this view, is merely a way station between the slums and the suburbs.

Similarly, public housing has been seen as a vehicle to inculcate the tenants with the basic ideals of democracy.[117] And since poor housing is said to be a menace to the morals of the tenants, improving the housing conditions of a family will hopefully improve their moral value structure.[118] Various social services have been provided public housing tenants in order to help them improve themselves. Unfortunately, the small efforts made to date give no indication that public housing, without comprehensive social services, in an effective tool for rehabilitation of individuals.

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*cert. denied*, 347 U.S. 974 (1954). *Contra*, West v. Housing Auth., 211 Ga. 133, 84 S.E.2d 30 (1954).

112. Exec. Order No. 11063, 27 Fed. Reg. 11527 (Nov. 24, 1962). *See also* 24 C.F.R. § 1500.6 (Supp. 1964) (issued by the PHA pursuant to Exec. Order No. 11063).

113. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (1964).

114. *E.g.*, R. FISHER, *supra* note 11, at 219. See the statement of policy in the Housing Act of 1937, 42 U.S.C. § 1401 (1964).

115. *See generally The Dreary Deadlock of Public Housing—How to Break It*, 106 ARCHITECTURAL FORUM 139, 141 (June 1957) (statement of William Wheaton).

116. R. FISHER, *supra* note 11, at 69.

117. R. DAVIES, *supra* note 30, at xi.

118. R. FISHER, *supra* note 11, at 64.

D. *Evaluation*

Public housing must have direction. There must be a clear statement of goals to which the program is aimed. To date, this direction has been absent. Consequently, the public housing program has not approached its potential as a vehicle of social improvement.

It is submitted that the public housing program should have a two-fold orientation: (1) the provision of adequate housing for all persons permanently or temporarily incapable of securing adequate housing for themselves in the private housing market; and (2) rehabilitation of the tenants so that a move to public housing will improve life style as well as physical accommodations. It is obvious that the implementation of these goals will require changes in the existing scope and design of the public housing program.

1. *Adequate Housing.*—In order to provide adequate housing for all persons who need it, the number of federally-funded housing units must be drastically increased.[119] Although the cost of such an endeavor will be quite high, recent expenditures in the Far East and for space and the antiballistic missile programs show that vast financial and technological resources are available for programs that are given top priority.

As noted, however, adequate public housing includes more than four walls and a ceiling. The total environment of the project, as with any home, is important for the comfort and well-being of the inhabitants.[120] Accordingly, existing public housing, which is physically inadequate and desperately in need of repair, should be corrected immediately, and new public housing should be built in smaller units[121] located in residential areas, not only in slums.[122] This

119. *See* notes 2-5 *supra* and accompanying text. The Kerner Commission recommends 6 million units by 1973. KERNER COMMISSION REPORT, *supra* note 3, at 475.

120. Public housing should provide an atmosphere which encourages tenant interest so that tenants will feel a part of the project. *See* Department of Housing and Urban Development, Circular (March 22, 1968) (a national policy is to create an environment in public housing so that tenants regard the projects as their home). Their interest will made their stay in public housing more enjoyable and improve their receptivity to rehabilitative programs. *See* More Than Shelter, *supra* note 99, at 41-42.

121. Large-scale, high-rise projects are more acceptable to the middle or upper class designers than to the tenants who unfortunately must use them. *See* L. FRIEDMAN, *supra* note 22, at 120-21. The 1968 Housing Act indicates a realization of this problem by prohibiting high-rise public housing projects for families with children unless there is no practical alternative. 42 U.S.C.A. § 1415(11) (Supp. 1969).

122. KERNER COMMISSION REPORT, *supra* note 3, at 478. *But cf.* Dep't of Housing and Urban Development, Circular (March 22, 1968) (a national policy is to encourage a broader cross-section of *low-income* households in public housing neighborhoods). Successful programs

will permit tenants in public housing to select the neighborhood and types of projects in which they will live.[123] In addition, it will permit their children to attend nonghetto schools, which usually are superior to ghetto schools.

New units should be designed so that they are both attractive and functional.[124] The rigid federal construction specifications should be liberalized to enable architects and engineers to use the full range of their skills and imaginations. Adequate playgrounds and recreational facilities, both indoor and outdoor, should be provided for children and adults.[125]

2. *Rehabilitation.*—After a project has been built, however, there is still much to be done if public housing is to provide an opportunity to change the course of tenants' lives. Perhaps the greatest failure of public housing to date is that it does not go beyond providing accommodations, and without more, public housing does not change values or behavior. This is why, for example, crime still abounds in public housing areas.[126] Rehabilitation requires a continued effort, for values must be changed and skills taught. What is needed desperately is a comprehensive program of medical and social services so that counselling and guidance are available from trained personnel.[127] Public housing projects should also furnish legal services, enabling tenants to exercise rights too often available only to the more affluent. The projects should have adult education and club facilities covering various fields from Alcoholics Anonymous to child rearing

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to rehabilitate public housing tenants will soften charges that the public housing in residential areas will merely disperse undesirable elements and thus pollute other parts of the city. *See* notes 127-30 *infra.*

123. This choice, giving public housing tenants the same choice which private housing tenants have, could increase the enjoyment of public housing and expose the tenants to non ghetto people and values.

124. Public housing today is designed to prevent charges that tenants are living a life of luxury. *See* MORE THAN SHELTER, *supra* note 99, at 12.

125. *Cf.* N. STRAUS, THE SEVEN MYTHS OF HOUSING 132-33 (1944) (wading pool and tenant gardens should be provided). For designs of projects equipped with attractive and adequate outside facilities, see *Urban Housing: New Approaches and New Standards*, 143 ARCH. REC. 147, 152 (June, 1968); Friedberg, *Super-Block Play Areas*, 58 RECREATION 164 (1965). Elizabeth Wood, former Chicago Housing director, recognizing the need to harmonize public housing projects, suggests, among other things, that projects be equipped with pubs so that the tenants do not lose the flavor of the neighborhood city blocks. *See* 115 ARCH. F. 8-9 (Sept., 1961).

126. R. FISHER, *supra* note 11, at 66.

127. HUD recently declared that "better and more coordinated social services for project tenants" are an important social objective of the public housing program. Dep't of Housing and Urban Development, Circular (March 22, 1968).

and sewing.[128] In addition, vocational training classes should be provided so that the unskilled can acquire skills which bring them and their families an opportunity to leave the slums. In short, we must realize that public housing tenants are not normal families; rather they are often beset with family or emotional problems and possess few skills and substandard intelligence.[129] The system of public housing as a controlled environment affords an excellent opportunity to help the tenants achieve security and stability.

If we presently do not have the knowledge to rehabilitate public housing tenants, we should begin a massive program of research and experimentation. Past investigation has suffered from both a lack of funds and duplication of efforts. Only a centralized research program, which is adequately funded by the federal government, will prevent the next generation from sharing the ignorance and inabilities of this generation.[130]

Critics will charge that the rehabilitation program outlined above is misguided because it attempts to instill middle-class values on non middle-class citizens. To some degree this allegation is true. Through rehabilitation, however, it is hoped that public housing tenants will realize the importance of values such as cleanliness, education, and family responsibility, which are described also as middle-class values. It is to be noted that rehabilitation does not mean that racial and ethnic groups will or should lose their identity. Rather, it is hoped that through a progressive program of rehabilitation, public housing tenants, irrespective of their backgrounds, will live a longer, more comfortable and productive life, and their children will avoid the hardships, the hunger, and the insecurity suffered by their parents and grandparents. Pulbic housing, if we let it, can make a substantial contribution to the lives of millions of Americans.

### E. *Why the Public Housing Need Has Not Been Met*

There is no longer any doubt that a shortage of low-rent housing

128. For a description of the local attempts to provide these services, see L. FRIEDMAN, *supra* note 22, at 140.

129. R. FISHER, *supra* note 11, at 66.

130. There has never been a large-scale, well coordinated research project focusing on the methods of uplifting the slum dweller. Consequently, research that is done is often repetitious. President Lyndon B. Johnson created a new Office of Urban Technology within HUD to remedy this problem, but thus far no major changes have come about. Ink, *supra* note 92, at 382. *See* R. FISHER, *supra* note 11, at 234; Hearings on Dep't of Housing and Urban Development Appropriations for 1968, before the Subcommittee on Independent Offices and Department of Housing and Urban Development of the House Committee on Appropriations, 90th Cong., 1st Sess., pt. 3, at 4 (1967).

for low-income families exists. Yet, the production of public housing has not even met the number of units appropriated by Congress. As noted, the entire production of public housing to date has been less than that authorized under the 1949 Housing Act.[131] Accordingly, those persons and groups opposing public housing have been relatively successful.

1. *Group Views of Public Housing.* (a) *Lack of popular support.*—Despite the desperate need for more housing, public housing in the United States has never been advocated strongly by a diversified, influential movement.[132] Since public housing, by definition, involves the efforts of the federal government, needed changes in the public housing program will not be made until the government is prodded. The cause of public housing in the United States has been hampered most severely by its inability to arouse the interest of the middle and upper classes who constitute the numerical majority and are most influential in instituting governmental action.[133]

Generally only the poor, who lack influence in the power structure of government and industry, are directly concerned with public housing.[134] Although recent social disorders may have vastly increased the power of the poor, there has, as yet, been no major public housing program designed to house all those in need of housing. The large, influential middle class simply is not concerned with public housing because it will neither live in public dwellings nor gain financially from them.[135] Those upper classes concerned at all with public housing will oppose it, for public housing will bring slum landlords and real estate interests a financial setback.[136] Rural areas, similarly, will oppose public housing because the benefits of the program will rarely run to them;[137] their taxes pay for housing which they neither occupy nor see.

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131. Despite the authorization of 810,000 public housing units in the 1949 Housing Act, by the end of 1966 only 431,000 units had been built. MORE THAN SHELTER, *supra* note 99, at 11. Indeed, in 1967, 30 years after the Housing Act of 1937, only 650,000 low-rent housing units had been produced. KERNER COMMISSION REPORT, *supra* note 3, at 478.

132. *See* C. BAUER, MODERN HOUSING 252-54 (1934). In England, on the other hand, public housing was successful because of a mass movement. Bauer, *The Dreary Deadlock of Public Housing*, 106 ARCH. F. 140, 141 (May 1957).

133. *See* Friedman, *Government and Slum Housing: Some General Considerations*, 32 LAW & CONTEMP. PROB. 357-64 (1967); *cf.* C. ABRAMS, *supra* note 13, at 313; Bohn, *supra* note 102, at 177.

134. *E.g.*, L. POST, *supra* note 9, at 18, 156.

135. *See* Friedman, *supra* note 133, at 363.

136. *See* note 139 *infra* and accompanying text.

137. *See* R. DAVIES, *supra* note 30, at 112-14.

(b). *Opposition to public housing.*—Public housing has been unsuccessful for reasons other than the lack of mass support. Many groups actively oppose any increase in public housing. The most vocal opponent is the "real estate lobby" composed of groups of builders, real estate agents, savings and loan associations, bankers' groups and the United States Chamber of Commerce.[138] These groups feel that their best financial interests lie with private rather than public housing. Real estate brokers, for example, realize that they receive no commissions when public housing is occupied. The effort of these groups initially was confined to Washington, but shifted to local areas after the 1949 Housing Act in an attempt to influence local governments.[139] In order to reach the public, this lobby relies on professional organizers, advertisements in the mass media and the distribution of leaflets. Their approach varies from depicting public housing as "socialistic" to a more subtle appeal to racial prejudices.[140]

Opposition to public housing has also been noted among local governmental bodies which fear new projects will financially damage the community.[141] They find unappealing the prospect of partially financing public housing which, in turn, often destroys property they had previously taxed, while simultaneously increasing the public services which they must furnish. In addition, these governmental bodies fear that the local bonds used to pay for the housing will compete with their own municipal bonds.[142]

At the federal level, one author has found opposition to public housing in the federal authority responsible for the public housing program,[143] while various interest groups and classes have influenced some members of Congress to submit bills curtailing the housing program through controls or appropriations.[144]

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138. *See generally* N. STRAUS, *supra* note 66, at 209; Mulvihill, *Problems in the Management of Public Housing*, 35 TEMP. L.Q. 163, 165-67 (1962); Robinson & Weinstein, *supra* note 65, at 607. One author maintains that the tactics of these groups were so arrogant that they might have actually influenced some people to *favor* public housing. Bauer, *supra* note 132, at 140. There are indications that the opposition of this lobby has subsided. *See, Miami Realtors Switch Stand: Won't Oppose Public Housing*, 22 J. HOUSING 141 (1965). *See generally* MORE THAN SHELTER, *supra* note 99, at 2.

139. R. DAVIES, *supra* note 30, at 126-28; N. STRAUS, *supra* note 68, at 209.

140. *See* N. STRAUS, *supra* note 66, at 206-10. For an account of the lobbying against the Housing Act of 1949, see R. DAVIES, *supra* note 30, at 20, 38, 50, 109-10.

141. *See* Mulvihill, *supra* note 138, at 169.

142. *Id.* at 170-71.

143. *Id.* at 169.

144. *Id.* at 167-68.

2. *Public Housing and American Values.* (a) *Myth of the home.*—Perhaps the main reason for the general public's lack of enthusiasm and support for public housing lies in the American myth that:

> [w]here a man has a home of his own he has every incentive to be economical and thrifty, to take his part in the duties of citizenship, to be a real sharer in government. Democracy was not predicated upon a country made up of tenement dwellers, nor can it so survive.[145]

In the American mind, the goal of each family is to have its own home.[146] Consequently, housing families in large, impersonal apartments goes against traditional American values.

Conversely, the public housing tenant lives a rather un-American life. He does not represent the common value that each man should occupy his own home, and is often considered less respectable than his fellow citizen in the suburbs burdened with a twenty-year mortgage. It is to be noted that public housing is most accepted and most advanced in New York City where apartment living has at least equalled home living as an accepted value.[147]

(b) *Individualism.*—A closely related American value, which also restricts the progress of public housing, maintains that people should rely on themselves rather than on government,[148] and that private enterprise, if encouraged, will supply ample dwellings.[149] Proponents of this view would argue that housing by the federal government competes with private enterprise, is "socialistic," and will bring a decline in the concept of individual initiative which has made America great.[150] Of course, the great value placed on frugality supports charges that public housing is too expensive. Therefore, cheaper alternatives, such as total reliance on the private market, are desirable.[151]

(c) *Integration.*—Many people oppose public housing because of fears that it will bring racial integration,[152] and the real estate lobby

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145. L. VEILLER, *supra* note 7, at 6-7.

146. *See, e.g.*, K. BACK, SLUMS, PROJECTS, AND PEOPLE 39-40 (1962); C. ABRAMS, *supra* note 13, at 36; N. STRAUS, *supra* note 66, at 71; *Our Confused Housing Program*, 106 ARCH. F. 126, 129 (April 1957). This myth is encouraged by such federal programs as FHA mortgage insurance.

147. Bauer, *supra* note 132, at 141.

148. *Cf.* R. DAVIES, *supra* note 30, at 18.

149. *Id.* at 38.

150. *Id.* at 18; N. STRAUS, *supra* note 66, at 256-69.

151. *See, e.g.*, Veiller, *Who Shall Provide Houses for the Workingman? The Government?*, NATIONAL HOUSING ASSOCIATION, HOUSING PROBLEMS IN AMERICA 153, 160 (1923) (public housing is too expensive for a government to undertake); Mulvihill, *supra* note 138, at 163.

152. *See, e.g.*, Mulvihill, *supra* note 138, at 167.

has successfully used this ploy.[153] Similarly, many people refuse to support public housing because they believe it will benefit primarily the Negro.[154]

(d) *Desire for tangible results.*—The American desire for tangible results also creates opposition to public housing. Those liberals who viewed public housing as a panacea have realized that the program has not only failed to remedy our ills, it has exacerbated some problems. These disillusioned former proponents of public housing have turned to other remedies. Some are presently opponents of further public housing efforts.[155]

3. *Internal Discouragement of Public Housing.*—The present organization of public housing also contributes to its slow growth. The procedure for starting a housing authority is complex and time-consuming.[156] The first step in creating a public housing project must be taken by local initiative, and too often professional aid is unavailable, since as already noted, there is little interest in public housing among the middle and upper classes.

F. *The Mechanics of Public Housing Today*

1. *Administration.*—Since 1965, the public housing program has been administered by the cabinet-level Department of Housing and Urban Development (HUD), directed by the Secretary of Housing and Urban Development, who is responsible only to the President of the United States.[157] In reality, however, public housing is administered by the Housing Assistance Administration (HAA), a department within HUD. The Assistant Secretary for Renewal and Housing Assistance, responsible to the Secretary of HUD, has general supervisory authority over this and several other programs. Actual day-to-day supervisory responsibility over the HAA is vested in the Deputy Assistant Secretary for Housing Assistance, who is responsible to the Assistant Secretary for Renewal and Housing Assistance. HUD administers its various programs, including public housing, through seven Regional Offices, each covering several states or Puerto Rico and the Virgin Islands. States or local authorities generally deal with HUD through a Regional Office.

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153. *See* note 140, *supra* and accompanying text.

154. *See* Friedman, *supra* note 133, at 362; *cf.* Keith, *supra* note 4, at 215.

155. *See* Ledbetter, *supra* note 44, at 496.

156. R. DAVIES, *supra* note 30, at 126; N. STRAUS, *supra* note 66, at 198.

157. For a general description of the organization of HUD, see UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1968-69, at 385-96, 645 and J. WILLMANN, THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (1967).

The actual mechanics of public housing today closely resembles that outlined in the 1937 Act. States must pass enabling legislation authorizing the creation of local housing authorities.[158] Generally the local governing body (such as a city council) then creates a local housing authority[159] and appoints a Board of Commissioners, often composed of five persons recommended by the mayor, to supervise the activities of the local authority. The Board of Commissioners, in turn, may select an executive director to serve as chief administrator of the local program.

To obtain federal funds for a project, the local authority must first furnish HUD with evidence of the need for the proposed project and of compliance with local and state law.[160] In some states, this will require approval of the proposed project by the city's voters in a referendum.[161] The local authority must pass a resolution approving the submission of an Application for a Low-Rent Public Housing Program to HUD,[162] and if a Preliminary Loan is sought, the local government must also adopt a resolution approving the Application.[163] Both resolutions must be included in the Application sent to HUD.

Once this Application is approved, HUD issues a Program Reservation which is a statement of HUD's determination to enter a Preliminary Loan or Annual Contributions Contract covering the number of units requested in the Application. This Program Reservation does not create a legal obligation.[164] Before a Preliminary Loan Contract or Annual Contributions Contract is entered, the local authority must enter a Cooperation Agreement with the local governing body. Through this Agreement, arrangements are made for such necessities as the provision of municipal services and facilities to

158. For examples of typical state statutes authorizing local authorities, see IND. REV. STAT. § 48-8104 (1963); FLA. STAT. ANN. § 421.04 (1960); NEB. REV. STAT. § 14-1401 (1962). As of June, 1964, there were 1,500 local housing authorities in over 2,000 areas. Burstein, *Housing Our Low-Income Population: Federal and Local Powers and Potentials*, 10 N.Y. L.F. 464, 465 (1964).

159. The percentage of local governments opting to create a local authority varies directly with the population of the area. Thus, the larger cities are more likely to have authorized a local housing authority than smaller towns. Note, *supra* note 8, at 508, 509 n.6.

160. HOUSING ASSISTANCE ADMINISTRATION, LOW-RENT HOUSING MANUAL § 201.1, (4)(b) (April 1968) [hereinafter cited as LOW-RENT HOUSING MANUAL]. The procedure for obtaining § 23 housing varies slightly from the normal procedure. However, since most public housing today is conventional, the procedural differences for § 23 housing are not noted.

161. *E.g.*, CAL. CONST. art. 34, § 1 (1954); *cf.* NEB. REV. STAT. § 71-1507 (1966).

162. LOW-RENT HOUSING MANUAL § 201.1(6)(a) (April 1968).

163. 42 U.S.C. § 1415(7) (Supp. III, 1965-67); LOW-RENT HOUSING MANUAL § 201.1(6)(b) (April 1968).

164. LOW-RENT HOUSING MANUAL § 201.1(8)(a) (April 1968).

the project, the elimination of an equivalent number of substandard dwellings,[165] and payments in lieu of taxes by the local authority to the local government.[166] If planning funds are needed, the local authority will ask HUD for a Preliminary Loan of up to 400 dollars per unit,[167] which covers the costs of preliminary surveys, optioning of sites, and other preconstruction planning and preparation.[168] A Preliminary Loan is made only after approval by the Assistant Secretary for Renewal and Housing Assistance.[169]

2. *Site Selection.*—The local authority is given the responsibility for selecting the site of the proposed project, subject to approval by the HUD Regional Office.[170] Site selection is extremely important because of the tendency for tenants to reflect the racial composition of the community in which the project is built. Thus, selecting a site in an all black community will often insure that all the tenants will also be black. Factors which HUD considers in evaluating a site include the overall scheme of the city and the immediate area, physical character of the site, anticipated costs in improvement, and "suitability of the site from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964 and agency regulations and requirements issued pursuant thereto."[171] As added emphasis, HUD has noted that:

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165. The "elimination" can be by remodeling or repair as well as destruction or condemnation. One dwelling unit is considered eliminated for each family living in a substandard dwelling unit which is improved or destroyed. Therefore, five units are considered eliminated if one building housing five families is destroyed. This requirement of equivalent elimination is deferred, however, when the area suffers from an acute shortage of acceptable housing. In addition, there need be no equivalent elimination for rural, non-farm projects or for projects developed on the site of a slum cleared since 1949. 42 U.S.C. § 1410a (Supp. III, 1965-67).

166. LOW-RENT HOUSING MANUAL § 201.1(8)(c) (April 1968). The current statute actually authorizes a tax of 10% of the rent to be paid by the local authorities to state or local taxing bodies. This amount is usually paid in the form of a "payment in lieu of taxes." In effect, this provision merely sets a ceiling on the amount of taxes which can be levied on a housing project. *See* 42 U.S.C. § 1410(h) (Supp. III, 1965-67).

167. LOW-RENT HOUSING MANUAL § 201.1(8)(b) (April 1968).

168. *Id.*

169. 24 C.F.R. § 1520.3 (1968).

170. LOW-RENT HOUSING MANUAL § 205.1(6)(a) (August 1968). Site selection can become a controversial political issue. For an account of the political fighting accompanying selection of sites for public housing in Chicago, see M. MEYERSON & E. BANFIELD, POLITICS, PLANNING, & THE PUBLIC INTEREST (1955).

171. LOW-RENT HOUSING MANUAL § 205.1(2)(a)(b) (August 1968).

> [A]ny proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration.[172]

Thus, despite the general prohibition against building projects in predominantly black or white areas, HUD will permit exceptions when more desirable alternatives are unavailable. Depending on the interpretation, HUD's regulations could mean either that no more facilities will be approved which are surrounded by people of one race, or that future projects will be just as isolated from multiracial neighborhoods as are many present facilities.[173]

3. *Planning and Construction of the Project.*—After tentative approval of a site by the Regional Director, the local authority then contracts for site surveys, title information and appraisals, and hires a

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172. *Id.* § 205.1(2)(g) (August 1968) (emphasis in original).

173. Public housing projects have been built in ghettos rather than suburban or middle class urban areas partly beeause of the strong opposition by the inhabitants of these affluent areas who object to an influx of poor people, especially Negroes. This has brought a form of racial and ineome segregation. L. FRIEDMAN, *supra* note 22, at 122-23.

Irrespective of site approval by the HAA, the local authority's selection of a project site can be challenged in the courts. It has been held that taxpayers do not have standing to challenge the expenditure of federal funds on a housing project without a showing of some uncommon harm. Barber v. Housing Auth., 89 Ga. 155, 5 S.E.2d 425 (1939) (relying on Massachusetts v. Mellon, 262 U.S. 447 (1922)). But taxpayers can enjoin construction of a housing project to prevent wrongful expenditure of state or local funds. *E.g.*, Housing Auth. v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App., 1967); Matthaei v. Housing Auth., 177 Md. 506, 9 A.2d 835 (Md. Ct. App., 1939). Persons living adjacent to a proposed project also have standing to enjoin construction of a project. *See* Housing Auth. v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App., 1967). In addition, tenants of or applicants for public housing have standing to challenge site selection when their constitutional rights may be violated by future use of the facility. Gautreaux v. Chicago Housing Auth., 265 F. Supp. 582, 583 (N.D. Ill. 1967) (brought under 42 U.S.C. § 1983 (1964)). It is established, however, that selection of a project site in an all Negro area is not, of itself, violative of constitutional rights, without a showing of an intent to promote racial segregation. Thompson v. Housing Auth., 251 F. Supp. 121 (S.D. Fla., 1966). Proof of the necessary intent is difficult because of the presumption that public officials will discharge their duties in good faith. *Id.* For a successful challenge of discriminatory site selection, see Gatreaux v. Chicago Housing Authority, 37 U.S.L.W.. 2481 (N.D. Ill., Feb. 10, 1969) (sites in all-white areas were vetoed by alderman in the prospective area with the result that only 4 of 54 projects were in white areas). If no constitutional issue is raised, site selection may be challenged only if arbitrary, capricious, unlawful or made in bad faith. *See, e.g.*, Thompson v. Housing Authority, 251 F. Supp. 121 (S.D. Fla., 1966); *In re* Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952). It is difficult to protest successfully site selection on any basis because of the wide discretion the courts accord local housing authorities. *See, e.g.*, Thompson v. Housing Auth., 251 F. Supp. 121, 124 (S.D. Fla., 1966); Varnadoe v. Housing Auth. 221 Ga. 467, 145 S.E.2d 493, 495 (1965).

professional real estate broker to negotiate for the property.[174] Although the HAA must approve any land purchase, when necessary and permitted by state or local law, the local authority can use the power of eminent domain to obtain title to land for the construction of a project.[175]

The local authority must also select the architect[176] who is given responsibility for planning and construction of the project. To comply with congressional requisites, materials and supplies used in construction of a public housing project must be made in the United States, unless HUD specifically gives permission for the use of foreign-made goods.[177] Architects and construction workers must be paid at least the wages prevailing in the area.[178]

HUD also establishes specific guidelines for room size,[179] with special provision for elderly tenants.[180] The regulations also allow facilities for community rooms and education and recreational programs. The project cost is circumscribed by Congress, and general occupancy units are limited to a cost of 2,400 dollars per room, while units designed for the elderly, disabled or handicapped may cost 3,500 dollars per room. When necessary because of peculiar local conditions, these limits can be raised as much as 750 dollars per room.[181]

4. *Annual Contributions Contract.*—As soon as site approval is given, the local authority prepares a Development Program which includes specifications to be used as the basis of an Annual Contributions Contract. The Program contains estimates of the cost of construction and administration of the project, statistical data, evidence that certain statutory requisites will be met, and the cost of purchasing property and site improvements.[182]

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174. LOW-RENT HOUSING MANUAL § 208.1(2)(a) (January 1965).

175. *E.g.*, GA. CODE ANN. § 99-1119 (1967).

176. LOW-RENT HOUSING MANUAL § 206.1(1) (May 1966).

177. *Id.* § 211.5(1) (June 1968). Permission will be given if the use of American materials is impracticable or unreasonably expensive. *Id.*

178. 42 U.S.C. § 1416(1)-(2) (Supp. III, 1965-67); LOW-RENT HOUSING MANUAL § 206.10(1)(a) (February 1965).

179. *See, e.g., id.* § 207.1(6) (February 1966).

180. *E.g., id.* § 207.3 (June 1963).

181. The maximum amount includes the cost of construction and equipment, but does not include the cost of land, demolition, and nondwelling facilities. Maximum rates are higher for Alaska. 42 U.S.C. § 1415(5) (Supp. III, 1965-67); LOW-RENT HOUSING MANUAL § 207.1 (2)(a) (February 1966).

182. *Id.* § 206.3(1)(a) (October 1968).

Before granting an Annual Contributions Contract, HUD must also approve a Workable Program for Community Improvement,[183] which describes the project's relation to the community, and a plan for the temporary relocation of families displaced from the project site.[184] Also, the local authority must show that except for displaced, handicapped and elderly families, the rental limits for the units will be at least twenty per cent lower than the cheapest adequate private housing,[185] and the method for determining this twenty per cent gap is set out in detail.[186] Finally, HUD must be furnished with proof that the local authority has authorized execution of an Annual Contributions Contract[187] and has reached agreement with the local governing body on the amount to be given as payments in lieu of taxes.[188]

Once these documents are accepted and the Assistant Secretary for Housing Assistance has approved, HUD enters an Annual Contributions Contract with the local authority, obligating the federal government to fund up to 90 per cent of the acquisition and construction costs of the project, amortized over 40 years. Rent for each unit in the project, therefore, only covers the cost of maintenance, and any rent collected which exceeds the operational costs of the project is used to reduce future annual contributions.

After the final blueprints are approved by HAA, bids are publicly solicited for the project.[189] If any bids are found acceptable, the local authority awards the contract to the firm making the lowest bid. While the project is being built, the local authority will often repay any initial federal loans by issuing its own short-term tax-exempt bonds. These bonds are then retired and new long-term bonds (usually 40 years), backed by the federal commitment to make annual contributions, are issued when the project is approximately 80 per cent complete.

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183. *Id.* § 206.3(1)(b) (October 1968).

184. 42 U.S.C. § 1415(7)(b) (Supp. III, 1965-67); LOW-RENT HOUSING MANUAL § 206.3(1)(c) (October 1968). *See id.* § 209.1(a)(a) (March 1965). Relocation expenses are included in the acquisition cost of the project and, accordingly, may be subsidized by annual contributions. 42 U.S.C. § 1415(8) (Supp. III, 1965-67).

185. 42 U.S.C. § 1415(7)(b) (Supp. III, 1965-67); 24 C.F.R. § 1520.4 (1968).

186. LOW-RENT HOUSING MANUAL § 20.5(1) (August 20, 1951).

187. *Id.* § 206.7(2)(d) (June 1956).

188. *Id.* § 206.7(2)(f) (June 1956).

189. *See generally id.* §§ 212 (Aug. 1960), 213 (June 1966). A new technique developed by HUD permits a local authority to contract with the builder to construct a project which the local authority will purchase. This method is called the "turnkey" technique because the builder turns the key over to the local authority. *Id.* § 221.1 (Sept. 1967).

## III. Determining the Eligible Applicants

Since there are many more persons in need of housing than available housing units, upon completion of a project the local housing authority must establish standards which can be used to determine which families are eligible for public housing. It must then develop an admissions process through which a low-income person may seek admission to public housing. If the tenant meets the eligibility standards, the authority must set forth assignment procedures to determine the manner in which the approved applicants will be assigned to the various vacancies. The first hurdle for the low-income person, then, is to meet the eligibility standards established by the housing authority.

### *A. A Survey of Eligibility Requirements*

Eligibility requirements for admission to public housing can be divided into three categories: (1) federal requirements; (2) state and municipal requirements; and (3) local housing authority requirements.

1. *Federal Requirements*— Federal eligibility requirements are derived from two main sources: (1) the federal statute,[190] which is made binding on local housing authorities as a condition to receiving federal funds;[191] and (2) administrative regulations issued by the Housing Assistance Administration (HAA).

(a) *The federal statute*—The federal statute provides that public housing will be limited to "families of low income," who cannot afford decent, safe, and sanitary dwellings.[192] Beyond this basic requirement, however, the federal statute simply requires the local housing authority to adopt admission policies which "give full consideration" to their "responsibility for rehousing of displaced families, and to the applicants' status as a serviceman or veteran."[193]

Although recent provisions include elderly, displaced and handicapped single persons within the term "family," the statute neither defines "family,"[194] nor establishes standards to determine

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190. United States Housing Act of 1937, *as amended,* 42 U.S.C. § 1401 *et seq.* (1964 & Supp. III, 1965-67).

191. Dep't of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract (October, 1967).

192. 42 U.S.C. § 1402(2) (Supp. III, 1965-67).

193. The housing authority must also take into consideration the applicant's age, disability, housing condition and urgency of housing need. *Id.* § 1410(g)(2).

194. *Id.* § 1402(2).

"low income." Although prior to 1958, income limits were part of the federal statute, restricting eligibility to families whose income did not exceed five times the public housing rent,[195] this provision was deleted in 1959,[196] and the establishment of maximum income limits is now a matter of local discretion.

The statute does retain the requirement that the maximum rent in public housing be at least twenty per cent less than the rent which is necessary to obtain adequate private housing.[197] Thus, the twenty percent gap rule will determine the maximum income limit for those states or local authorities which still retain an income-rent ratio.[198] For example, assume the state or local housing authority has a five-to-one ratio, that is, the income cannot exceed five times the rent. Now assume that a family of four can find adequate private housing in the community for 100 dollars per month. Under the twenty per cent gap rule, the maximum rent allowable in public housing would be 80 dollars, while the maximum income limit would be 400 dollars per month. The twenty per cent gap rule, then, while not establishing a maximum income limit, does represent a limitation on the local authorities' discretion. Of course, the effect will vary depending on whether the state or local authority retains an income-rent ratio. Even with a ratio, since the federal statute does not define "income," the local authority can juggle a family's income with numerous exemptions and deductions so that it does not exceed the maximum limit.[199]

(b) *Administrative regulations.*—The second source of federal eligibility requirements is the administrative material issued by the HAA. The *Low-Rent Management Manual* contains requirements which are "the minimum considered consistent with fulfilling Federal responsibilities under the Housing Act."[200] Although there once was some doubt whether the HAA had the power to enact mandatory requirements, the Supreme Court in *Thorpe v. Housing Authority*[201]

195. United States Housing Act of 1937, ch. 896, § 2, 50 Stat. 888, *as amended*, 42 U.S.C. § 1402(1) (Supp. III, 1965-67). The ratio was 6 to 1 for families with 3 or more minors.

196. Housing Act of 1959, Pub. L. No. 86-372, § 503a, 73 Stat. 680, *as amended*, 42 U.S.C. § 1402(1) (Supp. III, 1965-67).

197. 42 U.S.C. § 1415(7)(b)(ii) (Supp. III, 1965-67). This gap does not apply to elderly, displaced or handicapped families.

198. *See* note 214 *infra* and accompanying text.

199. *See* notes 223-30 *infra* and accompanying text.

200. HOUSING ASSISTANCE ADMINISTRATION, LOW-RENT MANAGEMENT MANUAL, § O, Preface (April, 1962). [hereinafter cited as LOW-RENT MANAGEMENT MANUAL].

201. 393 U.S. 268 (1969). The case dealt with a Dept. of Housing and Urban

held that the HAA could issue mandatory requirements pursuant to its rule-making power under the federal statute.[202]

Prior to 1968, the *Low-Rent Management Manual,* like the statute, only required the local authorities to have a reasonable definition of "families of low income."[203] However, a Circular issued by HAA in December, 1968,[204] which is to become part of the *Low-Rent Management Manual,* has placed new restrictions on the local authorities. These restrictions deal with tenant "desirability" standards that were promulgated by many local authorities to deal with problem families.

The HAA also publishes a *Local Housing Authority Management Handbook,* which lists guidelines that are "intended to furnish advisory and guidance material to local authorities."[205] This directive is much more explicit than the statute and the *Low-Rent Management Manual.* For example, the *Handbook* suggests that local authorities define family to include "some concept of family living beyond the mere sharing or intention to share housing accomodation by two or more persons; some recognized and accepted basis of family relationship must exist as a condition of eligibility."[206] The *Handbook* also gives guidelines as to what the local authorities should consider in computing family income, and suggests specific deductions and exemptions.[207] However, the *Handbook* is only advisory and is followed by the local housing authorities in varying degrees.

(c) *Other sources. (i) Civil Rights Act of 1964.*—In the early days of public housing, racial criteria were often used to determine eligibility. In 1962, President John F. Kennedy issued an Executive Order declaring racial discrimination practices denying Negroes the

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Development circular on eviction standards. The first time the Court heard the case, Thorpe v. Housing Authority, 386 U.S. 670 (1967), it vacated the judgment of the Supreme Court of North Carolina as a result of the circular, remanding for further consideration below and deferred judgment on the effect of the circular. The North Carolina Supreme Court reaffirmed its decision and the case was reappealed.

202. "Although the circular supplements the control in the sense it imposes upon the authority an additional obligation not contained in the contract, that obligation is imposed under HUD's wholly independent rule-making power." 393 U.S. at 279 (1969).

203. LOW-RENT MANAGEMENT MANUAL, § 3.5 (Oct., 1967).

204. Dep't of Housing and Urban Development, Circular (Dec. 18, 1968) [hereinafter cited as HUD Circular (Dec. 18, 1968)]. For a discussion of the significance of this Circular, see note 246 *infra* and accompanying text.

205. HOUSING ASSISTANCE ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, pt. I, § 7, ¶ 10(c) (Aug., 1963) [hereinafter cited as LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK].

206. *Id.*, pt. IV, § 1, ¶ 3(b) (July, 1965).

207. *Id.*, pt. VII, § 5, (July, 1964).

benefit of housing financed through federal assistance to be "unfair, unjust and inconsistent, with the public policy of the United States."[208] This Order served as the basis for Title VI of the Civil Rights Act of 1964, which provides: "No person . . . shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[209] Pursuant to this Act, the HAA has issued regulations to insure that the local authorities adhere to a non discriminatory policy.[210]

(ii) *Gwin Amendment.*—At one time, the "Gwin Amendment," which was enacted as a rider to the federal statute in the early 1950's, provided that "no housing unit constructed under the Housing Act of 1937, shall be occupied by a person who is a member of an organization designated subversive by the Attorney General."[211] Despite the deletion of the amendment from the appropriation measure after 1954, many local authorities have retained it as a requirement for eligibility. In *Lawson v. Housing Authority*[212] the Milwaukee provision was declared unconstitutional by the Wisconsin Supreme Court on the grounds that the possible harm from suppression of first amendment freedoms outweighed any threatened evil posed by occupation of federally aided housing projects by members of subversive organizations. However, there remains no federal law or decision which specifically prevents the local authorities from excluding members of subversive organizations from public housing.[213]

2. *State and Municipal Requirements.*—State and Municipal governments set very few criteria for admission to public housing. Most state statutes authorizing the establishment of public housing programs

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208. Exec. Order No. 11, 063, 27 Fed. Reg. 11,527 (1962).

209. 42 U.S.C. § 2000(d) (1964). For a discussion of racial discrimination in public housing, see Note, *The Public Housing Administration & Discrimination in Federally Assisted Low Rent Housing*, 64 MICH. L. REV. 871 (1966).

210. 24 C.F.R. § 1.1 et seq. (1968).

211. Independent Office Appropriations Acts, ch. 578, 66 Stat. 402 (1952); ch. 302, 67 Stat. 306 (1953). For a discussion of the Gwin Amendment, *see* text accompanying notes 512-14 *infra*; Note, *The Gwinn Amendment: Practical & Constitutional Problems in Its Enforcement*, 104 U. PA. L. REV. 694 (1956).

212. 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882 (1955).

213. The Houston Housing Authority still retains the following provision: "No family is eligible who includes any person who is a member of any organization designated as subversive by the Attorney General of the United States." HOUSTON HOUSING AUTHORITY, APPLICATION PROCEDURES AND POLICIES 6 (Apr. 15, 1967) [hereinafter cited as HOUSTON REGULATIONS].

are merely re-enactments of the federal statute. Therefore, the main eligibility requirement is a "family of low income." However, many states retain the five-to-one income-rent ratio which was deleted from the federal statute in 1959.[214]

Municipal governments do not actually promulgate eligibility requirements. However, since all proposed housing projects need local approval, eligibility is often indirectly established by municipal governments, which can simply refuse to approve any new housing project unless it is reserved for a certain kind of low-income family.[215] For example, in recent years municipal governments have been reluctant to approve any housing projects except those designed for the elderly. In 1966, 50 per cent of all units completed and placed under management were for elderly families.[216] This is attributed primarily to the increase of Negro problem families in public housing and the reluctance of middle class suburbanites to support public housing for this group. Furthermore, the federal statute allocates an extra 120 dollars per unit in cost allowance for projects designed for the elderly.[217] Undoubtedly, a great many of the future housing projects will be open only to elderly low-income families.

3. *Local Housing Authority Requirements.*—The bulk of power to determine eligibility requirements is delegated to local housing authorities,[218] who are responsible for filling in the details and promulgating the specific requirements.

Generally, the local housing authorities' eligibility requirements fall into two categories: (1) technical requirements and (2) desirability requirements. The former are basically implementations of the basic federal framework, while the latter are additional requirements imposed by each individual housing authority.

(a) *Technical requirements.*—Technical requirements can be divided into five main categories: (i) Family; (ii) Income; (iii) Net Assets; (iv) Housing Conditions; and (v) Residency.

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214. "More than thirty states have the five-to-one ratio or some variant." Friedman, *Public Housing and the Poor: An Overview,* 54 CALIF. L. REV. 642, 657 (1967); *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-1409 (Supp. 1967); TENN. CODE ANN. § 13-81 (1955); TEX. REV. CIV. STAT. art. 1269k (1959).

215. *See* note 165 *supra* and accompanying text.

216. MORE THAN SHELTER *supra* note 99 at 72 (1968).

217. 42 U.S.C. § 1410(a) (Supp. III, 1965-67).

218. "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements." 42 U.S.C. § 1401 (1964).

(i) *Family*—Although local housing authorities are required by thc federal statute to restrict public housing to "families,"[219] they are free to define this term as they see fit. "Family" is typically defined as a "group of two or more persons related by blood, marriage or adoption who will live together in the same dwelling unit of the project."[220] On the surface, the definition seems reasonable, but there is one major problem. In states in which a common-law marriage is not recognized, this definition excludes a common-law couple from eligibility, since they are not related by "blood, marriage or adoption." In Michigan, a state that does not recognize common-law marriage, the Detroit Housing Authority has solved this problem by defining a family as "two or more persons who have a family type relationship."[221]

(ii) *Income.*—In addition to defining a family, the local housing authority must also determine what constitutes "low income." This is done by establishing a maximum income limit which the family cannot exceed and still be eligible for public housing. The average maximum limit for a family of two adults and two children is approximately 4,000 dollars in localities within urban areas.[222] The local housing authority is free to establish any limit, subject to two important limitations: (1) a state statute which establishes an income-rent ratio; and (2) proof to the HAA that the income limit is reasonable.

Perhaps even more important than the maximum income limits are the local housing authorities' methods for computing a family's income. The maximum income limits are normally based on a family's net income. Thus, a family's eligibility can vary depending

219. 42 U.S.C. § 1402 (Supp. III, 1965-67).

220. *See, e.g.*, CLEVELAND METROPOLITAN HOUSING AUTHORITY, ADMISSION REGULATIONS § 1, (1968) [hereinafter cited as CLEVELAND REGULATIONS]; NASHVILLE HOUSING AUTHORITY, STATEMENT OF POLICIES GOVERNING ADMISSION TO AND CONTINUED OCCUPANCY OF THE PHA-AIDED LOW-RENT HOUSING PROJECT OPERATED BY THE NASHVILLE HOUSING AUTHORITY § X, (1964) [hereinafter cited as NASHVILLE REGULATIONS]; OAKLAND HOUSING AUTHORITY, STATEMENT OF POLICIES GOVERNING ADMISSION TO AND CONTINUED OCCUPANCY OF THE HAA-AIDED LOW-RENT HOUSING PROJECTS OPERATED BY THE HOUSING AUTHORITY OF THE CITY OF OAKLAND § VIII(A) (Nov. 13, 1967) [hereinafter cited as OAKLAND REGULATIONS]; HOUSING AUTHORITY OF SEATTLE, MANUAL OF OPERATIONS § 1 (1965) [hereinafter cited as SEATTLE REGULATIONS].

221. DETROIT HOUSING AUTHORITY, RESOLUTION ESTABLISHING POLICIES AND STANDARDS TO GOVERN THE ADMINISTRATION OF HAA-AIDED PROJECTS § II. (Jan. 2, 1969) [hereinafter cited as DETROIT REGULATIONS].

222. PHA REP. NO. 220.0, ANNUAL REPORT OF MAXIMUM INCOME LIMIT AND RENT IN LOW RENT HOUSING (Statistics Branch, Dec. 31, 1964), *quoted in* Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508 (1967); *see* note 434 *supra*.

on what method the local authority uses to determine this net figure. Generally, the gross income for the entire family is determined first. Normally, certain items are excluded from gross income, such as: (1) amounts received as reimbursements for illness or medical care; (2) casual or irregular gifts; and (3) amounts received in inheritances.[223] In addition, a few authorities also exclude the value of Federal Surplus Foods and Food Stamps and the sporadic income of minors.[224]

After gross income is established, various exemptions and deductions are allowed, resulting in the rent income or net family income. Some local housing authorities, such as Chicago, do not allow any deductions or exemptions and rely on gross income for determining if the family is under the maximum income limits.[225] However, normal exemptions include 100 dollars for each minor child and amounts paid by the government in connection with a military death.[226] Some authorities are more generous. For example, the Houston Housing Authority, in addition to the preceding, allows a 200 dollar exemption for each adult member of the family having no income, except for the head of the family and his spouse. A 600 dollar exemption is also allowed on the income of each adult member of the family having income other than the principal income recipient. A similar exemption is allowed on a minor's income.[227]

Most local authorities allow an applicant to deduct occupational expenses, social security taxes (federal income taxes are not allowed), expenses for support of members of the family not residing in the project, extraordinary medical expenses, and a limited amount for living expenses for a principal income recipient who is in the armed forces.[228] Again, some authorities are more generous than others. The Seattle Housing Authority allows a 50 dollar deduction for tuition of members of the family enrolled in college; it also exempts the first 85 dollars plus one-half the remainder per month received by the head of the house, spouse, or both as enrollees or participants in the Job Corps, Neighborhood Youth Corps or College Work Study

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223. *See, e.g.,* HOUSING REGULATIONS 18; NASHVILLE REGULATIONS § X(m); SEATTLE REGULATIONS 7 (1966).

224. *See, e.g.,* OAKLAND REGULATIONS § VIII(N)(2).

225. Chicago Housing Authority Times, Apr., 1968, at 1, col. 2.

226. *See, e.g.,* NASHVILLE REGULATIONS § I(A)(2)(a); OAKLAND REGULATIONS § I(A); SEATTLE REGULATIONS 2.

227. HOUSTON REGULATIONS 4, 5 (Oct. 1, 1968).

228. *See, e.g.,* CLEVELAND REGULATIONS 3; DETROIT REGULATIONS § IV; NASHVILLE REGULATIONS § X(N).

programs.[229] Houston allows a deduction for expenses incurred in connection with a seeing eye dog.[230]

It is apparent that maximum income limits are releative in nature. Two housing authorities with identical maximum income limits could conceivably reach the opposite conclusion on the same family depending on what each authority allowed in the way of exclusions, deductions and exemptions.[231]

It should be noted that while some families may have too much income for public housing, others may be unable to obtain admittance because of a lack of income. Since public housing is not free, such families may be unable to afford even the minimum rent. Families with insufficient income to afford this rent without sacrificing other essentials are technically ineligible for public housing. However, very few of the housing authorities have minimum income requirements, and in most cases some plan is worked out through a public assistance or welfare agency to enable the family to pay the rent.[232]

(iii) *Net Assets.*—In addition to income requirements, most local housing authorities require that a family's net assets, excluding personal and household effects, not exceed a fixed amount. The average amount is around 3,000 dollars, but can range up to 7,500 dollars.[233] A family with assets in excess of the stated amount, regardless of whether its income is under the maximum limit, is not eligible for public housing.

(iv) *Housing Conditions.*—A further requirement for eligibility to public housing, which has been adopted by some of the local housing authorities, is that the family, at the time it applies for admission, must be either (1) living in an unsafe, unsanitary or overcrowded dwelling, or (2) displaced by public action, or (3) actually without public housing through no fault of the applicant, or (4) about to be without housing due to causes other than the fault of the tenant.[234] Again, some local authorities are not as restrictive as

229. SEATTLE REGULATIONS 9 (1967).

230. HOUSTON REGULATIONS 20.

231. For example, Oakland and Seattle have the same maximum limit for a family of four, $4700. *See Vanderbilt Law Review Survey*, note 286 *infra*. Because of the variations in exclusion, exemptions and deductions, however, these limits are not identical.

232. MORE THAN SHELTER, *supra* note 99, at 75. None of the authorities studied in the report maintained a minimum income limit.

233. *See Vanderbilt Law Review Survey*, note 286 *infra*. The amounts for the elderly are usually higher.

234. *See, e.g.*, CLEVELAND REGULATIONS 1; NASHVILLE REGULATIONS § 1(a)(3); SEATTLE REGULATIONS 2. This requirement was in the federal statute until it was deleted in 1961. Housing Act of 1961, Pub. L. No. 87-70, § 205(a), 75 Stat. 164.

others. The Oakland Housing Authority, for example, will admit low-income families who are paying over 30 per cent of their income for rent, regardless of the type of housing in which they are living.[235] Still others, such as the Detroit Housing Authority, have followed the federal statute and do not use housing conditions as a formal requirement.[236]

(v) *Residency.*— Most housing authorities do not have any formal residency requirements other than demanding that the applicant be residing in the city at the time he applies for admission. However, a few housing authorities require the applicant to have lived in the city for a certain amount of time, ranging from six months to one year.[237]

(b) *"Desirability" Requirements.*— Many local housing authorities have established eligibility requirements which exclude certain families because of their social behavior. The most widely discussed and criticized standards are those of the New York Housing Authority which has adopted an arbitrary list of criteria for excluding applicants on behavioral grounds and a second list for screening on a case-by-case basis.[238] Included among the criteria are arrest records, narcotics addiction, illegitimacy, and presence of a child who is a juvenile delinquent. Of these, the most controversial has been the illegitimacy standard.

Prior to 1968, housing authorities in twelve states denied eligibility to "families" which had an illegitimate child.[239] However, in 1967 a federal district court[240] invalidated the Little Rock, Arkansas, unwed mother policy, which automatically denied public housing to mothers with illegitimate children. The court, in holding that the requirement was not consistent with the policy of public housing, stated:

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235. OAKLAND REGULATIONS, § 1(A)(3). A family of a Veteran or Serviceman or an elderly family are exempted from this requirement.

236. DETROIT REGULATIONS 1.

237. Detroit requires 1 year of continuous residency. Detroit REGULATIONS § 11(F). Houston requires 6 months. HOUSTON REGULATIONS.

238. For a discussion of the New York Housing Authority, see Rosen, *Tenant's Rights in Public Housing, Housing For the Poor: Rights and Remedies* 154 (N.Y.U. School of Law Project of Social Welfare Supp. 1, 1967). *See also* Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

239. Alabama, Arkansas, Connecticut, Delaware, Kansas, Maryland, Michigan, New Jersey, New York, North Carolina, Oregon & Pennsylvania, *quoted in* Rosen, *supra* note 238, at 227 n.170.

240. Thomas v. Housing Auth., 282 F. Supp. 575 (1967), *noted in* 56 GEO. L.J. 1215 (1968).

An indiscriminate denial of access to public housing to families unfortunate enough to have or acquire one or more illegitimate children would be to deprive of the real or supposed benefits of the program many of the very people who need it most—the poorest and most ignorant of the poor.[241]

Although this decision was not based on constitutional grounds, subsequent actions challenged similar unwed mother policies in other cities as violating the equal protection clause of the fourteenth amendment.[242] Most of these cases, however, were settled out of court when the local authority agreed to revise its policies.

The culmination of these suits was the issuance of the HAA Circular in December, 1968, which is to be incorporated into the *Low-Rent Management Manual* and is therefore mandatory on the local authorities.[243] The Circular, after quoting the language from the district court decision, adopts the following provision:

b. A Local Authority shall not establish policies which automatically deny admission or continued occupancy to a particular class, such as unmarried mothers, families having one or more children born out of wedlock, families having police records or poor rent-paying habits, etc.[244]

In addition to invalidating all automatic exclusions, the Circular provides that an applicant's previous conduct will exclude him only if it indicates he "would be likely to interfere with other tenants in such a manner as to materially diminish their enjoyment of the premises." Finally, the Circular requires that investigations into the applicant's eligibility not invade his right to privacy or require unreasonable documentation.[245]

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241. 282 F. Supp. at 580.

242. *See, e.g.*, Richardson v. Housing Auth., Civil Action No. 678 (E.D.N.C. 1966); Thrift v. Housing Auth., Civ. Action No. 3734 (S.D.W. Va. 1967).

243. HUD, Circular (Dec. 18, 1968).

244. *Id.* The Circular prohibits local authorities from basing such an exclusion "solely on such matters as the marital status of the family, the legitimacy of the children in the family, police records, etc." One might argue that this Circular in effect invalidates automatic exclusion because of marital status of couples who live together without being ceremoniously married in states which do not recognize common-law marriages. *See* note 221 *supra* and accompanying text. The sounder interpretation of the Circular probably is that it incorporates local definitions of "family," and that therefore it would still permit local authorities to exclude couples who were not legally married under local law. *See also* notes 256, 257, 276 *infra* and accompanying text.

245. The Circular provides for the following safeguards: (1) that forms and procedures provide for obtaining only such information from the applicant and for only the verifications as are necessary for determining his eligibility, preferenees (if any), size of unit required, and amount of rent, and reporting to HUD; (2) that applicants and tenants be treated with courtesey and consideration at all times, in all written or verbal communications and relationships; (3) that applicants and tenants be the primary source for information required by the Local Authority, applicants and tenants shall be required to furnish only documentation that can be

Actually, the Circular will not affect the majority of the local housing authorities. A report issued by the National Commission on Urban Problems, before publication of this Circular, concluded that the vast majority of the local authorities "accept all technically eligible applicants unless there is overwhelming evidence that the family will cause serious threat to the safety and welfare of the other tenants."[246] However, for New York and other authorities with arbitrary standards, the Circular will require a major change in their "desirability" requirements.

### *B. Evaluation of Eligibility Requirements*

For the low-income citizen eligibility requirements are crucial because they are often the difference between a decent home and a life in the slum. The great shortage of adequate private housing for low-income families was recognized as early as 1949,[247] when Congress authorized the construction of 800,000 low-rent public housing units. Nineteen years later, however, only 73 per cent of that number were occupied.[248] As of 1960, assuming that an annual income of 4,000 dollars marks the approximate average of financial need for low-rent housing, the supply was equal to only 3.3 per cent of the number of units needed to house low-income urban families.[249] In 1967, the President's National Commission on Civil Disorder re-emphasized the desparate need for additional housing by recommending the construction of 6,000,000 public assistance units within five years.[250] In short, families unable to meet the eligibility requirements for public housing are forced to live in substandard private housing, often paying more rent than public housing families.

In view of the importance of eligibility requirements, several questions concerning the existing standards arise. First, because they are so important, should the local authorities have so much

reasonably obtained without undue effort, delay, or expense. The Authority shall utilize other sources to obtain required information only to the extent necessary; and (4) that applicants be provided in a reasonable time with the most accurate and factual information possible concerning their status, with full regard for their need to know how to plan for meeting their houshold needs. *Id.*

246. MORE THAN SHELTER, *supra* note 99, at 76. *See Vanderbilt Law Review Survey, infra* note 286.

247. Housing Act of 1949, ch. 338, § 2, 63 Stat. 413, *as amended*, 42 U.S.C. § 1441 (Supp. III, 1965-67).

248. MORE THAN SHELTER, *supra* note 99, at 68.

249. *Id.*

250. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 475 (Bantam ed. 1967). It is improbable that such a goal will be reached.

discretion? Should there instead be uniform federal standards? Second, since the federal statute only requires that the inhabitants be families of low-income, should there be any desirability standards?

1. *Uniform Standards Versus Local Discretion.*—The decision to place the main responsibility for administering the projects in independent local authorities can be traced back to the Housing Act of 1937. Two factors made it necessary that local authorities be given control of the program. One was local resentment against the overcentralized Public Works Administration.[251] Thc other was a Sixth Circuit decision which held that slum clearance and construction of low-rent housing were not legitimate public purposes for the federal exercise of eminent domain.[252]

In some instances, of course, local authorities are better suited to establish eligibility requirements. For example, local authorities should determine the income limit. Due to the variations in local housing conditions and the difference in the cost of living, the income needed to afford adequate private housing varies from city to city. This realization was the primary reason Congress failed to re-enact the income-rent ratio in the 1959 statute[253] and allowed local authorities to adopt a "reasonable" limit. For the same reason, the state income-to-rent ratios should be abolished: the economic and housing conditions can vary greatly from city to city within the same state.

However, there are other instances where the autonomy of the local authorities is questionable. Why, for example, should each local authority adopt its own definition of "family?" Why should local authorities in states recognizing common-law marriages be permitted to consider a common law couple a family, while loeal authorities in states which do not recognize common-law marriages do not?[254] It can be argued that the constitutional guarantee of equal protection requires that these couples be accorded the same treatment. Basic fairness also demands the same: a family does not suddenly dissolve when it crosses state boundaries. The only way to prevent such a

251. *See* Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508 (1968).

252. United States v. Certain Lands in the City of Louisville, 9 F. Supp. 137 (W.D. Ky. 1935), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *dismissed on motion of Solicitor General*, 294 U.S. 735 (1935).

253. Housing Act of 1959, Pub. L. No. 86-372 § 501, 73 Stat. 679, 42 U.S.C. § 1401 (1964).

254. *See* note 221 *supra* and accompanying text.

result is for a uniform definition of family that would not be dependent on whether the couple was legally married under state law.

Similar objections can be made with respect to local authorities establishing their own methods of computing income. Why should a family in one state receive an exemption on the wife's income while a family in another state does not?[255] Under these circumstances, even though the income limits were identical, the former family could earn more than the latter family and still be eligible for public housing. It is one thing for local housing authorities to establish their own income limits; it is yet another for them to have their own method of computing income. Again, equal protection would require a uniform standard.

This is not to say that the local authorities' requirements are in and of themselves invalid. To the contrary, these generous exemptions and deductions show extraordinary insight. But by allowing the local authorities complete discretion, some families are denied equal protection, and when a program is financed by federal funds, it is imperative that all potential applicants be given an equal chance to participate. Accordingly, the overall program should be governed by a uniform federal policy which insures a just and efficient administration.

2. *Desirability Requirements.*—The usefulness of uniform standards was demonstrated by the promulgation of the December, 1968, HUD Circular restricting the local authorities' power to establish desirability standards. Due to the obvious denial of equal protection that resulted by having different standards for each separate housing authority, some federal action was clearly appropriate. But while all agree that uniform standards were desired, not all agree with the approach taken by the Circular.

Some critics would maintain that rather than preventing the local authorities from automatically excluding such families as those with illegitimate children and criminal records, the Circular should have instructed the authorities to deny admission to all families with such problems.[256] The theory behind this view is that public housing is designed to provide a better social environment for poor families, a

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255. *See* note 227 *supra* and accompanying text.

256. *See* Ledbetter, *Public Housing: A Social Experiment Seeks Acceptance,* 32 LAW & CONTEMP. PROB. 490 (1967). Mr. Ledbetter argues: "It is clear that a vast majority of the taxpayers, the housing authority officials, and particulary the occupants of the projects, want such a policy." *Id.* at 522.

goal which can be accomplished only by keeping out "the alcoholics, the drug addicts, families with propensities for trouble and delinquency, and unwed mothers who show no signs of reform."[257] The defenders of this argument point to the high turnover rate in public housing, which they maintain is due in large measure to the presence of problem families.[258]

This argument, however, has never been accepted widely. As already indicated, most local housing authorities have never had desirability requirements. The general view seems to be that the goal of public housing is not to provide a better social environment, but rather to provide a better physical environment for poor families.[259] Requirements of moral worthiness have no relation to a family's need for a decent, safe and sanitary home. Furthermore, the goal of rehabilitating the poor will not be fulfilled by keeping them in the ghettos. Indeed, there is evidence that socially undesirable behavior may be more easily eliminated in an atmosphere of decent living conditions.[260] This has led some people to suggest that public housing should give priority to, rather than exclude, those families with social problems.[261]

In any event, it is clear that desirability standards often represent an insurmountable barrier for the poor family. The very fact that the family is poor and lives in a slum usually means that it is beset by the typical problems of alcoholism, arrest records, delinquent children and illegitimacy.[262] Perhaps illegitimacy is so controversial because of the large size of the class affected. Approximately one out of sixteen births is illegitimate,[263] and for families with incomes low enough to meet the income limits for public housing, the rate is probably much

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257. *Id.*

258. In a survey of 50 of the largest cities the turnover rate was 16%, although the range of turnover varied considerably. In New York and Chicago, for example, the rate is 5.7% and 9.9%, respectively. In contrast, it is 38.5% in Jersey City, 39% in Los Angeles, and 45.8% in Phoenix. MORE THAN SHELTER, *supra* note 99 at 73.

259. *See* Rosen, *supra* note 228, at 247.

260. *See, e.g.*, M. HARRINGTON, THE OTHER AMERICA 32 (Penguin ed. 1963); W. WHYTE, STREET CORNER SOCIETY 254, 256 (2d ed. 1955).

261. *See* Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122, 1135 (1968).

262. *See* Wirth, *Point of Entry Work*, 14 J. HOUSING 127 (1957).

263. The estimated ratio of illegitimate live births to all live births in 1963 was 63.3 per thousand for all groups (259,400 total live illegitimate births out of 4,098,020 live births); 235.9 per thousands for nonwhites (150,700 total live illegitimate births). *Vital Statistics of the United States*; 163, Natality, Tables 1-26, 1-28 (U.S. Dept. of Health, Education and Welfare, Public Health Service, 1964).

higher. One study in Washington, D.C., estimated that two out of every five births for all families with incomes below 4,000 dollars are illegitimate.[264] For Negroes, illegitimacy, and desirability standards in general, are particularly burdensome. Not only are nearly one-quarter of all urban Negro marriages dissolved, but also nearly one quarter of Negro births are illegitimate. Consequently, almost one-fourth of Negro families are headed by females on public welfare.[265]

In short, desirability requirements generally reflect middle class values which may be unrelated to the experience of low-income families. It is unrealistic to expect people who have lived in slums all their lives to have the same mores and values of persons reared in a middle class environment. It would seem, then, that restricting public housing to poor families and then setting up desirability standards is a contradictory policy.

The applicant may have a further objection to desirability standards. By their very nature desirability standards inquire into personal and family affairs, the "sort of things that are, to the average person, nobody else's business, certainly not the government's."[266] Although the right of privacy is not specifically protected by the Constitution, the Supreme Court has made it clear that certain areas of family life are constitutionally protected from government intervention.[267] Private tenants do not have to prove that their children are legitimate or that they have never been in jail. Furthermore, since the state has its own penal system to deal with socially undesirable behavior,[268] the housing authority should not add its own sanctions.

But, on the other hand, the interests of the housing authority should not be ignored. Obviously, people who would damage the property or interfere with other tenants' use of the premises should not be admitted to public housing. The problem, however, is to determine whether an applicant would engage in such activities if he were admitted. While past behavior is not conclusive, it does suggest a pattern of behavior which should be considered in making the

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264. *Income, Education and Unemployment in Neighborhoods*, Washington, D.C., (Dept. of Labor, Bureau of Labor Statistics, 1964).

265. L. Rainwater & W. Yancey, The Moynhan Report and the Politics of Controversy 5 (1967).

266. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1254 (1963).

267. Griswold v. Connecticut, 381 U.S. 479 (1965) (State law against use of contraceptives held unconstitutional).

268. 381 U.S. 486 (Goldberg, J., concurring).

eligibility determination.[269] For example, repeated arrests for prostitution, a recent history of drug addiction, and convictions for child molestation may suggest undesirable behavior. Of course, each case is different and must be considered on an individual basis. But when the authority can offer clear and convincing evidence that the applicant's past behavior strongly indicates he will interfere with other tenants' rights or that he might misuse the premises, he should be declared ineligible.[270]

From these observations, it is clear the HUD Circular has adopted the correct policy.[271] Although automatic exclusions are forbidden and authorities are limited in the inquiries they can make into the families' personal lives, it is clear that certain behavior will be grounds for denying admission. What would constitute such behavior? The National Commission on Urban Problems lists five behavioral criteria that are used by most authorities as grounds for denying admission. They would seem consistent with the provisions of the Circular.

> (1) Former tenants who vacated owing a balance must clear the arrearage before being admitted.
> (2) Women with police records or other history indicating an active pattern of prostitution are excluded.
> (3) Girls under 18 (or in some instances under 20) who are pregnant and unmarried are asked to bring a parent or are referred to an agency for counseling. While rejection of such an applicant would not be automatic, it would be expected that she would live with her parents or another family or accept care through an agency for unmarried pregnant girls.
> (4) A family in which an adult or older teenager has had a recent active history of aggressive behavior involving such elements as addiction to or "pushing" drugs, extreme alcoholism, child molestation, rape or attempted rape, or assault and battery—any of which might constitute a threat to other tenants—would be rejected.
> (5) A family with a critical history with respect to misuse or destruction of prior housing accomodations might be rejeeted.[272]

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269. In Thomas v. Housing Authority, 282 F. Supp. 575, 581 (E.D. Ark. 1967), the court, after striking down the un-wed mother policy stated: ". . . the housing authority (does not) have to close its eyes to the fact that the head or member of the family group has one or more illegitimate children. And the Court thinks that the authority might permissibly formulate a policy giving some evidentiary or presumptive effect to the presence of illegitimate children in a family group, particularly where there are more than one of such children, where they are of recent birth, and where the births have followed each other in quick succession."

250. For a list of suggested criteria, see the ACLU OF SOUTHERN CALIFORNIA, PROPOSED REGULATION FOR THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES § 1 (1967), and a criticism with alternative suggestions in Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122, 1136 (1968).

271. *See* note 224 *supra* and accompanying text.

272. MORE THAN SHELTER, *supra* note 99, at 76-77.

### C. *Recommendations and Conclusions*

While there are many shortcomings with the present eligibility standards, nevertheless, the evidence shows that public housing is reaching the low-income family which cannot afford adequate private housing. The average median income of all families in public housing in 1965 was 2,446 dollars.[273] Criticisms against the New York Housing Authority and other authorities with desirability requirements do not reflect an accurate view of the overall program.[274] Nor do the charges that local authorities refuse to comply with the Annual Contributions Contract by publishing their requirements find support.[275] To the contrary, most authorities have an open door policy and do their best to admit all qualified applicants.

However, there is room for improvement. The decision in *Thorpe v. Housing Authority*[276] has opened the way for the HAA to assume a larger role in the administration of the program. Such action would seem desirable, since it would insure equal protection for all and lead to greater efficiency. In this regard it is recommended that the HAA issue a mandatory Circular setting forth: (1) a uniform definition of family, which would permit common-law couples to be eligible for public housing regardless of state law; (2) a uniform method for computing net family income including those exclusions, deductions and exemptions that the HAA feels necessary; and (3) a uniform requirement on the type of housing in which the applicant must be residing to be eligible. In addition, state income-rent ratios should be eliminated in place of language which corresponds to the liberal flexibility of the federal statute. Finally, all authorities should adopt a liberal attidue toward admission of all technically qualified applicants unless there is clear and convincing evidence that the family might interfere with the other tenants' enjoyment of the premises.

## IV. THE ADMINISTRATION OF ADMISSIONS AND ASSIGNMENTS IN PUBLIC HOUSING

As noted, for an ever-growing number of low-income families, the federally-financed, low-rent housing program is the principal

273. *Id.* at 75.

274. Rosen, *supra* note 238, relied almost exclusively on the New York Housing Authority Admission Standards for his article.

275. "The local authority shall duly adopt and promulgate, by publication or posting in a conspicous place for examination by prospective tenants regulations establishing its admission policies." Dept. of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contribution Contract, pt. I, § 206 (1967) [hereinafter cited as Annual Contributions Contract].

276. 393 U.S. 268 (1969). See notes 450-59 *infra* and accompanying text.

source of hope for safe and decent shelter. Consequently, as the low-rent program has grown in size, it has become increasingly important not only to establish appropriate eligibility requirements but also to create a fair procedure by which to admit and assign public housing applicants.

Since World War II, local administration of public housing has been beset with problems which have caused a great deal of dissatisfaction among tenants themselves, as well as lawyers, social scientists and certain segments of the general public. In order to understand the sources of this dissatisfaction, it is necessary to examine both the existing admissions and assignment procedures as well as judicially created procedural safeguards.

### A. *The Admissions Process*

1. *The Federal Requirements.*—Federal statutes and regulations give little direction to the local public housing authority in the area of admissions policies and procedures controlling tenant selection. The 1959 Housing Act, while making local policies subject to the approval of HAA, gives the "local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program."[277] The Act of 1961 requires the local authority "to adopt and promulgate regulations establishing admissions policies . . ." and to admit each family in a project pursuant to these policies.[278] Details for local procedures are practically nonexistent in the federal housing statutes.

Since the HAA has the responsibility of administering the federal low-rent housing program, it has issued rules and regulations to implement federal policy on the local level. Although there are few specific regulations, the HAA does require local authorities to promulgate and make available to prospective tenants regulations setting forth admissions policies. The regulations must be "reasonable" and consistent with the authority's statutory responsibility relating to displaced persons, servicemen, veterans or disabled servicemen, and their relations.[279] Furthermore, the federal

277. 42 U.S.C. § 1401 (1964). It has been suggested that the HAA rarely exercises its authority and then only in cases of clear violation of the Act. *See* Rosen, *Tenants' Rights in Public Housing*, HOUSING FOR THE POOR: RIGHTS AND REMEDIES 154, 162 (N.Y.U. School of Law Project on Social Welfare 1967).

278. 42 U.S.C. § 1410(g)(2)-(3) (1964).

279. HOUSING ASSISTANCE ADMINISTRATION, LOW-RENT MANAGEMENT MANUAL § 3.5 (1967) [hereinafter cited as LOW-RENT MANAGEMENT MANUAL]. The policies and priorities discussed are repeated from the statutory language, 42 U.S.C. § 1410(g)(3) (1964), and also appear in the Annual Contributions Contract, pt. I, § 206, at 7.

regulations require each local authority to secure a written application from each applicant; to establish policies governing the investigations of applicants' and tenants' statements about their eligibility; and to keep records showing the date of receipt and the determination of each application, the preference rating assigned to each applicant, the vacancies offered, and the date and disposition of units assigned.[280]

The regulations provide little more than the statutes in setting procedural requirements. An aggrieved public housing applicant, for example, can find little in the regulations to support a claim that a local authority has not complied with federal requirements in dealing with his application. The record-keeping requirements, for instance, seem designed more to facilitate HAA supervision of compliance with statutory maximum rent levels than to provide procedural safeguards or fundamental fairness to the applicant. Thus, there is no provision for allowing an applicant to discover the status of his application, the sources of information detrimental to his application, or the reasons for a finding of ineligibility or for a denial of admissions. Moreover, it is anomalous that tenants who are evicted must be informed of the reasons in a private conference and be given an opportunity to reply, while ineligible applicants need not be afforded the same right.[281]

Certain requirements may be implied from the regulations, although they are not expressly provided. Such requirements include chronological processing of applications and the maintenance of a waiting list of qualified applicants awaiting vacancies. Each application is to be "dated, time-stamped, and referred to a central tenant selection and assignment office." Applicants must be assigned a place on "a community-wide basis" in "sequence,"[282] through a series of offers made to the family at the top of the sequence list for the available vacancy.[283]

2. *Local Practices.*—Recently, much attention has been focused

280. LOW-RENT MANAGEMENT MANUAL § 3.8(a)-(c) (1967); repeated in Annual Contributions Contract, pt. I, § 208(A)-(C). *See also* HOUSING ASSISTANCE ADMINISTRATION, LOW-RENT HOUSING MANUAL § 102.1, Exhibit 1, ¶ 10 (July 1967) [hereinafter cited as LOW-RENT HOUSING MANUAL], relating to nondiscrimination. For HAA suggestions for verification of applicants' statements, see LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Part IV, § 2, ¶ 4 (May 1964) [hereinafter cited as MANAGEMENT HANDBOOK].

281. *See* LOW-RENT MANAGEMENT MANUAL § 3.9(a) (1967). An exception to the general proposition that the aggrieved tenant has little recourse in federal law is found in the nondiscrimination regulations, discussed in text accompanying notes 344-59 *infra*.

282. 24 C.F.R. § 1.4(b)(2)(ii) (1968); LOW-RENT HOUSING MANUAL § 102.1, Exhibit 2, ¶ 1(c) (July 1967).

283. *See* notes 348-54 *infra* and accompanying text.

on the problem of insuring due process in welfare administration. Generally,[284] including the operation of public housing.[285] Despite this concern, the local housing authorities responding to the *Vanderbilt Law Review Survey*[286] reveal a pattern of basic procedures designed to provide a modicum of fundamental fairness while facilitiating local operations.

In general, all of the responding authorities indicated that copies of regulations governing admissions and a regular list of approved applicants awaiting vacancies were made available to applicants. For example, the Chicago Housing Authority, which houses over 34,000 people of whom 33,000 are in federally-aided housing,[287] maintains a regular waiting list, as does the Seattle Authority, which operates a much smaller project. In addition, most housing authorities grant seniority to approved applicants by assigning positions on a waiting list according to time of application. Moreover, most responding authorities—including Houston, Detroit, and New Orleans—indicated that an applicant may receive notification of his position on the list upon request and that an approved application does not lapse as long as the applicant responds affirmatively to periodic checks of continued interest.[288]

The *Survey* thus indicates that a local authority is almost certain to comply with the federal requirement that information on admissions procedures be easily obtainable.[289] Moreover, a regular waiting list of approved applicants, notice of position, seniority, and no automatic expiration seem to be common procedures. Although these provisions are not universal, it does seem clear that the presence

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284. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

285. *See, e.g.*, Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968), discussed at length in part B of this section; Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966); Rosen, *supra* note 202; Smith, Jr., *Due Process In Public Housing*, 2 D.C. HOUSING RESEARCH COMM. REP. 22 (1967).

286. The *Vanderbilt Law Review* sent a questionnaire to the public housing authorities of twelve cities with various populations. Responses and additional information were received from the housing authorities of Chicago, Illinois; Cleveland, Ohio; Detroit, Michigan; Houston, Texas; Nashville, Tennessee; New Orleans, Louisiana; Oakland, California; and Seattle, Washington. Additional field research and interviewing were done in Nashville. Information obtained from the questionnaire is cited to the *Vanderbilt Law Review Survey*, on file with the *Vanderbilt Law Review*. Information obtained from a publication of a local authority will be cited to the publication.

287. CHICAGO HOUSING AUTHORITY, ANNUAL STATISTICAL REPORT (1967).

288. *Vanderbilt Law Review Survey*.

289. *See* text accompanying note 279 *supra*.

of these procedures can be considered as representative of local administration of the admissions process.

Even though the federal regulations require the local authority to set policies for investigating the statements made by applicants concerning eligibility,[290] very little is known about how a local authority attempts to verify an applicant's statements or how it discovers and evaluates information about the applicant's eligibility. With the great discretion allowed the local authorities by federal law and the existing disparity between demand and available vacancies in most cities, however,[291] "for slum dwellers seeking admittance to public housing . . . the procedural and substantive standards governing their admission . . . [spell] the difference between decent shelter and total frustration."[292] Since investigations are likely to produce the information which will determine whether an application will be accepted or rejected, it seems desirable and fair that an applicant have some sort of hearing before being denied admissions to public housing, in order to confront and explain any adverse information.

Several cities responding to the *Vanderbilt Law Review Survey* indicate that a hearing procedure is in use. Chicago, for example, has an administrative board which reviews complaints about denials of admission, although no hearing is held prior to denial. Seattle similarly provides a post-denial hearing, at which the applicant may have counsel present and be informed of the source of information detrimental to his application. In addition, plans are underway to set up similar review procedures in New Orleans and Cleveland.[293]

Again, the fact that some sort of administrative review is available at all to persons denied public housing indicates a concern with procedural fairness by the responding authorities beyond what is required by the federal regulations governing admissions. If a hearing for the applicant denied admission to public housing comes to be considered an essential of due process, however, it is not certain that a hearing will suffice if conducted after a final decision has been made to reject an application.[294]

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290. LOW-RENT MANAGEMENT MANUAL § 3.8(b) (1967); Annual Contributions Contract, pt. I, § 208(B).

291. *See, e.g.*, J. ANGEVINE, THE POOR IN PUBLIC HOUSING 54-55 (Boston University School of Law, Law & Poverty Project 1967).

292. Note, *Non-financial Eligibility and Eviction Standards in Public Housing: The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

293. *See Vanderbilt Law Review Survey*, *supra* note 286.

294. *Cf.* Kelly v. Wyman, CCH POVERTY L. REP. ¶ 9134 (S.D.N.Y. Dec. 16, 1968).

Since the *Survey* generally revealed little about the nature of the hearings made available by the responding authorities with respect to due process, the details of the proposed Cleveland plan for review of denials are of interest. The Cleveland Authority has proposed a five-member Review Panel, composed of two tenant representatives, one member of the housing authority, a member of a local social organization, and a member of the American Arbitration Association, as chairman. In addition to applicants who have been denied admission, evicted tenants or residents with complaints may seek review of management policies and actions. Jurisdiction is to be limited to:

> decisions involving a matter of judgment of a staff person relating to the applicant's eligibility or the resident's record . . . and not questions of a technical nature such as determination of family composition, determination of residence, income computation, or assets limitations . . . which are governed by regulations.[295]

This proposal indicates that an informal administrative hearing is contemplated, and the same is likely to be found in cities providing review of admissions policies or management decisions in a project. The formality of an adversary trial is not always necessary for due process, but there is no apparent reason why an authority could not implement a fair procedure to assure the right of personal appearance and confrontation in order to minimize abuses of administrative discretion, to discover its sources, and to prevent injustices.[296]

### B. *Evaluation of Case Law Developments*

A housing authority's failure to provide a mechanism for challenging the admissions process arguably is contrary to the constitutional protection of due process. When an applicant who is formally eligible for public housing under federal laws cannot learn the reason for the local authority's rejection of his application or cannot question the process of determining his noneligibility, he may have a justiciable claim that he has been denied due process of law

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295. CLEVELAND METROPOLITAN HOUSING AUTHORITY, PROPOSED ADMISSION AND CONTINUED OCCUPANCY POLICIES AND REGULATIONS (December 23, 1968) (mimeographed report on file with the *Vanderbilt Law Review*).

296. *Cf.* Department of Housing and Urban Development, Circular, The Social Goals of Public Housing (March 3, 1968). The Circular states that "the development of equitable systems for handling grievances," is one of the most important goals of the program. *Id.* To implement this goal HUD recommends "The adoptation of procedures whereby tenants, either individually or in a group, may be given a hearing on questions relating to Authority policies and practices, either in general, or in relation to an individual or family." *Id.*

protected by the fourteenth amendment.[297] The minimum which should be required of the local authority to guarantee due process in the admissions system is that each applicant have access to regulations governing admissions, be informed of the basis of action taken on his application, and be given a right to rebut detrimental evidence on which the rejection of his application was based.

1. *The Required Procedural Safeguards.*—The entire admissions process was scrutinized recently in the case of *Holmes v. New York City Housing Authority*.[298] Plaintiffs, 31 nonpreference[299] applicants for state-assisted public housing in New York City, alleged in a class action that they had filed 51 applications with the Authority and that none had been advised in writing of the disposition of any of the applications. They complained further that regulations pertaining to admissions procedures and criteria were unavailable despite repeated requests and that applications were neither processed chronologically nor on the basis of "ascertainable standards." In addition, they alleged that all applications, whether accepted or rejected, expired automatically in two years, that a renewal application was given no preference although the applicant had once been deemed eligible more than two years earlier, that the applicant was not informed that he had been declared ineligible, and that a waiting list of approved applicants was unavailable. The tenants claimed that these defects deprived them and all similar applicants of due process in violation of the fourteenth amendment by increasing "the likelihood of favoritism, partiality and arbitrariness on the part of the Authority," and by depriving them "of a fair opportunity to petition for admission to public housing, and to obtain a review of any action taken by the authority."[300]

297. *See* Kelly v. Wyman, CCH POVERTY L. REP. ¶ 9134 (S.D.N.Y. Dec. 16, 1968). Courts have sometimes countered this argument by declaring that one having no right to a government gratuity cannot complain that the denial or termination of the privilege must conform to due process. *See* Smith, Jr., *supra* note 285, at 23, and cases cited at 23 n.14. It may be argued, however, that participation in programs established by Congress is a "right" of all eligible persons, subject to the requirements of due process for denial or termination of benefits thereunder. *Cf.* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *supra* note 284.

298. 398 F.2d 262 (2d Cir. 1968).

299. The New York City Housing Authority operates federal, state, and local housing. In choosing candidates for federal housing, preference is given to certain specified classes of applicants, *e.g.*, "site residents" and "families in emergency need of housing." Nonpreference candidates are to be allocated to federal projects according to an objective scoring system. There is no similar system for state-aided or locally-aided projects. *Id.* at 264.

300. *Id.* at 264.

The action was brought in federal district court[301] for relief under the Civil Rights Act of 1871,[302] which is now section 1983 of title 42 of the *United States Code.* This section provides for "an action at law, or suit in equity" to redress the "deprivation of any rights, privileges, and immunities secured by the Constitution and laws."[303] After the district court denied defendant's motion to dismiss, ruling that the complaint stated a federal claim within its civil rights jurisdiction, defendants appealed.[304] The Second Circuit affirmed, holding that sufficient facts for a claim for relief under section 1983 and the due process clause of the fourteenth amendment were alleged, thus permitting the lower court to proceed with a trial on the merits.

The Second Circuit discussed two of the alleged irregularities in the Authority's admissions procedures that may deny due process. The court noted that by failing to adopt standards for selection among nonpreferance candidates, the defendants failed to establish a fair procedure for allocating a scarce supply of vacancies:

> It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. [Citation omitted.] For this reason alone due process requires that selection among applicants be in accordance with ascertainable standards . . . .[305]

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301. Federal jurisdiction was predicated upon 28 U.S.C. § 1343(3) (1964), which provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

302. Although the case is not clear on this point, it is assumed that the action sought to enjoin the housing authority from continuing to use the procedures complained of and to proceed to deal fairly with the tenants' applications. An injunction is an appropriate remedy under § 1983. *See, e.g.,* Van v. Toledo Metro. Housing Auth., 113 F. Supp. 210 (N.D. Ohio 1963). But there has been reluctance to grant injunctions against state or local officials except in cases of manifest injustice. *See* NAACP v. Gallion, 290 F.2d 337 (5th Cir.), *vacated on other grounds,* 368 U.S. 16 (1961). The doctrine of municipal immunity for performance of governmental functions still has vitality. *See* Henig v. Odorioso, 256 F. Supp. 276 (E.D. Pa. 1966), *aff'd* 385 F.2d 491 (3d. Cir. 1967) (§ 1983 does not contemplate suit against municipalities). *See also* notes 574-580 *infra* and accompanying text.

303. 42 U.S.C. § 1983 (1964) provides in full: "Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action at law, suit in equity, or other proper proceeding for redress."

304. The defendants were permitted to take an interlocutory appeal to the Second Circuit under 28 U.S.C. § 1292(b) (1964).

305. 398 F.2d at 265.

Although this language was directly applicable to the absence of standards for choosing among "nonpreference" candidates for New York state-funded housing,[306] it is arguable that ascertainable standards are required for all classes of candidates and for local, state, as well as federal projects governed by federal regulations.[307]

The court then noted the virtually universal problem of choosing among equally eligible candidates, once standards have been set. A fair and reasonable system, such as "by lot or on the basis of the chronological order of application," was suggested as necessary.[308] The court further noted that due process is a flexible concept, suggesting that chronological processing on the basis of an objective scoring system could be suitable.[309] The court stated that the fairness sought by such a system could be subverted, however, if, as the tenants alleged, some applicants were rejected "secretly" without ever being notified, thus withdrawing them from the pool of applicants without affording them the chance to seek review of the decision.[310]

Although the complaint in *Holmes* arguably relates to procedural defects in operating state-funded public housing, the requirements of due process permeate all governmental action, and there is no reason why requisites of due process in the admissions procedure noted in *Holmes* should not apply to admissions to federal public housing, for which the HAA has provided almost no operating standards.[311] The *Holmes* case suggests, at a minimum, that publication of regulations and criteria, chronological processing of applications on the basis of these criteria, and some form of notice as to one's standing in the bureaucratic mill are clearly requisites of due process.

2. *The Fair Hearing.*—When a formally eligible applicant is denied admission to federal public housing under additional state or local criteria, some form of judicial or administrative review should be a requisite of due process. When the party wishes to challenge the standard as applied to him, the evidence used, or the procedure

306. *See* note 299 *supra.*

307. *See* text accompanying note 279 *supra* for federal requirements. As noted in the New York regulations, an objective scoring system for choosing among nonpreference candidates for vacancies in federal projects was employed. *See* note 299 *supra.*

308. 398 F.2d at 255, quoting Hornsby v. Allen, 326 F.2d 605, *petition for rehearing denied*, 330 F.2d 55 (5th Cir. 1964). The case dealt with alleged violations of due process in the administration of liquor licenses. The court quoted from the decision denying the petition for rehearing. *Id.* at 56.

309. 398 F.2d at 265.

310. *Id.* at 265 n.4.

311. *See* text accompanying notes 297-300 *supra.*

followed, it seems that a hearing must be afforded; the requirements indicated by *Holmes* would be meaningless unless the applicant can question the reasonableness of the standards and the manner in which they were applied.

Although there are no housing cases which have established guidelines for a fair hearing, a recent welfare case, *Kelly v. Wyman*,[312] did establish both the importance of a fair hearing before the denial of welfare benefits and the criteria of a fair hearing. It is submitted that the criteria which would satisfy due process in the welfare area should be equally necessary in public housing hearings.

In *Kelly*, recipients of both federal and state welfare payments brought an action under section 1983 to enjoin the termination of welfare payments without a prior hearing conforming to the requisites of due process.[313] The district court held that due process requires an adequate hearing before termination, even though state regulations provided for a constitutionally fair hearing after termination.[314] In discussing the constitutional standards of a fair hearing, the court in *Kelly* set forth several items constituting minimum procedural safeguards which would be equally applicable to a housing hearing.

(a) *Sufficiency of notice.*—The court stated that due process required that the welfare agency disclose the real basis for termination of benefits in order to enable the recipient to prepare a defense. In the court's view, the New York practice of giving notice of the proposed discontinuance in a letter containing a brief statement of general reasons clearly failed to satisfy the requirements of due process.[315] Although the court did not elaborate, sufficient information for a defense would seem to require the names and addresses of all persons giving detrimental information about the recipient, the content of that information, and an indication of the relative weight given the information in the decision to terminate benefits.

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312. CCH POVERTY L. REP. ¶ 9134 (S.D.N.Y. Dec. 16, 1968).

313. Defendants were the Commissioner of the New York State Department of Social Services, the State Board of Public Welfare, and the Commissioner of the New York City Department of Social Services, responsible for administration of state funded general assistance and home relief and the federal AFDC program under the Social Security Act, 42 U.S.C. § 301 et seq. (1964), *as amended*, (Supp. I, 1965). CCH POVERTY L. REP. ¶ 9134, at 10,255.

314. *Id.*, at 10,265. The considerable hardship caused to at least one of the plaintiffs in the time between termination of payments and reinstatement thereof after a regular post-termination hearing several months later was indicative of the problems that led the court to hold that a pre-termination hearing was essential, and that the additional expense of providing pre-termination hearings could not justify denying the sort of fair procedure needed to catch and prevent such injustices before they concur. *Id.* at 10,260.

315. *Id.* at 10,261-62.

(b) *Personal appearance.*—The court found that the New York City welfare regulations only permitted the recipient to submit a written statement defending his grant. The court said that inviting a welfare recipient to submit written arguments without granting a right to a personal appearance was "cruelly ironic" and insufficient to allow him to rebut the evidence disqualifying him. The court declared that "the right to a personal appearance is ordinarily implicit in the constitutional concept of a fair hearing . . . ."[316] Considering the general educational level of many welfare recipients, an informal face-to-face hearing would most likely produce a just resolution of disputes over continued eligibility.[317] Similarly, the public housing applicant or tenant should be afforded the right to be told in person by a responsible group or individual the reasons for the denial of his application.

(c) *Right to cross-examination.*—The court further held that in addition to being fully informed of the case against him, the recipient must be able to meet and question the sources of adverse evidence. The court sought to prevent the termination of benefits on the basis of hearsay, rumors, and outright falsehoods which the recipient does not have the right to rebut. Due process does not require a formal adversary trial, in the court's view, but merely dictates that the recipient be afforded the right to question the evidence against him before the person or board making the decision to terminate.[318]

Combining the three requisites, the court held that:

> when the decision is made to terminate benefits, the recipient must be afforded an opportunity to learn the evidence against him which the investigation turned up, if it was a basis of that decision, and when the value of that evidence turns upon a person's credibility, the recipient must have the opportunity to test it. . . .[319]

These minimum procedures were declared necessary for a constitutionally required fair hearing, and termination of benefits without such process was enjoined.[320]

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316. *Id.* at 10,258-60.

317. *Id.*

318. The court conceded that where information supplied by the recipient himself was used, confrontation is not essential, but where the termination of benefits is based on information from sources the veracity of which is questioned by the recipient, the right to confront and to question should be afforded. *Id.* at 10,262.

319. *Id.* at 10,263; *cf.* Willner v. Committee on Character and Fitness, 373 U.S. 96, 108 (1963).

320. CCH POVERTY L. REP. ¶ 9134, at 10,263. The court further considered an optional set of procedural regulations and found other shortcomings in them with regard to choice of reviewing officials and adherence to regulations, but refused to enjoin its use. *Id.* at 10,265.

Although *Kelly v. Wyman* involved the termination of welfare benefits, the rights established in that case should be afforded to the public housing applicant. While the needs of the housing applicant may not be as immediate or desperate as those of a welfare recipient whose grant is terminated, in some situations a hearing at which the public housing applicant can defend his rights before a final decision on his application is made is clearly necessary to give substance to the requirement of due process in the admissions procedures.

The welfare recipient whose grant is terminated experiences an immediate and perhaps total loss of income. The prior hearing is an important safeguard of his economic well-being, as it may prevent an unjustified termination and deprivation of income during the interval before a post-termination hearing could be held. Since in many cities even approved public housing applicants must often wait several months for a vacancy, some housing authorities argue that the denial of admissions without a prior hearing is not similarly detrimental to the applicant's welfare. A hearing could be held, they argue, after the denial during what would have been the ordinary waiting period had the applicant been accepted. This argument ignores the fact that acceptance of an applicant generally establishes his seniority on the waiting list for vacancies. Thus, while an applicant may successfully challenge the grounds for his denial and be adjudged acceptable in a post-denial hearing, his position on the waiting list will naturally be lower than if he had been vindicated in a prior hearing. In cities with more vacancies and shorter waiting lists, the denial of a prior hearing could unjustifiably postpone an applicant's admission to decent housing, since, arguably, the waiting period for a hearing might be longer than that for a vacancy. It is submitted, therefore, that the hearing should be afforded before denial of admissions so that an applicant who can rebut the reasons for the denial may be placed higher on the waiting list than if he had been forced to wait until after rejection to raise his claim.

In addition to the hardships caused by delay in getting on a waiting list for a vacancy, an unjustified denial of admission to public housing may have other serious effects on the applicant in the interim before a post-denial hearing. It might, for example, jeopardize his ability to draw welfare, to obtain credit, or to keep a job. A prior hearing, therefore, including the minimum procedural safeguards set forth in *Kelly v. Wyman* is required for the fair administration of the admissions process.

Hopefully all local housing authorities will exercise their broad

powers and guarantee these safeguards to all tenants in order to fully implement the goals of public housing. Unfortunately, however, such may not be the case. Consequently, the burden may fall on HUD to assure the tenant fair treatment. For example, the 1967 HUD Circular,[321] held binding in *Thorpe v. Housing Authority*[322] required local housing authorities to explain to tenants the reason for threatened evictions. In a similar manner HUD could promulgate binding circulars which require a prior hearing and establish minimum standards for that hearing.

3. *Judicial Remedies To Secure Due Process.*—It should not be necessary for the tenant to litigate to secure due process in the admissions procedure. If neither the local housing authority nor HUD guarantee due process to all tenants, however, the *Holmes* decision indicates that the tenant may utilize a federal injunction to insure that he is treated fairly. In that case the court refused to accept the defendant housing authority's contention that the district court should have refused to accept jurisdiction under the judicially created "abstention" doctrine, under which a federal court, at its discretion, may decline to proceed with a case over which it has statutory and constitutional jurisdiction.[323] Although not clearly stated in the decision, presumably the defendant argued that the petitioners should have been required to exhaust state judicial and administrative remedies before seeking a federal injunction under the civil rights statutes.[324]

321. Department of Housing and Urban Development, Circular, *Termination of Tenancy in Low Rent Projects* (Feb. 2, 1967).

322. Thorpe v. Housing Auth., 393 U.S. 268 (1969). For a discussion of this case, see text accompanying notes 450-59 *infra*.

323. Holmes v. New York City Housing Auth., 398 F.2d 262, 265-67 (2d Cir. 1968). There are four general situations and grounds on which federal courts have refused jurisdiction under the abstention doctrine: (1) when state action is being challenged on constitutional grounds and state law may be dispositive of the case; *see, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); (2) when refusing jurisdiction would allow the court to avoid needless conflict with state administration of state affairs; *cf.* Steffanelli v. Minard, 342 U.S. 117 (1951) (enjoining enforcement of operation of state criminal law); (3) when difficult issues of state law may be avoided in civil litigation; *see* Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940) (state property law in bankruptcy proceeding); *but cf.*, Meredith v. City of Winter Haven, 320 U.S. 228 (1943); (4) when convenient for the federal courts; *cf.* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (forum non conveniens doctrine permitting dismissal). *See generally* C. WRIGHT, FEDERAL COURTS § 52, at 169-77 (1963).

324. *Cf.* Harrison v. NAACP, 360 U.S. 167 (1959) (abstention upheld in suit under civil rights statute). Petitioners in *Holmes* sued under 42 U.S.C. § 1983 (1964), set out in note 303 *supra*.

Some district courts have abstained, however, from taking jurisdiction in public housing cases. In *Randell v. Newark Housing Authority*,[325] for example, the Third Circuit affirmed a district court's refusal to enjoin the eviction of tenants by the public housing authority. Plaintiffs sought preliminary injunctions, alleging that their evictions would violate due process. They specifically objected to the unavailability of both the reasons for their threatened evictions and the opportunity to defend themselves. The district court had held that under section 1983 it did not have jurisdiction over the case.[326] The court affirmed the refusal to grant the injunction, since the plaintiffs had not sustained their burden of proof, but found the record unclear as to whether there was an absence of jurisdiction under section 1983. The court remanded the case for vacation of the order of dismissal, saying that "plaintiffs should have the opportunity to demonstrate . . . that the state laws and procedures did not afford them a forum to present their claims for constitutional protection."[327]

Although the court in *Randell* proposed the abstention doctrine as a basis for dismissal when remanding the case to the district court,[328] the court in *Holmes* distinguished *Randell* and other cases applying the abstention doctrine because the relevant state statute had concentrated all state judicial review of administrative matters in one state court, thus permitting disposition of the case under state law.[329] Where, as in the case of public housing administration, state law has provided an inadequate means of seeking review of state administrative action affecting substantial federal and constitutional rights, it is inappropriate for federal courts to "abstain" from taking cases seeking redress of these rights. As the Second Circuit said in another context, "cases involving vital questions of civil rights are the least likely candidates for abstention."[330]

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325. 384 F.2d 151 (3d Cir. 1967).

326. 266 F. Supp. 171 (D. N.J. 1967) (*semble*), *noted in* 3 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 225 (1967). To support its holding the court cited Monroe v. Pape, 365 U.S. 167 (1961), which held that a municipality was not liable in damages under § 1983 for the illegal conduct of its policemen. Language in *Monroe v. Pape* indicating that municipal corporations were not "persons" within the meaning of § 1983, 365 U.S. at 191 n.50, was soon criticized as so questionable as not to be binding on a district judge's exercise of discretion. *See* 3 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 225, 230 (1967).

327. 384 F.2d at 157.

328. 384 F.2d at 157 n.15.

329. 398 F.2d at 262 & n.6.

330. Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967) (action for injunction and damages for violation of state prisoner's constitutional rights under eighth amendment is an inappropriate case for abstention).

Moreover, when an action is brought under section 1983 for relief from the actions of state administrative agencies, the Supreme Court has held that the petitioners need not have first exhausted state administrative and judicial remedies.[331] Thus district courts should be accessible to aggrieved applicants for public housing who wish to challenge the adequacy of admissions procedures and to enjoin continued use of procedures unacceptable under federal, state or local regulations.[332] Similarly, applicants may be able to secure a hearing prior to rejection of their applications by raising the arguments set forth in *Kelly v. Wyman*[333] concerning the hardships imposed by a denial of eligibility in an action founded on section 1983.

### C. *Tenant Assignment and the Problem of Discrimination*

The national objective expressed in the Housing Act of 1949—a "decent home and a suitable living environment for every American family"[334]—when read together with Title VI of the Civil Rights Act of 1964[335] indicates that Congress intended that federal low-rent housing must be administered without discrimination as to race, color, or national origin.[336] Yet "at the end of World War II virtually all public housing in America was segregated."[337] Soon after the Supreme Court refused in *Shelley v. Kraemer*[338] to allow a state to enforce a racially restrictive covenant in a lease and invalidated the "separate but equal" concept in *Brown v. Board of Education*,[339] two federal courts of appeal held that government-enforced segregation in public housing was a denial of equal protection.[340] By 1959, all federal and state decisions had held the state powerless to provide separate

331. Damico v. California, 387 U.S. 416 (1967).

332. *See* Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968); *see* text accompanying notes 299-311 *supra*; *cf.* Lewis v. Housing Auth., 397 F.2d 178 (5th Cir. 1968) (issued in petition to enjoin eviction under local regulation rendered moot by recission of regulation).

333. CCH POVERTY L. REP. ¶ 9134 (S.D.N.Y. Dec. 16, 1968); *see* text accompanying notes 312-320 *supra*. *See generally* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).

334. 42 U.S.C. § 1421 (1964).

335. 42 U.S.C. § 2000d-1 (Supp. 1, 1965).

336. *See* Sauer, *Free Choice in Housing*, 10 N.Y.L.F. 525, 531-32 (1964).

337. U.S. COMM'N ON CIVIL RIGHTS REP. 160 (1963), *cited in* Sauer, *supra* note 336, at 539.

338. 334 U.S. 1 (1948).

339. 347 U.S. 483 (1954).

340. Heyward v. Public Housing Admin., 238 F.2d 689 (5th Cir. 1956); Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955).

but equal public housing.[341] It was not until 1962, however, that the federal government, by means of an Executive Order, recognized housing discrimination as a target of federal policy,[342] and only in the Civil Rights Act of 1964 did legislation prohibit racial discrimination in all federal housing programs.[343]

The current regulations governing tenant assignment and selection of sites for federally-aided low-rent housing are the principle HAA tools for effectuating federal anti-discrimination policy. Accordingly, the federal tenant assignment requirements, the programs of several local authorities, and the success of the HAA in enforcing compliance with its nondiscrimination regulations must be examined.[344] Of particular interest is the question whether the HAA regulations are designed merely to prevent racial discrimination in public housing or to promote positively the integration of low-rent projects.[345]

1. *Federal Requirements.*—The basic HUD regulations require that assignments be made on a community-wide basis from a chronological list within local preference categories. The local authority, however, may permit the applicant to refuse a limited number of offered vacancies without losing his position on the list.[346] The regulations further require the local authority to "make available . . . such information [concerning nondiscrimination regulations] . . . to appraise [applicants] of the protections against discrimination . . . ."[347]

(a) *The free choice plan.*—HAA has promulgated a set of nondiscrimination regulations, which include specific outlines of two acceptable assignment plans.[348] The first is a plan "under which the eligible applicant must accept the vacancy offered or be moved to last place on the eligible applicant list . . . ."[349] The other is the "free

341. *See* Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959).

342. *See* Exec. Order No. 10063, 27 Fed. Reg. 11527 (1962); Sauer, *supra* note 336, at 528-31.

343. Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (Supp. 1, 1965).

344. For a discussion of the problems of site selection, see notes 170-73 *supra* and accompanying text.

345. *Cf.* Comment, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871, 873 (1964).

346. *See* 24 C.F.R. § 1.4(b)(2)(ii) (1968).

347. *Id.* § 1.6(d) (1968).

348. LOW-RENT HOUSING MANUAL § 102.1, Exhibit 2 (July, 1967) *as amended*, (1968). These provisions are incorporated by reference in the LOW-RENT MANAGEMENT MANUAL, § 3.7 (1967).

349. LOW-RENT HOUSING MANUAL § 102.1, Exhibit 2, at (1)(d)(i) (July, 1967).

choice" plan, based on a system of rejections. Under this plan, where the authority has suitable vacancies in more than one location, it must offer the applicant a unit at the location with the largest number of vacancies. The applicant may reject three offers before being moved to the bottom of the vacancy list.[350] If there are only two locations with suitable vacancies, the applicant is offered a vacancy at the location having a larger number of vacancies; if he rejects, the second location is offered, and if that offer is also rejected, the applicant is placed at the bottom of the list of eligible applicants.[351] If there is only one location with a suitable vacancy, it is offered to the applicant; if he rejects it, a second offer is made to him as a vacancy becomes available; if he rejects that, he is placed at the bottom of the list of cligible applicants.[352]

The local authority is permitted to make minor variations in cither plan, but no applicant may receive more than three offers before losing his top position on the list.[353] If, however, an applicant demonstrates satisfactorily that he would be unable to move to a particular offered location, a refusal for such reason is not to be counted as one of the allowed refusals. Similarly, if he can show that acceptance of a location would cause undue hardship "not related to race, color, or national origin," such as "inaccessibility to source of employment," his refusal is not counted.[354]

(b) *Alternative plans.*—All local authorities operating under federal assistance were initially required to submit assignment plans in accordance with the above-described regulations in 1968.[355] An authority, however, may use another previously operative plan if it shows that the average vacancy rate in each of its projects for the preceding year did not exceed five percent, that there was substantial desegregation in its projects, and that continuance of the existing plan is likely to produce a greater degree of occupancy and desegregation than either of the plans suggested by the HAA.[356] In addition, the

350. *Id.* at (1)(d)(1)(a).
351. *Id.* at (1)(d)(1)(b).
352. *Id.* at (1)(d)(1)(c) *as amended* (1968).
353. *Id.* at (1)(d)(2)(a).
354. *Id.* at (1)(d)(2)(b)-(c).
355. *Id.* at (1)(d)(1)(3).
356. *Id.* at (1)(d)(4)(a). "Substantial segregation" is defined to mean that at least 2/3 of the local authority's projects are desegregated on a greater than token basis. In 1968, 81 cities were given permission by the Assistant Secretary for Equal Opportunity in HUD to continue use of existing tenant assignment procedures rather than employ either of the HAA plans. 25 J. HOUSING 501 (Nov. 1968).

local authority may, after implementing either of the HAA plans, recommend to HAA a different plan with similar criteria.[357]

(c) *Compliance measures.*—HUD regulations set out several different measures to assure compliance with its nondiscrimination regulations in both admissions and assignment procedures. The Annual Contributions Contract must bear a covenant of assurances, both as to existing and future funding arrangements.[358] In addition, HUD requires the local authority to maintain a record of applications[359]. and assignments,[360] and periodically checks these records.[361] Any person who believes he has been discriminated against is authorized to file a complaint with either HUD[362] or the local authority,[363] Local authorities must keep records of all complaints received and notify the complainant of action taken.[364]

The regulations require HAA to investigate complaints and to seek at the local level an informal solution to any complaint.[365] If the informal method is unsuccessful, HAA may terminate federal assistance or may request the Justice Department to enforce any federal rights arising under the statutes or the Annual Contributions Contract in an appropriate judicial action.[366]

2. *Local Experience and Federal Policy.*—It is too early to evaluate fully the effects of the HAA nondiscrimination regulations on the problem of segregated housing, although integration did not increase significantly following the nondiscrimination Executive Order of President Kennedy in 1962.[367] The current regulations,

357. LOW-RENT HOUSING MANUAL, § 102.1, Exhibit 2, at (1)(d)(4)(b) (July, 1967).

358. 24 C.F.R. § 1.5(a)-(c) (1968). The Executive Order applied prospectively only to contracts executed after November 20, 1962. Exec. Order No. 11,063, 27 Fed. Reg. 11527 (1962).

359. *See* notes 281 & 284 *supra*, and accompanying text.

360. LOW-RENT HOUSING MANUAL § 102.1, Exhibit 2, at (1)(d)(1)(6) (July, 1967).

361. *Id.*; 24 C.F.R. § 1.7(a) (1968). The practice of a biennial audit has been discontinued. Interview with Jo Ann Webb, HUD Office of Equal Opportunity, in Nashville, Tenn., March 6, 1969.

362. 24 C.F.R. § 1.7(b) (1968).

363. LOW-RENT HOUSING MANUAL, § 102.1, Exhibit 2, at (1)(h) (July, 1967).

364. *Id.* at (1)(h)-(2).

365. 24 C.F.R. § 1.7(c)-(d) (1968).

366. *Id.* § 1.8(a) (1968). For regulations governing termination of funding and other disciplinary actions, see 24 C.F.R. §§ 1.8 (b)-(d) (1968). See also 24 C.F.R. §§ 1.9 to 1.11 (1968), dealing respectively with hearings, promulgation of decisions, and the right of judicial review. Under a recent reorganization, all complaints are reviewed by the Office of Equal Opportunity within HUD which makes decisions about appropriate remedies. Termination of funding or a lawsuit by HAA are considered extraordinary remedies. Interview, *supra* note 361.

367. *See generally* Sloane, *One Year's Experience: Current and Potential Impact of the Housing Order*, 32 GEO. WASH. L.J. 457 (1964).

however, give HAA more power to enforce federal policy, although it is not certain whether enforcement of these nondiscrimination regulations will produce increased integration of public housing.[368] It has been forcefully argued that HAA and the federal housing programs generally distinguish segregation from discrimination, with HAA policies designed to prevent the latter while, at the same time, allowing local authorities to perpetuate intentional segregation of the projects through site selection and tenant selection policies.[369] It has also been suggested that HAA does not use effectively its powers to prevent segregation. It does not, for example, use its authority to formulate and dictate assignment procedures to assure more racially balanced projects:

> [I]f [HAA] wishes to assume a truly nondiscriminatory position, it seems that it must adopt an affirmative approach in its tenant placement procedures in order to counterbalance the negative features of governmentally supported segregation in site selection.[370]

The current "free choice" plan, then, may be ineffective so long as local choice of sites is not more closely supervised. Finally, administrative review may not reveal the procedures for both tenant assignment and site selection which foster continued patterns of segregation.

For these reasons litigation may be the only way in which an interested party can call attention to the persistence of segregation of the races and discrimination in selection and assignment of tenants. In *Gautreux v. Chicago Housing Authority*,[371] litigation did prove useful in remedying discriminatory practices. Plaintiffs, Negro tenants and applicants for public housing, sought in a federal district court a declaratory judgment that defendant Chicago Housing Authority's site selection procedure violated plaintiffs' rights to equal protection of the law. Plaintiffs also requested a permanent injunction against racial discrimination in public housing, an order that defendants submit a new nondiscriminatory plan for site selection, and a declaratory judgment allowing plaintiffs to seek an injunction against the use of federal funds to perpetuate racial discrimination in public housing.[372] As to tenant assignment policies, defendants admitted

368. *See* Comment, note 345 *supra*. The author argues that any reduction in the 100% segregated low-rent housing since 1945 is due to state antidiscrimination laws rather than the HAA policies. *Id.* at 871 n.4.

369. *Id.* at 872.

370. *Id.* at 882.

371. CCH POVERTY L. REP. ¶ 9413 (N.D. Ill. Feb. 10, 1969), *reported in* 37 U.S.L.W. 2481.

372. CCH POVERTY L. REP. ¶ 9413, at 10,621.

maintaining quotas limiting the number of Negroes in at least four projects.[373] Although Negroes comprised almost 90 percent of the residents of public housing, the proportions of Negroes in these four projects were seven percent, four percent, six percent, and one percent.[374] The court said that an alleged history of violence and threats of violence in the area could not excuse a

> governmentally established policy of racial segregation . . . . CHA's [Chicago Housing Authority] quotas have clearly maintained Negro occupancy at a permanently low level . . . [and] plaintiffs are entitled to appropriate relief against the defendant's policy of denying applications to the four projects on the basis of racial quotas.[375]

The court refused, however, to enjoin the use of federal funds in view of HAA's previously demonstrated uncertainty as to whether it would be appropriate to cut off federal funds on the basis of the sort of evidence presented at the trial.[376] The court noted that such action would be possibly more damaging than beneficial to those for whose benefit the suit was brought, and certainly less efficient in this case than an injunction under section 1983.[377]

The case reveals HAA's reluctance to use fully its powers to end discriminatory practices in site selection and tenant assignments.[378] Although the regulations issued pursuant to Title VI of the Civil Rights Act of 1964[379] give the HAA sufficient means of enforcement, the *Gatreux* case indicates that HAA may still prefer to utilize the time consuming administrative complaint procedures instead of more stringent measures, such as suspension of funds. Thus it is possible that these administrative procedures[380] may come to be used less than litigation by private parties, as a matter of strategy. In this way, HAA may assume a secondary role in eliminating segregation in existing public housing.

In many instances local authorities are likely to be in compliance

373. *Id.*

374. *Id.*

375. *Id.* The court reported that only two violent incidents were raised by defendants, one in 1953, and one in 1959 involving white hostility to Negro tenants. *Id.*

376. *Id.* at 10,625-26. The court noted a letter from the Commissioner of PHA dated October 14, 1965, to a local citizens' group, "taking a position against denying federal funds in reply to a rather scanty presentation protesting the selection of a few sites on the basis of racial composition of their neighborhoods." *Id.*

377. *Id.* Both parties were given thirty days by the court to submit new proposals for tenant assignment and site selection.

378. *Id.; see* Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955).

379. 42 U.S.C. § 2000d-1 (Supp. I, 1965); *see* text accompanying notes 342-65 *supra.*

380. 24 C.F.R. §§ 1.6-1.12 (1968).

with the HAA suggested assignment procedures.[381] If increased integration is a goal, however, these plans may need reevaluation. They were supported originally as analogous to the free choice plans for school integration approved by both HEW and the courts.[382] The Supreme Court, however, has since declared that freedom-of-choice plans in schools violate the equal protection clause of the fourteenth amendment when a more effective plan for achieving a unitary, nonracial school system exists.[383] Similarly, more effective public housing plans may be possible and hence required by the courts when faced with proof that an existing plan is perpetuating segregation despite compliance with HAA approved procedures.[384] As noted, moreover, site selection contributes to segregation, and to the extent that sites continue to be chosen in connection with urban renewal and slum clearance, greater racial balance in low-rent housing cannot be expected without some form of compulsory integration not currently pursued.[385] The solution to the problem of integration may ultimately lie in adoption of newer approaches to low-rent housing, such as scattered site housing and private leased housing.[386]

The problem of segregation has not been ended by legislation. Before more legislation is enacted, however, the goals of public housing should be reviewed to determine whether the current law

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381. Two authorities responding to the *Vanderbilt Law Review Survey*, Detroit and Cleveland, sent copies of their proposed plans, both of which were substantially the same as the federal plan.

382. *See* Comment note 345 *supra*, at 883.

383. Green v. New Kent County School Bd., 391 U.S. 430 (1968), *noted in* 21 VAND. L. REV. 1093 (1968).

384. *Cf.* Gatreux v. Chicago Housing Auth., CCH POVERTY L. REP. ¶ 9413 (N.D. Ill. Feb., 1969). *But cf.* Ledbetter, Jr., *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490, 503-04 (1967). The author notes alternative plans that have been used, partieularly in New York City, to promote integration, without attaining the desired results, often due to the reluctance of whites to move to predominantly Negro projects. There arc thosc who feel that anything more compulsory than free choice would violate the individual's freedom of association. According to one such view, slum clearance and decent housing should be the primary objectives of low-rent housing, while forced integration is "social compulsion manipulated according to plans of self-appointed social engineers." Avins, *Anti-Discrimination Legilsation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13, 37 (1960); *cf.* Comment, note 345 *supra*, at 877-78 & n.39, suggesting that the former PHA saw supplying the maximum amount of low-rent housing whether segregated or integrated as the fulfilment of its responsibilities. It is also argued that more enforced integration would cause whites to leave public housing, creating an increase in Negro tenancy and accompanying depression of rental levels and loss of rental income. *Id.* at 887.

385. Ledbetter, Jr., *supra* note 384, at 504.

386. *See generally* Burstein, *New Techniques in Public Housing*, 32 LAW & CONTEMP. PROB. 528 (1967).

reflects the social goals to be attained. For instance, where pressure for decent housing on the fringes of Negro ghettoes is great, compulsory integration, requiring a percentage of units in nearby housing projects to be occupied by whites, may really add to the pressure of slum housing by removing a number of dwelling units from the market for Negro residents, while whites may refrain from moving into the area.[387] It is yet undetermined whether integration of public housing can be a generally achieved goal without compulsory means. Since much existing low-rent housing was developed as segregated, according to a " 'racial equity' formula by which units were separately constructed for whites and nonwhites."[388] more than the current nondiscrimination regulations will be required to alter effectively the segregated patterns of low-rent housing heretofor created in many cities.

## V. TENANTS' RIGHTS TO REMAIN IN PUBLIC HOUSING

Since the number of families eligible for admission to low-rent public housing is far greater than the number of units available to accomodate them, and since a sufficient supply of new units is not being built to meet the existing need, new vacancies for eligible applicants most often arise when incumbent tenants leave voluntarily or are evicted. Tenants who voluntarily vacate public housing units usually move into suitable private housing, but tenants who are evicted from public housing have serious problems, for they are generally forced to live in substandard private dwellings.[389]

Despite the severe consequences of evictions, tenants rarely judicially challenge a housing authority's right to dispossess them. This failure to resist is not unusual, however, since poor tenants are often unable to engage legal counsel and distrust the efficacy of legal remedies.[390] Therefore, public housing evictees are more likely to

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387. *Cf.* Ledbetter, Jr., *supra* note 384, at 504 & n.64.

388. Grier, *The Negro Ghetto and Federal Housing Policy*, 32 LAW & CONTEMP. PROB. 551, 554-55 (1967).

389. For example, in Nashville, Tennessee, the Housing Authority's relocation office operates only to find space in public housing for displaced persons. No efforts are made to determine whether evicted tenants are able to find suitable private housing. Interview with Mrs. Dorothy Gibbes, Assistant to the Housing Director of Nashville Housing Authority, in Nashville, Tennessee, Jan. 21, 1969. Since tenants generally enter public housing from low-cost, substandard housing, evictees most likely return to substandard housing.

390. *See* P. WALD, LAW & POVERTY: 1965, at 42-46 (Report to the Nat'l Conf. on Law & Poverty, 1965).

accept inadequate housing within their means than to demand restoration to their former premises.[391]

Given the average tenant's reluctance to challenge a housing authority's action, it is mandatory that both visible[392] and non-visible[393] decisions which affect a tenant's tenure be controlled carefully. Otherwise, only bold tenants will escape the perils and inconveniences accompanying inadequate housing by seeking and obtaining legal enforcement of their rights to a decent living environment.

### A. *Termination of Public Housing Tenancies*

The right to inhabit public housing is, however, not absolute. Congress plainly limited public housing tenants' rights when it expressly authorized evictions of tenants whose incomes exceed the permissible maxima.[394] In addition, tenants may be evicted under state laws if they make fraudulent statements to the housing authority or violate their leases. But these admittedly valid reasons for eviction present housing authorities with a dilemma. Since there are insufficient public housing units to satisfy the need of low-income families, an authority deciding whether to evict a family must decide whether to deny decent housing to either the incumbent tenant or the potential eligible replacement, currently occupying substandard housing. Therefore, eviction from public housing produces no net social benefit—the sole effect is to provide adequate housing for one family at the expense of another. In order to fulfill its responsibilities

391. In fiscal 1968, the Nashville Housing Authority required approximately 200 families to vacate (roughly 25% of all move-outs). Only one family of the total 4,000 tenants, however, requested permission to stay until it could find suitable housing. As a result of this request, the family was not evicted. Interview, note 389 *supra*.

392. Visible decisions to evict a tenant are those which are made according to established procedures and for reasons within the scope of a housing authority's power to evict. Evictions for over-income, fraud and nonpayment of rent are the result of typical visible decisions. *See* text accompanying notes 396-439 *infra*.

393. Non-visible decisions to evict a tenant are made by administrators for personal reasons which are ultra vires. They are said to be "non-visible" and therefor unjust because administrators give valid grounds for the decisions, while the true, hidden reasons for the evictions are illegal or unconstitutional. Examples of non-visible motives for evictions are racial prejudice, distrust of a tenant's political power and personality conflict. *See* text accompanying notes 441-45 *infra*.

394. United States Housing Act of 1937, *as amended*, 42 U.S.C. § 1404a (Supp. III, 1965-67); *see* Rosen, *Tenants' Rights in Public Housing*, HOUSING FOR THE POOR: RIGHTS & REMEDIES 182-85 (N.Y.U. Project on Social Welfare Law, Supp. 1, 1967); text accompanying notes 222-232 *infra*.

under the federal statute, a housing authority must fairly decide to which family it owes the greater duty to provide shelter.

In determining whether or not to evict a tenant, the authority must first decide whether it has the authority to evict him. Tenants subject to eviction from public housing fall into three categories: (1) those whose incomes exceed the permissible maxima ("over-income" tenants);[395] (2) those who make misrepresentations to housing authority officials; and (3) those whose leases are cancelled.

1. *Over-income.*—The federal statute requires local housing authorities to establish a "continued occupancy maximum" and to evict a family whose income exceeds it.[396] The continued occupancy maximum is generally higher than the maximum income permissible for eligibility for low-rent public housing.[397] Local authorities may discover over-income tenants as a result of annual income reviews.[398] These reviews may lead to rent adjustments, the transfer of overcrowded families to larger units, or the eviction of over-income families. Some authorities, in addition to holding annual reviews,

395. Once a family's income exceeds its permissible maximum (its "continued occupancy maximum"), it is said to be "over-income," and therefore subject to eviction.

396. United States Housing Act of 1937, *as amended*, 42 U.S.C. § 1404a (Supp. III, 1965-67).

397. The following table, taken from the *Vanderbilt Law Review Survey*, illustrates the relation between maximum incomes for initial eligibility and for continued occupancy:

| *Housing Authority* | *Admission Maximum— 2 persons* | *Continued Occupancy Maximum* | *Admission Maximum— 6 persons* | *Continued Occupancy Maximum* |
|---|---|---|---|---|
| Chicago (no exemptions) | $4,800 | $5,520 | $7,200 | $8,280 |
| Cleveland | $4,180 | $5,225 | $5,200 | $6,500 |
| Detroit | $4,800 | $5,800 | $6,100 | $7,200 |
| Houston | $3,000 | $3,750 | $4,200 | $5,250 |
| Nashville | $3,800 | $4,750 | $4,400 | $5,500 |
| Oakland | $3,800 | $5,000 | $5,500 | $7,400 |
| Seattle | $4,000 | $4,800 | $5,200 | $6,240 |

Once a housing authority determines that a family is over-income, it usually charges a higher rent commensurate with the tenant's increased ability to pay. For instance, Chicago Housing Authority surcharges $5 to $35 per month rent for income $1500 over the maximum for continued occupancy and $15 to $70 per month rent for income more than $1500 over the continued occupancy maximum. Other authorities surcharge a fixed amount over the maximum rent depending upon the unit that the over-income family occupies. VANDERBILT LAW REVIEW SURVEY, *supra* note 286.

398. 42 U.S.C. § 1410(g)(3) (Supp. III, 1965-67). Department of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract, pt. II, § 207A(1967) [hereinafter cited as Annual Contributions Contract].

require tenants to report significant changes in their incomes whenever they occur.[399]

Housing authorities, however, may refrain from immediately evicting an over-income family if they determine that the tenant family cannot find suitable housing within its income range.[400] To allow the over-income family time to find private housing, such families generally receive a grace period, ranging from three months to an indefinite period.[401] After this grace period the authority may initiate eviction proceedings, unless the family's income again falls below the continued occupancy maximum.[402]

One reason for establishing limited grace periods is to encourage over-income tenants, who would otherwise be content to remain in low-rent public housing, to look for private accomodations. Arbitrary grace periods supposedly supply the needed encouragement. Certainly, if adequate shelter is available within one's income range, six months should be an adequate time within which to find it. But when the tenant, because of a shortage of private housing, is unable to obtain suitable housing within his means, a set grace period is inconsistent with the authority's mandate to provide decent, safe and sanitary housing. As a result of this contradiction, authorities should either assist over-income families to find decent private housing or allow them to remain indefinitely until decent private housing becomes available. Otherwise, evicted over-income tenants are forced to return to the ghetto, and the public housing program will produce no net gain in the number of families occupying adequate housing.

Housing authorities could assist over-income families in finding suitable dwellings in several ways. For example, rent supplements were specifically designed to ease the financial burden of housing for families in the over-income tenant's range.[403] Since the same federal agency supervises both rent supplement and low-rent housing, transferring over-income tenants to rent supplement housing should

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399. *E.g.*, NASHVILLE HOUSING AUTHORITY, TENANT RULES AND REGULATIONS No. 5. The housing authority of Houston makes interim readjustments when a tenant reports, between annual re-examinations, a change in income amounting to $800 or more per annum. HOUSING AUTHORITY OF THE CITY OF HOUSTON, TEXAS, OPERATING MANUAL 27-29 (Oct. 10, 1968).

400. 42 U.S.C. § 1410(g)(3) (Supp. III, 1965-67). Annual Contributions Contract, pt. II, § 207B (1967).

401. *Vanderbilt Law Review Survey, supra* note 286.

402. *E.g.*, SEATTLE HOUSING AUTHORITY, A HANDBOOK FOR THE RESIDENTS OF SEATTLE HOUSING AUTHORITY APARTMENTS 16.

403. United States Housing Act of 1937, *as amended*, 42 U.S.C. § 1421b(a) (Supp. III, 1965-67).

present no insurmountable administrative difficulties. Moreover, low interest-bearing loans are generally available to persons in the over-income range in cities which lack rent supplement housing. To insure that these programs are fully utilized, housing authorities should publicize the availability of both loans and rent supplement housing and assist over-income families in applying for them.

If over-income evictees do not move into governmentally supplemented housing, housing authorities should find other ways to help them secure suitable private housing. This could be done by referring over-income families to reputable real estate firms or by inspecting private housing offered to these families for conformity with the standards the authority uses to determine whether applicants' housing is substandard.[404]

2. *Misrepresentation.*—Some housing authorities provide that initial falsification of income information or failure to report subsequent income increases are grounds for eviction.[405] Such provisions theoretically prevent a financially ineligible family from obtaining public housing at the expense of another with actual need. Since housing units are scarce, the available units must be alloted on the basis of accurate information. Eviction for misrepresentation thus seems justified, since the threat of eviction probably is the authority's only effective way to deter such fraud. A judgment for damages, on the other hand, for falsifying reports would be uncollectible, and imprisonment for criminal fraud would merely remove the income-producer from the family, thus lowering the rent which could be recovered.

Nevertheless, there are several reasons why misrepresentation of income is a poor ground for evicting public housing tenants. First, there appears to be no requirement that the misrepresentation materially affect the rent being paid by the tenant or, as in the case of an over-income tenant, make the tenant ineligible for continued occupancy. Therefore, misrepresentation of income could result in the eviction of otherwise eligible low-income families. Second, since discovery of misrepresentation immediately terminates the lease,

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404. Several of the authorities responding to the *Vanderbilt Law Review Survey* require applicants for public housing to be living in substandard dwellings. The authorities have check-lists against which applicants or inspectors rate the dwellings to determine if they are substandard, *Vanderbilt Law Review Survey, supra* note 286.

405. HOUSING AUTHORITY OF THE CITY OF OAKLAND, CALIFORNIA, RESIDENT LEASE AGREEMENT 1, § 3; NASHVILLE HOUSING AUTHORITY, DWELLING LEASE 1.

evictees for misrepresentation may not receive the notice generally required by local statutes.[406] Finally, there is scant authority for ousting a person of low income from public housing for misrepresentation. The sole federal authorization for misrepresentation evictions is the *Local Housing Authority Management Handbook*,[407] a HUD publication which is merely advisory.

To justify the severe effects on families forced to live in substandard private housing, the local authorities' reason for evicting a prevaricating tenant should be very strong. It is submitted that the policy of providing decent housing, even to lying tenants, takes precedence over the policy of preventing fraud, because the former is a mandatory federal directive while the latter is a conflicting local practice. Accordingly, it is recommended that the local housing authority should determine first the misrepresenting tenant's actual income. If the correct income is still below the continued occupancy maximum, the tenant should be permitted to remain. If, however, it exceeds the maximum, the tenant should be treated in a manner similar to other over-income tenants.

3. *Termination of the Lease*—Although over-income and misrepresentation evictions are remedies peculiar to public landlords, housing authorities resemble private landlords when they evict for some reason which arguably impairs the landlord-tenant relationship. Like private landlords, public landlords sever their relationships with uncooperative tenants by cancelling their leases.

(a) *Termination provisions.*—Since there is no federal law governing the landlord-tenant relationship, the rights and obligations of landlords and tenants in public housing are governed by both common law and local statutes.[408] Leases of public housing units generally run for one-month periods and are renewed automatically unless cancelled by either party.[409] Written notice to the other party

406. State dispossessory laws invariably require all landlords to give tenants notice prior to commencing eviction proceedings. These provisions are explained in greater detail in text accompanying notes 480-502 *infra*.

407. HOUSING ASSISTANCE ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK pt. IV, § 1, ¶ 1(g). *See also* Rosen, *supra* note 394, at 184.

408. *Cf.* Walton v. Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949) (housing authority terminated an undesirable tenant's lease after 30-day notice specified in lease). *See generally* W. BURBY, REAL PROPERTY § 51 (3d ed. 1965).

409. All housing authorities who responded to the *Vanderbilt Law Review Survey* have month-to-month leases.

within a certain period is generally required.[410]

In addition, a lease may be cancelled automatically upon a tenant's failure to comply with its terms and conditions. For example, typical leases with automatic termination provisions allow evictions for untimely payment of rent or violation of housing authority rules and regulations.[411] But an authority may, by allowing the tenant to stay despite a violation of conditions of the lease, waive its right subsequently to evict the tenant for these violations.[412]

Moreover, some tenants promise in their leases to vacate the premises voluntarily, whenever their leases terminate either automatically or after notice of cancellation.[413] Such an agreement to waive formal notice, legal service of process and a hearing is called a "confession of judgment" clause.[414] The validity of such a provision, in light of the housing authority's duty to administer evictions fairly, will be discussed in detail later.[415]

The tenant must promptly vacate the premises whether a tenant's lease terminates as a result of a notice to vacate or automatically on the violation of some term of the lease. Once a lease has ended, a hold-over tenant may simply vacate, thus obviating the necessity of eviction. But if the tenant remains, state dispossessory law generally requires that he be given notice to vacate and served with a summons to appear and defend his eviction. State law is not uniform on the procedures which a public landlord must follow to evict a tenant who has lost his right to remain in a public housing unit. Such proceedings will be analyzed in greater detail later.[416]

(b) *Scope of housing authorities' power to cancel leases.*—Although public and private landlords are equally subject to state laws regulating eviction procedures, public housing authorities may not be able to evict their tenants for as wide a range of reasons

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410. *E.g.*, In Nashville, Tennessee, a proposed cancellation becomes effective after thirty days if given by the landlord, and after 15 days if given by the tenant. NASHVILLE HOUSING AUTHORITY, DWELLING LEASE 1; *cf.* Sullivan v. Ivey, 34 Tenn. 487 (1855), *construing* TENN. CODE ANN. § 23-1631 (1955); *Vanderbilt Law Review Survey, supra* note 286.

411. The covenant to pay rent creates privity of contract between landlord and tenant. Failure to pay rent after demand therefore gives the landlord a right to recover possession as well as rent due under tbe lease. *See generally* W. BURBY, *supra* note 408, at §§ 70, 73-74.

412. *See generally* TAYLOR, LANDLORD & TENANT § 500 (9th ed. 1904).

413. *See* text accompanying notes 487-93 *infra*.

414. The confession of judgment clause in leases is similar to a provision of the same name in certain negotiable instruments. The promissor agrees that any attorney may enter a judgment against him in the event he fails to perform bis agreement.

415. Text accompanying notes 487-93 *infra*.

416. Text accompanying notes 481-86 *infra*.

as private landlords can. It is often said that a private landlord may cancel a month-to-month lease for any reason or for no reason at all.[417] Moreover, in many states the private landlord's right to cancel a month-to-month lease is absolutely unrestricted.[418] In some states, however, the cancellation is void if it is in retaliation for the tenant's exercise of constitutionally[419] or statutorily[420] protected rights.

It may be argued that public housing landlords have equally broad grounds for cancelling leases. For example, in *Chicago Housing Authority v. Stewart*[421] the Illinois Supreme Court held that a housing authority may terminate a month-to-month tenancy simply by giving the tenant notice as required in the lease, without giving him any reason. The plaintiff housing authority instituted eviction proceedings without giving the tenant any reason for cancelling his lease. The defendant contended that the plaintiff's failure to give a reason for terminating his tenancy deprived him of property without due process of law, denied him equal protection of the law as compared to other tenants who were not evicted, and contravened a HUD directive that federally assisted housing authorities inform tenants of the reasons for evicting them. The Illinois Supreme Court rejected all of the defendant's arguments and affirmed the eviction.[422]

Although the Supreme Court remanded the decision in *Stewart* for consideration of the third defense, Illinois law arguably would still permit a public housing authority to evict for the same reasons as private landlords, since the Supreme Court did not question the Illinois Supreme Court's conclusions about Illinois dispossessory law.

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417. *E.g.*, Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Mun. App. 1947) (dictum).

418. *Accord*, Peterson v. Housing Auth., CCH POVERTY L. REP. ¶ 9,265 (Wis. Cir. Ct. Aug. 28, 1968).

419. *See* Tarver v. G. & C. Construction Corp., (S.D.N.Y., Nov. 9, 1964), in NAACP, CONFERENCE ON LAW & POVERTY (1966) (injunction against eviction because of tenant's exercise of first amendment rights); *cf.* Watts v. Lyles, CCH POVERTY L. REP. ¶ 9,028 (Mich. Cir. Ct. Feb. 28, 1968) (constitutional grounds for decision). *But see* LaChance v. Hoyt, CCH POVERTY L. REP. ¶ 9,092 (Conn. Cir. Ct. Sept. 6, 1968) ("retaliatory action" not a valid defense to eviction action).

420. MICH. STAT. ANN. § 27A.5646 (Supp. 1968); *cf.* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Portnoy v. Hill, 57 Misc. 2d 1097 (Binghamton, N.Y., City Ct. 1968).

421. 40 Ill. 2d 23, 237 N.E.2d 463 (1968), *rev'd*, 393 U.S. 482 (1969).

422. *Id.* On certiorari to the United States Supreme Court, the case was remanded for further consideration of the defendant's third defense, since in Thorpe v. Housing Auth., 393 U.S. 268 (1969), the Court had held mandatory a HUD directive requiring local authorities to give reasons for evictions. For a further discussion of *Thorpe*, see text accompanying notes 448-59 *infra*.

The Illinois court reasoned that the housing authority was acting in its proprietary capacity and therefore had "the same right as any other landlord to terminate a monthly lease by giving appropriate notice and to recover possession of its property without being required to give reasons for the action."[423] The court felt that since the plaintiff had given notice as required by the lease, it had accorded the defendant due process of law. Neither did the court agree that evicting only this defendant, "for any reason at all" as authorized in the lease, denied the defendant equal protection of the law.[424] The Illinois court refused to assume that the plaintiff's silence evidenced a wrongful reason for evicting the defendant, and concluded that the housing authority's compliance with the cancellation provisions of the defendant's month-to-month lease constituted substantially fair treatment for the tenant under Illinois dispossessory law.

More recently, however, courts have held that public housing officials have a narrower authority to cancel month-to-month leases than do private landlords. In *Vinson v. Greenburgh Housing Authority*,[425] a New York Supreme Court held that a public housing authority cannot evict arbitrarily (without reason) because, as a governmental agency, it must act according to reasonable and ascertainable standards of fairness. The plaintiffs, tenants in a wholly state-assisted public housing authority,[426] sought an injunction against eviction.[427] The court granted the injunction, finding that the defendant housing authority had cancelled the tenant's month-to-month lease without reason and that the tenant was otherwise eligible for continued occupancy. The court grounded its decision on the governmental agency's duty under the due process clauses of the New York and federal constitutions to function in a reasonable manner. In deciding that a housing authority cannot evict arbitrarily, the *Vinson* court distinguished the two cases[428] on which the Illinois Supreme Court had relied in *Stewart*.

423. 40 Ill. 2d 23, 24, 237 N.E.2d 463, 464 (1968).

424. *Id.* at 25, 237 N.E.2d at 465 (1968).

425. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968).

426. Since the housing authority was not receiving federal funds, it was not within HUD's jurisdiction. Consequently, the HUD Circular (Feb. 7, 1967), *infra* note 444 (discussed at text accompaning notes 444-69 *infra*), is not binding on the Greenburgh Housing Authority, and therefore the court's decision is based on a constitutional interpretation and not a HUD requirement.

427. The proceeding was commenced under N.Y. CIV. PRAC. LAW §§ 7801-06, both to annul the authority's decision to evict the plaintiffs and to stay eviction proceedings pending in the Justice's Court of Greenburgh, New York.

428. United States v. Blumenthal, 315 F.2d 351 (3d Cir. 1963); Pittsburgh Housing Auth. v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (1963). *Stewart* was not reported at the time *Vinson* was decided.

The United States Supreme Court has not yet decided a case where a tenant challenges an eviction as arbitrary. Cases such as *Vinson*, and those dealing with the analogous question of exclusion from public housing, indicate that the public landlord's right to evict after cancelling a lease is much narrower than that available to private landlords.[429]

(c) *The sufficiency of reasons for cancellation.*—If either federal or state law requires that housing authorities give some reason before cancelling a lease, then arguably that reason must bear a reasonable relation to the purposes of public housing. It is obvious that some reasons for evictions would be justified, if only to perpetuate the authority's very existence. For example, few would question the propriety of evicting a tenant for throwing rocks at neighbors' children or for burning housing authority buildings. These or similar reasons would clearly be sufficient for evictions.[430] On the other hand, some reasons are clearly not sufficient. Evictions because of race,[431] communist affiliations[432] or retaliation for reporting a housing code violation[433] would definitely be invalid. What is needed is some clarification of the gray area between the extremes.

Evictions for general non-desirability fall within this gray area. Such grounds as illegitimacy within a tenant family, child neglect, criminal tendencies and nuisance are examples of non-desirability criteria. It has been argued that evicting non-desirable "problem families" which are otherwise eligible is inconsistent with the goals of public housing.[434] Certainly, such evictions are inconsistent with

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429. *Compare* Louisville Mun. Housing Comm'n v. Murphy, CCH POVERTY L. REP. 912,245.20 (Ky. Cir. Ct. 1967) (eviction without giving any reason invalid for lack of due process), *and* Lewis v. Housing Auth. 397 F.2d 178 (5th Cir. 1968) (allegations of pending evictions because of illegitimacy and racial discrimination in administration presented justiciable issues) (discussed *infra* in text accompanying note 440), *with* Johnson v. Legitt & Sons, 131 F. Supp. 114 (E.D. Pa. 1955), *and* Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Mun. App. 1947).

430. *See* Thorpe v. Housing Auth., 386 U.S. 670, 679 (1967) (Douglas, J., concurring).

431. Racial discrimination in the administration of public housing, including eviction because of race, is prohibited by Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1964).

432. Kutcher v. Housing Auth. 20 N.J. 181, 119 A.2d 1 (1955).

433. *Accord*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (private landlord denied possession where eviction would punish tenant for reporting housing code violations); *see* MICH. STAT. ANN. § 27A.5646 (Supp. 1968) (landlord's retaliatory motive for seeking tenant's eviction is affirmative defense to eviction). Where retaliatory evictions are illegal for private landlords, they would be equally illegal for public landlords.

434. Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

providing adequate housing for the evictee. On the other hand, however, public housing officials argue that non-desirable tenants are evicted only when their continued occupancy would undermine the stability of the public housing community. Therefore, at least in theory, non-desirability criteria are only tools used for preventing the destruction of the community.[435]

The argument that non-desirability criteria protect the remaining public housing tenants at the expense of the evictees does not meet squarely the charge, however, that some non-desirability criteria are themselves incompatible with public housing's statutory goal of providing a decent living environment for every American family. For example, an unwed mother does not threaten the community's stability to as great a degree as a pyromaniac does. Yet, under some authorities' non-desirability criteria, both types of tenants are equally subject to eviction. Some distinction needs to be made between reasons for evictions which promote the continued existence of the housing authority as a viable community of needy families and reasons which affect purely sociological problems such as sexual mores,[436] family disintegration[437] and borderline crime.[438] Evictions for the latter reasons are arguably not necessary for the effective operation of housing authorities and should be challenged.

Some housing authorities' non-desirability criteria for evictions have been challenged judicially. For example, in *Lewis v. Housing Authority*,[439] the Fifth Circuit reversed a federal district court's refusal to enjoin the eviction of an unwed mother. The court held that the reason for her eviction—that she was "non-desirable"—was not detrimental to the orderly maintenance of a stable public housing community and therefore was insufficient to evict that tenant.

But since a tenant rarely challenges an authority's right to evict him, judicial delineation of sufficient reasons for eviction is likely to be slow. Therefore, to prevent eligible families, which are classified as "non-desirable," from being forced into substandard housing for reasons which defeat the policy behind public housing, some further safeguard is necessary. Accordingly, either HUD or, in the alternative, local housing authorities should set forth the valid

435. *Vanderbilt Law Review Survey, supra* note 286.

436. *E.g.*, evictions based on illegitimate offspring, homosexuality and adultery.

437. *E.g.*, evictions because of child neglect, juvenile delinquency and overcrowding resulting from "doubling-up."

438. *E.g.*, evictions for gambling, prostitution while off housing authority premises and drug addiction.

439. 397 F.2d 178 (5th Cir. 1968).

reasons for terminating tenancies in light of the goals of public housing.[440]

4. *Non-Visible Decisions to Evict.*—Theoretically, housing authorities evict tenants only for three reasons: over-income, misrepresentations or acts justifying lease terminations. The soundness of the policy behind each reason depends on the degree to which each effectuates public housing's goal of providing a decent, rehabilitative living environment for needy people. Assuming that each of these reasons is justifiable from a policy standpoint, it must be recognized that housing administrators can easily evict tenants because of personal bias, while couching the decision in terms which merit a valid eviction. Such administrative abuses clearly frustrate public housing policy.

Often, for instance, tenants are determined to be over-income on the basis of insufficient, exaggerated or fabricated evidence. The situation presented in *Holt v. Richmond Redevelopment and Housing Authority*[441] exemplifies unverified income determinations. The project manager of a public housing unit claimed that other tenants had informed him that the plaintiff-tenant was cutting hair and painting apartments. Since the plaintiff had not reported income from these activities, the manager threatened to evict the plaintiff for misrepresenting his income. The plaintiff, however, obtained an injunction in a federal district court restraining the landlord from evicting him.[442] At the trial, the manager failed to produce either witnesses to the plaintiff's alleged business activities or a reasonable estimate of the plaintiff's alleged unreported income. The court found that the manager's evidence of plaintiff's alleged income was an insufficient ground for an eviction.

440. The preceding discussion of non-desirability criteria has developed only one line of argument against such grounds for evictions: that they may contravene public housing's goal of providing adequate housing. Clearly, the determination of specific non-desirability criteria for evictions must be made in light of the over-all goals of public housing, including the goal of rehabilitation. *See* notes 119-30 *supra* and accompanying text for a discussion of recommended goals of public housing—providing adequate housing and rehabilitation of tenants.

441. 266 F. Supp. 397 (E.D. Va. 1966).

442. The plaintiff alleged that the real reason for his impending eviction was that he had organized other tenants. The court found the allegation to be true and therefore granted the plaintiff an injunction under 42 U.S.C. § 1983 (1964), on the ground that the plaintiff's eviction under the circumstances would abridge his constitutional right of freedom of association. Since the housing authority was a governmental agency, evicting the plaintiff would constitute an act under the color of law which would violate the civil rights act. *See* note 516 and accompanying text *infra*. For the text of § 1983, see note 303 *supra*.

Since it is unlikely that tenants will challenge evictions based on apparently valid exercises of power to evict, other means for checking abuses of administrative discretion should exist. Each tenant should be granted an adequate administrative or judicial review of any decision to evict him. Furthermore, such a review should include provisions for questioning the personal bias of administrators who participated in the decision.

The plaintiff in *Holt* employed a federal civil rights statute to obtain an injunction against his eviction. While that remedy does reach improper administrative action, its disadvantage from a tenant's standpoint is its failure to operate automatically to check administrative abuses. Institutionalized appeal machinery would be preferable to ad hoc judicial review, because its operation would be more understandable to tenants than the less accessible judicial remedies. It is submitted that tenants' affairs councils or a regular procedure for appealing administrative decisions to higher-ranking officials might provide preferable means of challenging personal decisions.

### B. *The Right to a Hearing*

The sole federally prescribed check on administrators' abuse of their power to evict is a HUD requirement, set forth in a 1967 Circular,[443] that a tenant receive with his notice to vacate an explanation of the reasons for his eviction and an opportunity to defend himself. There was some uncertainty whether the HUD Circular which contained these requirements was binding or merely advisory. The Supreme Court, resolved this question by deciding that the HUD Circular was mandatory.[444] Neither the Court nor HUD, however, has determined what constitutes sufficient hearing proeedure under the Circular. Consequently, local authorities have developed various hearing standards to protect tenants from being unjustly evicted.

1. *Pre-Circular Law.*—Prior to the issuance of the HUD Circular on February 7, 1967, some courts had held that a local housing authority need not explain to a tenant the reasons for his eviction. For example, in *Smalls v. White Plains Housing*

443. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, CIRCULAR (Feb. 7, 1967) [hereinafter cited as HUD, CIRCULAR (Feb. 7, 1967)], *reprinted in* Thorpe v. Housing Authority, 393 U.S. 268, 272 n.8 (1969).

444. Thorpe v. Housing Auth., 393 U.S. 268 (1969). For a discussion of this case, see notes 449-59 *infra* and accompanying text.

*Authority*,[445] the plaintiff housing authority cancelled the defendant's month-to-month lease without explanation and commenced eviction proceedings. A New York Supreme Court upheld the housing authority's right to evict him, holding that the housing authority, like a private landlord, was bound only by the terms of the lease. Therefore, since it complied with the lease's termination provisions, the housing authority was under no duty to explain its decision to the tenant.

A few courts had recognized that a tenant in public housing had a right to learn the reason for his eviction and to be heard in his own defense. One state court held that the failure to give a tenant notice of the reason for his eviction and an opportunity to defend himself was a denial of due process and equal protection under the fourteenth amendment.[446] Since the tenant had not been given an explanation prior to receiving a notice to vacate, the court denied the housing authority possession.

The court reasoned that a housing authority is unlike a private landlord, who would not be bound by the fourteenth amendment, because a housing authority is an arm of government. Moreover, the court analogized exclusion from admission because of an applicant's race, which would clearly be unconstitutional, to eviction without giving any reason. While this reasoning guaranteed tenants in a few locations some protection, there was no national guarantee until HUD promulgated the February 7, 1967, Circular.

2. *Effect of the Circular.*—Although the 1967 HUD Circular superseded an advisory one of the same subject, it was unclear if the new Circular was mandatory or merely advisory.[447] HUD officials, however, stated that the Circular was intended to be mandatory,[448]

445. 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962); *see* Brand v. Chicago Housing Auth., 120 F.2d 786 (7th Cir. 1941); Columbus Metropolitan Housing Auth. v. Simpson, 85 Ohio App. 73, 85 N.E.2d 560 (Ct. App. 1949); Housing Auth. v. Turner, 20; Pa. Super. 62, 191 A.2d 869 (1963). *Contra*, Vinson v. Greenburgh Housing Auth., 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968) (discussed in notes 425-28 *supra* and accompanying text).

446. Louisville Mun. Housing Comm'n v. Murphy, CCH POVERTY L. REP. ¶ 22,45.20 (Ky. Cir. Ct. 1967).

447. Circulars are official communications of HUD policy to local authorities and HAA officials. If a circular is subsequently incorporated in the Housing Assistance Administration's *Low-Rent Management Manual*, the Circular becomes binding on local authorities. On the other hand, a Circular may simply be advisory, with no binding effect on local authorities. Whether a particular circular is mandatory or advisory depends on HUD's intention at the time of the circular's promulgation.

448. Letter from Assistant Secretary Don Hummel to Mr. Charles S. Ralston of the NAACP Legal Defense & Educational Fund, Inc., July 25, 1967 and Letter from Joseph Burstein to Mr. Charles S. Ralston, Aug. 7, 1967 cited in Thorpe v. Housing Auth., 393 U.S. 268, 276 nn.22-23 (1969).

and to remove all doubt, quickly incorporated the Circular into the *Manual.*

Despite this incorporation, some authorities still refused to apply it. They contended that the HUD Circular did not have binding effect or that it did not apply retroactively to eviction proceedings begun before the Circular's effective date. In *Thorpe v. Housing Authority,*[449] the Circular's application was challenged on both grounds.

3. *Thorpe v. Housing Authority.*—In *Thorpe,* the United States Supreme Court held that the Circular was mandatory and that it applied to eviction proceedings pending on the date of the decision, regardless of the time when the proceeding had been commenced.[450] The plaintiff in *Thorpe* was a public housing tenant in Durham, North Carolina, who had received a notice to vacate her apartment on August 11, 1965, one day after having been elected president of a tenants' organization. The authority neither told her the reason for her eviction nor gave her an opportunity to defend herself. The trial court ruled that evidence allegedly showing that the eviction would abridge the tenant's constitutionally-protected freedom of association was irrelevant and ordered her evicted. After the North Carolina Supreme Court affirmed the decision,[451] the tenant obtained a writ of certiorari from the United States Supreme Court.[452] While the case was pending before the Supreme Court, however, HUD issued the February 7, 1968, Circular. To determine the effect of this Circular, the Supreme Court remanded the case to the state court[453] which refused to give the Circular retroactive effect.[454] Consequently, the Supreme Court again granted certiorari.[455]

The Court reversed the state court on the grounds that the Circular was valid and mandatory, even though the Circular was promulgated after the commencement of eviction proceedings.[456] The Court construed the Circular's language to require the use of the procedure outlined in the Circular. Furthermore, the Court noted that

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449. 393 U.S. 268 (1969), *rev'g* 271 N.C. 468, 157 S.E.2d 147 (1967), *enforcing* 386 U.S. 670 (1967), *vacating* 267 N.C. 431, 148 S.E.2d 290 (1966).

450. Thorpe v. Housing Auth., 393 U.S. 268 (1969).

451. 267 N.C. 431, 148 S.E.2d 290 (1966).

452. 385 U.S. 967 (1966).

453. 386 U.S. 670 (1967).

454. 271 N.C. 468, 157 S.E.2d 147 (1967).

455. 390 U.S. 942 (1968).

456. 393 U.S. 268 (1969).

the Circular was valid because HUD had the power to prescribe reasonable procedures for local authorities as a condition of receiving federal assistance, and that the hearing requirement was reasonable because it tended to prevent tenants' deprivation of "a decent home and a suitable living environment"[457] as a result of groundless evictions.

Having determined that the HUD Circular was valid and mandatory, the Court applied it retroactively, finding that individual rights created during an appeal generally apply to individuals involved in that appeal.[458] Since the plaintiff had not actually been dispossessed pending her appeal, she was entitled to a hearing before being given a notice to vacate, just as any other tenant would be.[459]

4. *Procedural Hearing Standards.*—The Court in *Thorpe,* declined to prescribe guidelines for the required hearing. Consequently, unless local authorities give content to the hearing which adequately protects tenants' rights, the HUD Circular's guarantee of a hearing is meaningless.

(a) *Prior hearing.*—It is not clear at what point in the eviction process a housing authority must give a potential evictee a hearing. One federal district court indicated that it might be sufficient for a housing authority to give a tenant a notice to vacate, containing a statement of reasons for his eviction, and to allow the tenant to present his defense at his eviction trial.[460] But the court's reasoning

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457. 42 U.S.C. § 1401 (1964); *see* Thorpe v. Housing Auth. 393 U.S. 268, 281 & n.37 (1969).

The plaintiff had also argued that HUD's alteration of its Annual Contributions Contract (by incorporating the Circular into the *Manual*) deprived him of property without due process in violation of the fifth amendment. But the Court pointed out that the Circular's notification requirement did not destroy the housing authority's right to evict a tenant and thereby repossess its property. Since the requirement was merely an additional, non-burdensome obligation imposed under HUD's rule-making power, the requirement did not impair the contract between HUD and the plaintiff. Thus, the only material issue was whether the HUD *Circular's* promulgation was a reasonable exercise of HUD's rule-making power.

458. Ziffrin, Inc. v. United States, 318 U.S. 73 (1943); *accord,* Vadenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Carpenter v. Wabash Ry., 309 U.S. 231 *rehearing denied,* 309 U.S. 695 (1939)); United States v. Chambers, 291 U.S. 217 (1934); *cf.* United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). *See also* Thorpe v. Housing Auth., 393 U.S. 268, 281-82 & nn.38-42 (1969).

459. Chief Justice Warrén emphasized that the Court was not holding that a public housing authority may not evict a tenant for an insubstantial reason, since no reason for evicting the defendant was before the court. 393 U.S. at 284.

460. Quevedo v. Collins, CCH POVERTY L. REP. ¶ 2,245.35. (N.D. Tex. July 12, 1968). As its reason for granting a preliminary injunction restraining the housing authority from evicting its tenant, the court stated that the HUD Circular's requirement with respect to an opportunity to

appears specious in view of the HUD Circular's provision for keeping records of pre-eviction conferences with tenants. The Circular requires local authorities to keep a record of the responses given to officials' explanations of reasons why tenants should be evicted.[461] Therefore, it seems that the Circular contemplates both an explanation of reasons and an opportunity for responses before eviction proceedings are commenced.

One policy for requiring authorities to give reasons and hear defenses before commencing eviction proceedings is that the severe consequences of eviction for low-income tenants make it mandatory that administrators have all the relevant facts before making a decision to evict. Evictions should not be made on the basis of wrong or biased information, and therefore the potential evictee should have an opportunity to rebut any false information which might otherwise influence an authority's decision.

Moreover, a case decided in the Tennessee Court of Appeals also indicates that the local housing authority must give a potential evictee both the reasons for eviction and an opportunity to respond before taking steps to dispossess him. In *Nashville Housing Authority v. Taylor*,[462] a Negro tenant intervened in a scuffle between a Negro boy and two white boys outside her apartment. The white boys retaliated by breaking some of the tenant's windows and cutting her screen door. Soon thereafter the project manager notified the tenant that her lease would not be renewed and subsequently told the tenant's attorney that his client was being evicted for being a "trouble-maker." The trial court evicted the tenant on the ground that the month-to-month lease had been properly terminated in accord with the tenant's lease; therefore the tenant was entitled to no explanation.

After a trial de novo, the Circuit Court of Davidson county

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respond to charges could be met by allowing the tenant at the trial to rebut the reasons given for his eviction. If the court meant to state that the phrase "or other appropriate manner" in the HUD Circular referred to the *time* when the tenant's response to reasons for his eviction may be given, as well as the *method* of informing him why he is being evicted, then the court's analysis of the Circular and cases interpreting it seems faulty. At any rate, the statement was dictum, because the court did not allow the housing authority to bring eviction proceedings against the tenant until it had given the tenant both a reason for his proposed eviction and an opportunity to respond to the reasons. As is the custom in federal district courts, the opinion supporting the preliminary injunction is not reported.

461. "[E]ach Local Authority shall maintain a written record of every eviction from federally assisted public housing. Such records are to be available for review from time to time by HUD representatives . . . ." HUD CIRCULAR (Feb. 7, 1967), note 443 *supra*.

462. CCH POVERTY L. REP. ¶ 9,172 (Tenn. Ct. App. Dec. 6, 1968), *petition for cert. filed*, (Tenn. Sup. Ct. March 5, 1969).

reversed the judgment on the ground that the HUD Circular made a conference with the prospective evictee a condition precedent to cancelling a lease or to serving notice to vacate for a breach of the lease. The Tennessee Court of Appeals affirmed, holding that the hearing procedure prescribed by the HUD Circular must be used before a public housing authority takes action to evict a tenant. The court assumed, without explanation, that the HUD Circular was binding on the Nashville Housing Authority. Like the Supreme Court in *Thorpe,* the Tennessee Court of Appeals found it unnecessary to pass on the sufficiency of the housing authority's reason for evicting the defendant. But unlike the situation in *Thorpe,* the housing authority in *Taylor* had given some reason for the eviction, although the court held that the reason had been given too late to comply with the HUD Circular.

The result in *Taylor* seems sound in view of the proposition that a full hearing must be held before an authority takes steps to eviet a tenant. Although authorities might simply grant an opportunity perfunctorily for a tenant to respond and not heed his defenses to an impending eviction, at least these authorities will have heard the tenants view, and, on occasion, might be persuaded to agree with it.

(b) *Hearing Procedure.*—Probably because the HUD Circular is relatively new, very few cases have raised the issue of what constitutes a sufficient hearing. The HUD Circular permits an informal conference to serve as the occasion for notifying a tenant of reasons for his impending eviction and for hearing his defenses.[463] Although it would appear that HUD has the authority to prescribe minimum procedural safeguards of fundamental fairness for hearings, it has not as yet prescribed any guidelines.

In the absence of federal guidelines, local authorities have been free to establish their own procedures. Some authorities already require that a tenant be given the reason or reasons why he is being considered for eviction at the time of informing him of the pending eviction.[464] While some routinely notify tenants of their right to have counsel present at hearings on their cases.[465] Others have gone further and have established panels consisting of both tenants and officials to hear the evidence against tenants and to make the final decision to

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463. "[I]t is essential that no tenant be given notice without being told by the Local Authority, *in a private conference or other appropriate manner*, the reasons for the eviction . . . ." HUD CIRCULAR (Feb. 7, 1967), note 443 *supra* (emphasis added).

464. *E.g.*, Detroit Housing Authority, *Vanderbilt Law Review Survey, supra* note 286.

465. *E.g.*, Nashville Housing Authority, *id.*

evict.[466] At least one housing authority (Cleveland) incorporates all of these requirements in its pre-eviction procedure.[467]

Existing procedures suggest that many housing authorities are concerned with protecting tenants' rights to remain in public housing until decisions to evict them are fairly made. The ever-present danger of evictions for non-visible reasons and the harshness of relegating a low-income person to substandard private housing, however, prompt questions as to whether present procedures adequately guarantee tenants fair treatment when decisions to evict are made. Is an informal conference sufficient opportunity for a prospective evictee to present his defenses? What rules of evidence, if any, should apply at a hearing? Does due process guarantee a right to have legal counsel at a hearing? The policy of assuring that no tenant be deprived of a suitable living environment without a fair consideration of his case should provide a basis for tentative answers to these questions.

(i) *Informal conferences.*—When the important interest of a family's having decent housing is at stake, housing officials should afford all potential evictees adequate time to prepare and present the strongest defenses possible. The chief disadvantage of requiring only a single informal confrontation between an administrator and a tenant is that a tenant might not have adequate time to prepare a defense. Accordingly, authorities should inform the tenant of the reasons for his eviction either (1) at a conference held prior to the hearing, or (2) in a written notice of a hearing at which he could present evidence rebutting those reasons.

(ii) *Evidentiary standards.*—Closely related to the requirement of advance notice of adverse evidence is the question of what kinds of evidence should be admitted at an eviction hearing. Although, as noted, such a hearing should not take the form of a formal trial, sufficient safeguards should exist in order to prevent tenants from being forced to live in substandard private housing. Moreover, strict evidentiary standards, which would exclude both unreliable and false adverse evidence, are clearly warranted by the magnitude of harm which a wrongful eviction would cause. At the very least, tenants should have the right to confront and cross-examine all witnesses who present adverse evidence.

Since HUD has failed to set forth hearing procedures, there is, and will continue to be, a lack of uniformity with regard to

466. *E.g.*, Cleveland Housing Authority, *id. See* note 293 *supra* and accompanying text.
467. *Vanderbilt Law Review Survey*, *supra* note 286.

evidentiary standards. Whatever standards a local housing authority adopts, however, should be simple enough for administrators to apply effectively, and they should be communicated to both the tenant and his attorney so that they will be fully aware of their rights during the hearing.

(iii) *Right to counsel.*—It is unlikely that poor tenants have sufficient knowledge of the pemissible grounds for eviction from public housing to know whether they are being evicted for valid reasons. Therefore, it is important for prospective evictees to have assistance of counsel to prevent being forced, without valid reason, to live in substandard private housing. With the expansion of free legal services to low-income persons, many housing authority tenants can obtain the assistance of counsel. The problem, however, is making the tenant aware of the availability of legal advice and encouraging him to seek it. As a first step, housing authorities should be required to guarantee each tenant the right to legal assistance at his hearing and notify each tenant of this right.

5. *Enforcement of Fair Procedures.*—HUD has failed to police the hearing requirement set forth in the HUD Circular. Although the Circular requires loeal authorities to keep a file of hearings granted to tenants before their evictions, HUD rarely inspects these records. The reason for this failure to check local authorities' hearing procedures is that the Housing Assistance Administration has lacked the funds to review local authorities' compliance with HUD's requirements.[468]

Even if HUD inspectors did make periodic checks on local authorities, it would provide little help to an already evictcd tenant. For example, even an active federal program for inspecting local eviction records would not reveal groundless accusations, "voluntary" move-outs under pressure, or decisions not to evict a tenant in return for some concession from the tenant.[469] Finally, without federal guidelines as to sufficient procedural standards for hearings, HUD inspectors would be powerless to help a a tenant who might have

468. Telephone interview with Jo Ann Webb, Equal Opportunity Officer, Southeastern Region, Housing Assistance Administration, in Nashville, Tennessee, March 7, 1969.

469. In Vinson v. Greenburgh Housing Auth., 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968), notes 425-28 *supra* and accompanying text, a housing authority's project manager attempted to persuade the plaintiff-wife to obtain a legal separation from her husband and to get a welfare grant from the state. Then the manager brought pressure on the wife by threatening to evict both her and her husband if the husband did not vacate their apartment. The Supreme Court, Appellate Division, enjoined the eviction proceeding brought against the family when the plaintiff-wife refused to throw out her husband.

presented an acceptable defense to his eviction if, for instance, he had had the assistance of counsel. Even if a housing authority did guarantee right to counsel, federal officials could not enforce local hearing standards because the federal government would not be a party to the guarantee. Under present circumstances, HUD inspectors would not effectively prevent groundless evictions.

Local authorities, however, might enforce hearing standards by setting up appellate boards composed of tenants and administrators to hear complaints about unfair hearings. Alternatively, tenant's councils might negotiate for the establishment of procedural safeguards of fair treatment in regard to decisions to evict and then set up their own watchdog committees to police compliance with these procedures. Until workable administrative enforcement mechanisms are established, however, tenants' complaints against allegedly unfair treatment will be heard and appropriate relief will be granted, as in the past, only by the courts.

### C. *Judicial Prevention of Unjust Evictions*

A public housing tenant faced with eviction may have effective judicial remedies to maintain possession.[470] Furthermore, a tenant who discovers, after being evicted, that the housing authority acted wrongfully may be able to recover damages for injuries cause by the eviction.[471] In some circumstances, the tenant might obtain an injunction against the eviction compelling the housing authority to reinstate him.[472] This section will analyze the means of obtaining a judicial hearing to contest an eviction and the legal claims assertable at that hearing.

470. Although administrative procedures are designed to prevent unfair treatment of tenants, once the procedures fail to protect a tenant's rights, he must take the initiative. Unfortunately, tenants do not often seek legal assistance. *See* notes 442-43 *supra* and accompanying text. One of the goals of aggressive legal assistance programs, however, is to encourage tenants to take advantage of free legal counsel. *See generally* CONFERENCE PROCEEDINGS, THE EXTENSION OF LEGAL SERVICES TO THE POOR (Nov. 12-14, 1964).

471. The possibility of obtaining injunctive relief under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1964), note 235 *supra*, has been discussed previously in connection with Kelly v. Wyman, CCH POVERTY L. REP. ¶ 9,134 (S.D.N.Y. Nov. 26, 1968) (welfare payments reinstated under court order), and Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968) (injunction for admission to public housing), notes 298-320 *supra* and accompanying text. The statute also authorizes the award of money damages for a violation of civil rights. The expense and uncertainty of reeovering damages, however, would probably discourage a low-income tenant from litigating the issue of wrongful eviction to recover damages alone.

472. In Simmons v. West Haven Housing Auth., 5 Conn. Cir. Ct. 282 (App. Div. Cir. Ct. 1968), *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. Apr. 7, 1969) (No. 909 Misc., 1968 Term; renumbered No. 1232, 1968 Term), a housing authority evicted its tenant for non-payment of

1. *Procedural Devices for Contesting Evictions.* (a) *Injunctions.*— Public housing tenants have successfully prevented unjustified evictions by suing their public landlords under state and federal statutes which authorize injunctions to prevent abridgement of constitutional rights. In *Vinson v. Greenburgh Housing Authority*,[473] a tenant of a state-assisted public housing authority obtained an injunction, authorized by a New York statute,[474] against his eviction without a reason. The New York appellate court held that such an eviction violated both the United States and New York Constitutions by depriving the tenant of his leasehold property without due process of law.

For similar reasons, in *Holt v. Richmond Redevelopment and Housing Authority*[475] a federal district court enjoined a housing authority under section one of the Civil Rights Act of 1871[476] from evicting the plaintiff-tenant. The fourt found that the threatened eviction was in retaliation for the tenant's activities in organizing his fellow tenants and held that the plaintiff's eviction would abridge his first amendment freedom of speech.

Due to the merger of law and equity in most states,[477] if a state did not authorize specifically injunctions against wrongful evictions, the tenant could argue that any law remedy would be inadequate. In view of the probability that eviction will force the tenant into substandard private housing, the contention may be persuasive. But

rent. After the eviction the housing authority agreed to reinstate the tenant if the tenant wins the appeal to the United States Supreme Court. Thus, the housing authority apparently recognized the existence of the tenant's enforceable right to reinstatement in the event dispossession was wrongful. No cases have been found in which housing authorities have been enjoined to reinstate evictees. However, courts have enjoined housing authorities to *admit* eligible applicants. *See* notes 298-320 *supra* and accompanying text.

473. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968).

474. N.Y. CIV. PRAC. LAW §§ 7801-06 (McKinney 1963).

475. 266 F. Supp. 397 (E.D. Va. 1966); *see* text accompanying notes 441-42 *supra*.

476. 42 U.S.C. § 1983 (1964) (text in note 303 *supra*).

477. Only four states—Arkansas, ARK. STAT. ANN. § 22-401 (1962); Delaware, DELA. CONST. of 1897, art. 4, § 10 (1966) (as amended); Mississippi, MISS. CODE ANN. §§ 1215-1393 (1956); Tennessee, TENN. CODE ANN. § 16-101 (1955)—still have separate courts of law and of equity. In these states, a court of equity with in personam jurisdiction over a housing authority might grant discretionary injunctive relief against an unfair eviction.

Tennessee Chancery Courts, however, will not grant a defendant injunctive relief from a dispossessory proceeding (detainer action) pending in another court, since Chancery's jurisdiction is concurrent with the jurisdiction of Circuit and Justice Courts and the first court whose jurisdietion attaches obtains exclusive jurisdiction. Robinson v. Easter, 208 Tenn. 147, 344 S.W.2d 365 (1961); *see* TENN. CODE ANN. §§ 16-602, 23-1607, 23-1608 (1955). Thus, as in states without separate courts, the concurrent jurisdiction of law and equity courts in these four states may preclude an injunction from being granted to prevent unfair evictions.

under the doctrine of abstention,[478] a federal or state court could deny injunctive relief, even against an allegedly wrongful eviction, if it finds that the tenant's remedy under the state's dispossessory law is adequate.[479] Therefore, considering the unreliability of discretionary injunctive relief against unjustified evictions, tenants will generally have more success by challenging the evictions at a trial.

(b) *"Summary" hearings.*—Although public and private landlords have different powers to evict their respective tenants, they have similar remedies against hold-over tenants. The law of the state in which either a public or a private landlord's property is located provides dispossessory proceedings which will generally allow both landlords to evict hold-over tenants. Within the procedural framework of these dispossessory proceedings, then, tenants may raise their affirmative defenses.

Dispossessory proceedings are popularly referred to as "summary," because they give plaintiff-landlord immediate access to a court without waiting for his case to work its way up the docket. While specific procedures vary from state to state, the operative provisions in every state resemble one another closely enough to permit generalizations.

To begin a summary proceeding to recover his property and unpaid rent from a hold-over tenant, the landlord, after paying the court costs in advance, obtains a summons ordering the tenant-defendant to appear at a hearing.[480] While both the landlord and the tenant are expected to be present at the hearing, it is common for only the former or his attorney to appear, and in that event, the landlord wins a judgment by default.[481] The only issue at the hearing

478. See notes 323-30 *supra* and accompanying text.

479. *Cf.* Robinson v. Easter, 208 Tenn. 147, 344 S.W.2d 365 (1961); Bailey v. Bushnell, 89 Ohio L. Abs. 449, 184 N.E.2d 413 (1962).

480. Service may usually be made either personally or by mailing the summons to the leased property and mailing a copy to the defendant by certified mail, return receipt requested. (The latter service is commonly referred to as "nail and mail.") One of the problems of low-income tenants is that they frequently do not receive notice of summary proceedings against them because of the failure of process servers to deliver summons. *See* P. WALD, *supra* note 390, at 17-18. This so-called "sewer service" prevents tenants from defending against evictions. Therefore, it would be an inexcusable denial of due process for a housing authority knowingly to evict a tenant who had been the victim of "sewer service." *See generally* LeBlanc, *Landlord and Tenant Problems*, CONFERENCE PROCEEDINGS, THE EXTENSION OF LEGAL SERVICES TO THE POOR 51 (1964).

481. A survey of summary proceedings for eviction (detainer actions) tried in General Sessions Court, Davidson County, Tennessee, during the months of May and October, 1968, revealed that of the 309 cases that went to judgment only 35 (11%) were contested in any fashion; the rest (89%) were default judgments for the landlord. Deputy clerks confirmed that a

is whether the landlord is in fact entitled to possession, and the decision can be appealed to the next highest court where a jury may decide any issues of fact.

Although most summary proceedings end at the hearing stage, the trial judge's decision does not always end the landlord-tenant dispute. There are various ways to challenge the trial judge's decision. The most common provisions allow a tenant to seek relief from an adverse decision in one of the following ways: (1) a trial de novo as of right in the next higher court;[482] (2) a trial de novo granted at the discretion of the next higher court;[483] (3) a new trial granted at the discretion of the trial court because of some defect in the original proceedings;[484] or (4) the equivalent of a judgment n. o. v. granted at the discretion of the court because the evidence produced at the original trial was insufficient to support a judgment for the landlord plaintiff.[485]

At the hearing stage, most defenses generally may be raised orally.[486] The specific manner in which they may be raised depends on local rules of practice and pleading.

2. *Legal Barriers to Avoiding Evictions.*—Regardless of the merit of a legal defense against an eviction, that defense would be useless to tenants who could not afford litigation costs or who had waived in advance their right to defend themselves. Some states make it impossible for indigent evictees to obtain review of their cases in state courts. Moreover, certain public housing leases contain

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high incidence of default judgments is normal in detainer actions. Interview with deputy clerks of General Sessions Court, in Nashville, Tennessee, Nov. 15, 1969.

482. *See* Thorpe v. Housing Auth., 267 N.C. 431, 148 S.E.2d 290 (1966), *vacated,* 386 U.S. 670, *enforced,* 271 N.C. 469, 157 S.E.2d 147 (1967), *rev'd,* 393 U.S. 268 (1969).

483. *See* Smith v. Holt, 29 Tenn. App. 31, 193 S.W.2d 100 (1945) (certiorari granted from a trial court's decision within the discretion of the appellate court); *see* TENN. CODE ANN. § 23-1631 (1955).

484. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); District of Columbia Court of General Sessions, R. 55(e)(z) (relief from final judgment suffered because of neglect, mistake, inadvertance or surprise applies by analogy to landlord-tenant).

485. *See* Venezie v. Housing Auth., 25 Beaver County L.J. 92 (Ct. C.P. Pa. 1963) (motion to strike judgment for landlord denied).

486. Statutory or technical defenses would include: (1) improper notice to the tenant that his tenancy has been terminated; (2) improper service of process on the tenant and (3) nonpayment of court costs by the plaintiff. Those defenses, arising from a landlord's failure to comply with any of the statutory prerequisites for obtaining an eviction, are merely dilatory, and thus a tenant would waive such defenses by appearing at the hearing on his eviction. Moreover, since such technical defects are curable, they can only delay, not prevent, eviction of a public housing tenant. Thus these defenses are of little importance.

provisions, which have been held valid, requiring low-income tenants to waive their rights to defend against evictions as a condition precedent to being placed in public housing. These tenants, then, face the threshold question of whether they may even assert a defense.

(a) *Confessed judgments.*— Many public housing leases provide that, if the tenant fails to perform any of the conditions of the lease, the lease is forfeited, and the tenant waives his right of notice to vacate and of service of process and agrees to vacate the premises without being compelled judicially to do so.[487] The effect of these provisions is that once a housing authority decides to evict a tenant, he has no choice but to leave.[488]

Some courts have upheld the validity of these clauses. A Pennsylvania court refused to review an evicted public housing tenant's claim that his eviction was unconstitutional because a confessed judgment clause in the lease waived that defense. In *Housing Authority v. Venezie*[489] a public housing authority, after cancelling the tenant's lease, obtained a judgment by confession, as permitted by the lease. The tenant appealed the trial court's decision, alleging that her landlord had evicted her because she had refused to stop associating with certain persons, a reason which contravened her first amendment right to freedom of association.[490] That court refused to consider her argument, holding that the agreement to waive the right to question the landlord's authority to evict was a valid contract between the housing authority and the tenant.[491]

Although housing authorities in other states have leases with similar confession of judgment clauses, no cases in other states have been found in which such provisions have been used to deny tenants the right to assert constitutional defenses against being evicted. Such a utilization of confession of judgment clauses in a public housing tenant's lease, however, would violate the policy behind public housing by forcing the tenant to live in substandard housing. In addition, even

487. *E.g.*, NASHVILLE HOUSING AUTHORITY, DWELLING LEASE 1; HOUSING AUTHORITY OF THE CITY OF OAKLAND, DWELLING LEASE 1 (Sept. 1967).

488. *See* Lancaster Housing Auth. v. Gardner, 211 Pa. Super. 502, 240 A.2d 566 (1968). Moreover, the fact that a tenant had promised to vacate peaceably might even serve as a lever for a project manager who wished to persuade the tenant to vacate for some personal reason or for some reason which, if judicially challenged, would not be tolerated.

489. 25 Beaver County L.J. 92 (Pa. Ct. C.P. 1963).

490. Technically, the tenant petitioned the court to grant her a new trial or to strike the judgment for possession, both of which remedies were discretionary. 25 Beaver County L.J. 92, 93 (Ct. C.P. Pa. 1963).

491. An 1806 Pennsylvania statute expressly authorized the courts to enforce such contracts. Act of Feb. 24, 1806, PA. STAT. ANN. tit. 12, § 739 (1953).

if a housing authority never enforced its apparent right to regain possession of its premises, the mere presence of the clause in the lease might discourage timid tenants from resisting their landlord's wrongful decision to evict them. Therefore, while confession of judgment clauses may be upheld as valid, they should be challenged as being contrary to the policy of providing decent dwellings to low-income persons.

Another ground for attacking confession of judgment clauses is that they are adhesive.[492] It is unrealistic to maintain that a low-income tenant bargains at arms length with a housing authority for admission to public housing. Persons of low-income bargain for admission to public housing from a clearly inferior position, due to local housing authorities' wide discretion in setting admissions policies. Therefore, it cannot be said that a tenant voluntarily waives future defenses by signing a lease containing a confessed judgment clause.

Finally, confessed judgment clauses may be attacked through federal legislation. Where state courts have upheld confessed judgment evictions, tenants might enjoin the evictions under the federal civil rights statute.[493] In order to obtain an injunction under this statute, a prospective evictee would have to establish that his eviction pursuant to a confessed judgment would violate the fourteenth amendment by depriving him of his leasehold property without due process of law.

(b) *Bond requirements.*—Most states require the tenant to post a substantial bond in order to remain in possession pending the appeal of a summary dispossession.[494] Such a provision, however, may be declared invalid as an invidious discrimination on the basis of wealth. The effect of a public housing tenant's financial inability to post a bond is to deny the tenant the opportunity to appeal.[495] In addition, if the tenant appeals after leaving the premises, the fact that he no longer lives in a public housing unit might make moot the issue of

492. For a discussion of contracts of adhesion, though not leases, see Leff, *Unconscionability & the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143 (1968).

493. 42 U.S.C. § 1983 (1964), *supra* note 303.

494. *E.g.*, CONN. GEN. STAT. REV. § 52-534-46 (Supp. 1965); GA. CODE ANN. § 61-303 (1966) (defendant must tender bond equal to rent that may be recovered against him pending appeal).

495. *See* Simmons v. West Haven Housing Auth., 5 Conn. Cir. Ct. 282 (App. Div. Cir. Ct. 1968), *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. Apr. 7, 1969) (No. 909 Misc., 1968 Term; renumbered No. 1232, 1968 Term); Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966); Shore-Wood Realty, Inc. v. Lynch, No. 41014, CCH POVERTY L. REP. ¶ 2,235.901 (Ill. Sup. Ct. 1967).

whether he was entitled to retain possession.[496] Accordingly, in order to appeal, an indigent tenant would either have to obtain a judicial waiver of the bond requirement or successfully challenge its validity.

Bond requirements are already under attack. A recent case, *Simmons v. West Haven Housing Authority*,[497] challenges the constitutionality of a Connecticut statute[498] which requires, as a prerequisite for retaining possession during an appeal, a bond sufficient to protect the landlord's rents during this period. In *Simmons*, the defendants attacked the statute as a violation of the equal protection and due process clauses.

In that case, a housing authority brought summary proceedings to evict its tenants for alleged nonpayment of rent. The tenants contended that the plaintiff's failure to comply with local housing laws relieved them of the obligation to pay rent.[499] The Connecticut trial court granted judgment for the plaintiff without discussing the issues that the defendant had raised. In addition to holding the statute constitutional the court also refused to waive the bond requirement, despite the defendant's obvious inability to pay.[500] After appeals were refused by the Connecticut appellate and supreme courts, the defendant appealed to the United States Supreme Court.[501]

Although *Simmons* has not yet been decided, a decision for the tenants would grant public housing tenants greater access to appellate judicial machinery. In their jurisdictional statement to the Supreme Court, the tenants emphasized that appeal bond requirements result in dire consequences to indigent persons denied access to the courts of their states.[502] If the Court rules the statute constitutional, the tenant will be forced to rely on the local court's discretion in waiving the bond requirement.

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496. *See* Williams v. Schaffer, 222 Ga. 334, 149 S.E.2d 668 (1966), *cert. denied*, 385 U.S. 1037 (1967).

497. 5 Conn. Cir. Ct. 282 (App. Div. Cir. Ct. 1968), *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. Apr. 7, 1969) (No. 909 Misc., 1968 Term; renumbered No. 1232, 1968 Term).

498. CONN. GEN. STAT. REV. § 52-542 (1968).

499. The defendant pleaded seven affirmative defenses and generally denied the plaintiff's allegations that tbe housing authority was entitled to possession and back rent.

500. The parties failed to agree on the amount of the bond, but defendant estimated it to be several hundred dollars. The defendant failed to raise the bond and had insufficient assets to supply it. Therefore, defendant offered to pay each month's rent into a fund, pending the appeal, on the condition that the authority could have the fund if it were adjudged entitled to it.

501. Simmons v. West Haven Housing Autb., *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. Apr. 7, 1969) (No. 909 Misc., 1968 Term; renumbered No. 1232, 1968 Term). The case had not been argued at the time of tbis writing.

502. Jurisdictional Statement of Petitioner at 9, Simmons v. West Haven Housing Auth., *prob. juris. noted*, 37 U.S.L.W. 3379 (U.S. Apr. 7, 1969) (No. 909 Misc., 1968 Term; renumbered No. 1232, 1968 Term).

3. *Constitutional Theories for Preventing Evictions.* (a) *Fourteenth amendment theories.*—Regardless of whether a tenant in public housing raises defenses in a summary eviction proceeding or seeks an injunction against his eviction, the due process and equal protection clauses of the fourteenth amendment may be sources of constitutional defenses underlying a successful challenge to an eviction from public housing. If the tenant can show that the housing authority's treatment of him violated an absolute standard of fundamental fairness, he can argue that he has been denied due process. If he can show that he was treated differently from other tenants, he can argue that he was denied equal protection.

It must be noted that while these defenses are theoretically distinct, they can be, and often are, overlapping. For example, if a housing authority evicts a Negro tenant because he is a Negro and does not evict any white tenants, the tenant can argue that his eviction denied him the equal protection which the housing authority is constitutionally bound to afford him. If other Negro tenants have been evicted, however, his constitutional argument against eviction may be based on the due process clause. But if a housing authority, which always gave white evictees the statutory notice to vacate, evicted a Negro tenant without giving him such a notice, the Negro tenant could argue both the equal protection and due process theories, because while depriving him of due process the housing authority also treated him differently from white evictees.

The analytical distinction between equal protection and due process defenses is important for tenants faced with eviction, because under the equal protection argument a tenant can avoid the legal consequences of governmental activity which otherwise complies with the requirements of due process.

(i) *Due process.*—A tenant who is subjected to eviction for an unspecified reason or under manifestly unfair procedure may argue that his eviction would deprive him of property (his leasehold) without due process. However, since the HUD Circular proscribes evictions from public housing for unspecified reasons, a tenant's right to be informed of the reason behind his eviction is a statutory right. Accordingly, tenants in federally assisted public housing would not need to argue that an eviction for no reason at all deprived them of due process, because the Circular is made binding on the local authorities as a condition to receiving federal aid.[503]

503. Thorpe v. Housing Auth., 393 U.S. 268 (1969).

In public housing which is not federally aided, however, a tenant might still argue that he had been denied due process in being evicted summarily. Such an argument successfully prevented the eviction of a low-income tenant in *Vinson v. Greenburgh Housing Authority*.[504]

A tenant might also argue that he has been denied due process, if the housing authority failed to use fair eviction procedures. For example, such an argument might be made where an authority has failed to adopt adequate hearing standards, including prior disclosure of adverse evidence, adequate evidentiary rules, and right to counsel. As noted earlier, HUD has failed to prescribe these safeguards for the hearing required of all federally assisted housing authorities. Nevertheless, it can be persuasively argued that the absence of any of the procedures would deny the tenant due process.

(ii) *Equal protection.*—The equal protection argument invalidating racially discriminatory evictions has been supported by congressional sanctions. Title VI of the Civil Rights Act of 1964[505] empowers HUD to make rules prohibiting racial discrimination in the administration of low-rent housing, to provide means for effectively implementing these rules, and to withhold funds from any authority which does not comply with the policy of the Civil Rights Act.[506] Although racial discrimination still seems to be a problem for the prospective tenant, there have been few recent challenges of racially motivated terminations of tenancies.[507] Hopefully, HUD sanctions are effective deterrents of racially motivated evictions.

The equal protection argument has already been used to attack state bond requirements for appeals from summary eviction proceedings. A tenant might also argue that to evict him because he fits into an unreasonable classification of public housing tenants deprives him of equal protection of the law. For example, if bearing children out of wedlock is a ground for a tenant's eviction from a housing project, an unwed mother would argue that her eviction would deny her equal protection of the law because evicting her would be treating her differently from other public housing tenants. Since the government cannot use an unreasonable classification to deny its benefits to citizens, an unwed mother should not be evicted.[508]

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504. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968); *see* notes 425-28 *supra* and accompanying text.

505. 42 U.S.C. § 2000e (Supp. III, 1965-67).

506. *See generally* notes 334-88 *supra* and accompanying text.

507. Racial discrimination was alleged as one of the factors causing eviction in Nashville Housing Auth. v. Taylor, CCH POVERTY L. REP. 9,172 (Tenn. Ct. App. Dec. 6, 1968), *supra* note 462 and accompanying text, and in Lewis v. Housing Auth., 397 F.2d 178 (5th Cir. 1968) (court found that eviction was based wholly on birth of illegitimate children).

508. *But see* Williams v. Housing Auth., 223 Ga. 407, 155 S.E.2d 923 (1967).

Since the equal protection argument must be based on a complex, factual determination—that a housing authority which usually reacts to a given situation in a certain way reacted differently in dealing with the tenant—proving disparate treatment is a most difficult task. In the areas of civil rights[509] and labor law,[510] however, courts have seemingly simplified the task of proving illegal disparate treatment by shifting the burden of proof to the alleged discriminators after those allegedly discriminated against have established a prima facie case of disparate treatment.

It is submitted that when a person of low-income loses suitable low-rent housing because of an unreasonable discrimination among public housing tenants, this produces harm as irreparable as does the loss of employment because of labor activities. Courts, therefore, should carefully scrutinize charges that evictions of public housing tenants would deprive them of equal protection of the law and give them the benefit of every favorable inference in order to prevent irreparable injustice to the tenants by forcing them to live in unsuitable private housing.

(b) *First amendment guarantees.*—A tenant in public housing may argue that his eviction would violate his first amendment guarantees of freedom of speech and association. Although fourteenth amendment cases have not been frequent, extensive case law supports the proposition that state-created housing authorities may not abridge an individual's first amendment rights by evicting him because of his associations.[511]

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509. *Cf.* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (compensation for similar work held disparate because of plaintiff's race, in violation of Civil Rights Act of 1964).

510. *Cf.* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (discharges for union activity held violations of National Labor Relations Act based on NLRB's finding that defendant corporation did not rebut employees' evidence of discriminatory discharges).

511. *See* Lawson v. Housing Auth., 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955) (resolution enforcing Gwinn Amendment held unconstitutional); *cf.* Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955) (refusal to sign non-affiliation oath under Gwinn Amendment held arbitrary ground for eviction); Housing Auth. v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956) (refusal to sign non-affiliation oath required by state statute held arbitrary ground for eviction); Chicago Housing Auth. v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522 (1954) (state statute requiring non-affiliation oath for continued occupancy denied tenants due process); Kutcher v. Housing Auth., 20 N.J. 181, 119 A.2d 1 (1955) (refusal to sign non-affiliation oath under Gwinn Amendment held not sufficient ground for eviction). *See generally* Williams, *Tenants' Loyalty Oaths*, 31 NOTRE DAME LAW. 190 (1956); Note, *Denial of Federally Aided Housing to Members of Organizations on the Attorney General's List*, 69 HARV. L. REV. 551 (1956); Note, *The Gwinn Amendment: Practical and Constitutional Problems in Its Enforcement*, 104 U. PA. L. REV. 694 (1956).

(i) *The Gwinn Amendment.*—In 1953, Congress enacted the Gwinn Amendment,[512] a public housing appropriations rider, which enabled housing authorities to evict persons who were suspected or admitted members of "subversive" organizations. Before the amendment lapsed in 1955, several courts struck down evictions because of association with alleged subversive organizations.[513] Since some local housing authorities still have rules excluding subversives from admission and continued occupancy,[514] the first amendment arguments used against the Gwinn Amendment might be employed successfully today against similar local regulations.

(ii) *Association-related evictions.*—A federal district court enjoined the defendant in *Holt v. Richmond Redevelopment and Housing Authority*[515] from evicting tenants because of their organizational activities among their fellow tenants. The plaintiff had, over a period of years, actively encouraged fellow public housing tenants to form groups for their common benefit. In view of this background, the court disregarded the housing authority's alleged purpose for evicting the tenant—the plaintiff's fraudulent misrepresentation of his income—and held that the real reason for eviction was the tenant's political activities. The court held that such a reason was impermissible because it unconstitutionally abridged the plaintiff's freedom of association.

Clearly, a housing authority has a duty to evict tenants only for valid reasons. Since an unconstitutional motive for evicting a tenant would clearly be invalid, courts ought not to allow evictions which deprive tenants of freedom of speech or any other first amendment rights. Furthermore, the harm which an association-related eviction could cause other tenants makes such evictions particularly objectionable. Such evictions are objectionable because the political activities which they prevent frequently are necessary to protect tenants from unsuitable living conditions within public housing.

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512. Independent Offices Appropriation Act of 1953, ch. 578, 66 Stat. 393, 402, 403; First Independent Offices Appropriation Act of 1954, ch. 302, 67 Stat. 298, 306; *cf.* Act of Aug. 31, 1951, ch. 376, 65 Stat. 276. On the question whether the Gwinn Amendment's omission from the subsequent appropriations acts (*e.g.*, Act of June 24, 1954, ch. 359, 68 Stat. 272, 284) repealed the provision, see 41 OP. ATT'Y GEN. 275 (1963) (the provision expired).

513. One court held that such an eviction constituted an unconstitutional abridgment of the tenant's freedom of association. Lawson v. Housing Auth., 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955); *cf.* Chicago Housing Auth. v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954) (eviction violated due process).

514. *E.g.*, Housing Authority of Houston, *Vanderbilt Law Review Survey*.

515. 266 F. Supp. 397 (E.D. Va. 1966).

### D. *Conclusion*

More effective safeguards are necessary to prevent housing authorities from unlawfully depriving tenants of tenure in public housing and thus subjecting them to the inadequacies of cheap, privately owned dwellings. HUD, in its Circular, has taken a first step toward preventing unjust evictions by requiring local authorities to inform all tenants of the reasons for evicting them. Although HUD has authority to do more to protect potential evictees, it has not done so, but instead has left the establishment of procedures for protecting tenants to the local housing authorities.

It is true that some local authorities have granted tenants right to counsel, advance notice of adverse evidence, and reasonably fair evidentiary standards in thc course of making their decisions to evict tenants. Nevertheless, many housing authorities' procedures permit unfair divestment of tenants' rights to live in a suitable environment, despite the fact that the tenants are told why they are being evicted. If HUD persists in declining to prescribe administrative safeguards of public housing evictees' rights, tenants must rely on judicial enforcement of those rights.

Provided that state laws do not erect barriers to tenant relief from unlawful evictions, courts have in the past thwarted evictions which deprived tenants of constitutional and statutory rights. Courts must continue to provide such relief in order to prevent unfair evictions and to promote the national policy of providing a "decent home and a suitable living environment for every American family."[516]

## VI. REMEDIES FOR TENANTS IN SUBSTANDARD PUBLIC HOUSING

Although public housing has provided the low-income tenants with better and cheaper accomodations than private housing, in many instances housing projects fall far short of the public housing goal of providing adequate dwellings.[517] Once the low-income tenant has gained admission to public housing, he is often faced generally with inadequate living conditions and disrepair of various facilities. In fact slumlordism exists in public housing just as it does in the private sector. Accordingly, adequate remedies must be made available so that the public housing tenant who desires to improve his living

516. Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1964).

517. *See* Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 644 (1966).

conditions may compel the public housing authority to take appropriate action. Ideally the tenant should be able merely to report defects to the local housing authority with the expectation of immediate attention. When, however, the authority fails to act, the tenant should be entitled to institute an action for damages or withhold rent without danger of eviction. Unfortunately, due to the sociological characteristics of the public housing tenant and existing legal authority, the public housing tenant has little in the way of concrete remedies.

### *A. Some New Approaches to Traditional Concepts*

1. *Property Law.* (a) *Traditional landlord-tenant relationships.*—The common law landlord-tenant relationship developed through private housing precedents. The lessee is regarded as the purchaser of an estate in land which gives him the responsibility for minor repairs.[518] On the other hand, although the landlord has no duty to maintain the premises in a habitable condition unless he has covenanted to do so in the lease,[519] he is generally considered to be responsible for repairs to major facilities such as plumbing and heating.[520] Despite the fact that the landlord is bound to maintain the premises or to make certain repairs, the private tenant may, nevertheless, be without a meaningful remedy, since under the common law the tenant is responsible for the rent even if the landlord fails to make needed repairs.[521] Therefore rent withholding, even under these circumstances, would probably result in eviction. Thus, although it might be argued that, like the private landlord, the public landlord has a duty to make certain repairs, the public housing tenant would, like the private tenant, have no means of forcing the landlord to comply with the law.

(b) *Constructive eviction.*—The courts have developed the doctrine of constructive eviction when the premises are made uninhabitable by virtue of the landlord's failure to repair.[522] Under the traditional view, however, to invoke this remedy and consequently

518. 1 AMERICAN LAW OF PROPERTY § 3.78, at 347 (A.J. Casner ed. 1952).

519. Friedman v. Le Noir, 73 Ariz. 333, 241 P.2d 779 (1952). *See generally* Annot., 4 A.L.R. 1453, 1461 (1919). A few courts have attacked this rule as anachronistic. *E.g.*, Bowles v. Mahoney, 202 F.2d 320 (D.C. Cir. 1952).

520. Carusi v. Schulmerick, 69 App. D.C. 77, 98 F.2d 605, *cert. denied*, 305 U.S. 645 (1938).

521. *See* Income Properties Inv. Corp. v. Trefethen, 155 Wash. 493, 498, 284 P. 782, 784 (1930); 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 230[3], at 262-63 (Bender ed. 1967).

522. 1 AMERICAN LAW OF PROPERTY § 3.51, at 279 (A.J. Casner ed. 1952).

avoid liability for future rent, the tenant must give up possession of the leased property.[523] Since there is a shortage of low-rent housing and long waiting lists, in the case of public housing this would not appear to provide a reasonable alternative. Accordingly, the orthodox doctrine of constructive eviction provides no relief to the public housing tenant who merely desires to improve his living conditions without moving.

(i) *Constructive eviction without abandonment.*—In some instances the strict requirement of abandonment has been relaxed. For example, New York courts did take judicial notice of the housing shortage after World War II and found a constructive eviction without abandonment.[524] The court noted that for those whose income dictated residence in substandard dwellings, moving elsewhere was an unreasonable burden. The recent migration to urban areas combined with the shortage of low-income housing would seem to make this theory particularly applicable to the public housing tenant who is seeking to have his dwelling repaired. Although this remedy would permit the public housing tenant to withhold his rent until the necessary repairs were made, the theory of constructive eviction without abandonment has not been accepted widely.[525]

(ii) *Equitable constructive eviction.*—Since most housing regulations obligate the public as well as the private landlord to repair the premises,[526] and since abandonment is not a reasonable remedy due to the shortage of adequate housing, the tenant should argue that the remedy at law is inadequate. Under these circumstances equity has held that abandonment is not required.[527] This theory might provide meaningful relief for the public housing tenant, although again the lack of present judicial acceptance of this theory makes its effectiveness uncertain.

(c) *Implied warranty of habitability.*—The public housing tenant would be able to withhold rent to force repairs, if the courts would recognize that an implied warranty of habitability is given with the

523. *See, e.g.*, Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942); P.J.W. Moodie Lumber Corp. v. A.W. Banister Co., 286 Mass. 424, 190 N.E. 727 (1934).

524. Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153 (N.Y. Mun. Ct. 1950); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (N.Y. Mun. Ct. 1946).

525. *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 529-30 (1966).

526. *See, e.g.*, ALA. CODE tit. 25, §§ 17, 43 (1958); CAL. HEALTH & SAFETY CODE § 34326; MASS. ANN. LAWS ch. 121, § 26S (1965); N.Y. PUB. HOUSING LAW § 155; PA. STAT. ANN. tit. 35, § 1556 (1964).

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

lease.[528] Since the tenant is a purchaser of an estate in land, and thus subject to the doctrine of *caveat emptor*, the general common law rule is that the lessor does not impliedly warrant the premises to be in a tenantable condition.[529] There is, however, an exception to the rule where there is a lease of a furnished premises.[530] In *Pines v. Perssion*,[531] a case involving private, furnished housing, the Wisconsin Supreme Court commented:

> Legislation and administrative rules, such as the safe-place statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent "tumbledown houses" is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for concientious landowners.[532]

Since housing regulations generally apply to public housing[533] and are not limited to rentals of furnished premises, the court's observations appear to be applicable to public housing. In other words, where there is a well-defined public policy—as in the case of public housing, where both Congress and local authorities have expressed interest in insuring adequate and decent housing—the individuals involved should not be permitted to circumscribe their obligations implicit in the poliey. One disadvantage with this theory is that, assuming the courts will imply this warranty, the public housing tenant would not be entitled merely to withhold rent, but would have to bring an action for damages.[534] Despite the clearly stated policy behind the public housing program, few courts have been willing to recognize an implied warranty of habitability in a public housing lease.

The traditional application of property law concepts provides the

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528. *See* Schoshinski, *supra* note 525, at 521, 523-27.

529. *E.g.*, Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

530. *Id.*; Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). One court has found an implied warranty in the lease of an unfurnished apartment in a private multiple dwelling unit. Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931).

531. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

532. *Id.* at 595-96, 111 N.W. at 412-13.

533. *See, e.g.*, ALA. CODE tit. 25, §§ 17, 43 (1958); CAL. HEALTH & SAFETY CODE § 34326; MASS. ANN. LAWS ch. 121, § 26S (1965); N.Y. PUB. HOUSING LAW § 155; PA. STAT. ANN. tit. 35, § 1556 (1964).

534. *See* Income Properties Inv. Corp. v. Trefethen, 155 Wash. 493, 284 P. 782 (1930).

private tenant with virtually no weapons to force his landlord to repair housing defects, and the public housing tenant shares the same status. The two exceptions are where the courts will relax the abandonment requirement for a constructive eviction and will recognize an implied warranty of habitability. If a court will accept these modifications, the public housing tenant will have two remedies. Constructive eviction without abandonment is the better of the two, since rent withholding is more convenient than bringing an action for damages.

2. *Contract Law.* (a) *Failure of considerations.*—Since leases were historically treated as conveyances of interests in real property,[535] contract principles requiring dependancy of promises have not been applied to leases. Although the weight of authority still supports this view,[536] a strong argument can be made in support of the theory that the modern day lease is a contract as well as a conveyance. The multiple dwelling lease resembles a contract for the purchase of space and services, since the landlord not only delivers possession but also is usually obligated by statute to provide care and maintenance for the building and services such as plumbing, electricity, heat, and water. Since it is customary for such services to be purchased by contract, the obligations in a lease which are contractual in nature should be mutually dependent under contract rules.[537] This argument is applicable to the public housing tenant since public housing projects are subject to local building codes which obligate the landlord to maintain the building in good repair.[538] Accordingly, the tenant should be permitted to assert as a failure of consideration the fact that the landlord has failed to meet the obligation imposed by the building code. This theory is applicable to the public housing tenant only if courts are willing to break from the traditional concept of independent covenants. So far, this theory has no case law support which makes its usefulness to the public housing tenant uncertain.

(b) *Illegal contract*—There is a well established rule of law that a contract which violates a statutory prohibition designed for police or

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535. 1 H. TIFFANY, LANDLORD AND TENANT § 16 (1910).

536. *Id.* § 51; 6 S. WILLISTON, CONTRACTS § 890, at 580 (3d ed. 1962).

537. *See* Schoshinski, *supra* note 525, at 534.

538. *See, e.g.*, ALA. CODE tit. 25, §§ 17, 43 (1958); CAL. HEALTH & SAFETY CODE § 34326; MASS. ANN. LAWS ch. 121, § 26S (1965); N.Y. PUB. HOUSING LAW § 155; PA. STAT. ANN. tit. 35, § 1556 (1964).

regulatory purposes is illegal and unenforceable.[539] If housing codes prohibit the renting of any habitation which is not clean, safe, sanitary, and repaired, a lease of property which fails to meet the statutory standard should be illegal. In the recent case of *Brown v. Southall Realty Co.*,[540] a landlord brought an action for possession against a tenant for non-payment of rent. The tenant contended that since the landlord had let the dwelling knowing that its condition violated the District of Columbia Housing Regulations, the lease was unenforceable as an illegal contract.

In deciding for the tenant the court of appeals held that where violations of housing regulations exist prior to an agreement to lease, the letting of such premises constitutes an illegal and unenforceable contract which defeats a landlord's action for possession and non-payment of rent. It was noted that when the lease agreement was made, the dwelling was not "in a clean, safe and sanitary condition, in repair and free from rodents and vermin," as required by the housing code.[541] If the reasoning of this case is followed in other jurisdictions, it will provide the low-income tenant with long needed relief from the landlord's ability to recover rent for defective housing. Although *Southall Realty* involves a private landlord and tenant, it should equally apply to public housing projects which are also subject to housing regulations.

(c) *Adhesion contracts*—In many instances courts have nullified unconscionable standardized provisions in contracts where there was an imbalance of bargaining power between the parties.[542] These courts have limited the scope of freedom of contract because the weaker party is forced to accept a standard contract. The elements of such "adhesion contracts" and the typical circumstances which accompany their execution are present in a lease between a housing authority and an indigent tenant, since the latter has the choice of accepting the standardized lease or rejecting the entire transaction and remaining in substandard housing.

In *Vinson v. Greenburgh Housing Authority*,[543] a New York

539. *See, e.g.*, Ewert v. Bluejacket, 259 U.S. 129 (1922); Hartman v. Lubar, 133 F.2d 44 (D.C. Cir.), *cert. denied*, 319 U.S. 767 (1942).

540. 237 A.2d 834 (D.C. Ct. App. 1968); *see* 21 Vand. L. Rev. 1117 (1968).

541. Brown v. Southall Realty Co., 237 A.2d 834, 836 (D.C. Ct. App. 1968).

542. *E.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948) (invalidated contract prohibiting the seller from selling to anyone but Campbell Soup, while Campbell Soup was not bound to buy from this seller); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (invalidated contract clause waiving the implied warranty of merchantability).

543. 29 App. Div. 2d 338, 288 N.Y.S.2d (1968).

court noted that since the housing authority lease was a set form that could not be negotiated, the public tenant has less bargaining power than the private tenant and therefore needed the court's protection far more than did the housing authority. Although this case dealt with an arbitrary eviction, it is significant because the court recognized the inability of the public housing tenant to deal on equal terms with the housing authority.

Accordingly, the public housing tenant should argue that a lease provision delegating to the tenant the housing authority's duty to repair is invalid and cannot be used by the authority as an excuse in an action for rent. Although no court has, as yet, invalidated such a lease provision, *Vinson* indicates a willingness by the judiciary to recognize the public housing tenant's inability to bargain effectively with public housing authorities.

(d) *Tenants as third party beneficiaries*—Since contract law permits a third party to enforce a contract made for his benefit,[544] the public housing tenant living in a defective housing project should have a cause of action which would allow him to force the repair of his dwelling. Under the Annual Contributions Contract with the federal government, the local housing authority agrees to operate each project so as to provide decent, safe, and sanitary housing for low-income families.[545] There is an additional promise to maintain each project in "good repair, order and condition."[546] Since these promises are obtained for the tenants' benefit, a tenant in a public housing project which is a party to an Annual Contributions Contract should be able to enforce these promises as a third party beneficiary.[547]

There are, however, several potential problem areas in the application of the third party beneficiary doctrine to the public housing tenant. First, the public housing tenant might be considered to be a "donee" rather than a "creditor" beneficiary. One is a donee beneficiary if the purpose of the promisee in obtaining the promise of the other party is to make a gift to the beneficiary;[548] one is a creditor beneficiary if the performance of the contract which benefits the

544. *See* 4 A. CORBIN, CONTRACTS § 782, at 78-80 (1951); 2 S. WILLISTON, CONTRACTS § 356, at 828 (3d ed. 1959).

545. Department of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract, Pt. II, § 201 (PHA - 3011, October 1957).

546. *Id.* § 213.

547. *See* Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561 (1968).

548. RESTATEMENT OF CONTRACTS § 133(1)(a) (1932).

beneficiary will discharge an obligation of the promisee to the third party.[549] Although originally only creditor beneficiaries were entitled to recover as third party beneficiaries, a large majority of the states now permit a donee beneficiary to enforce a contract made for his benefit.[550] In addition, a recent tentative draft of the *Restatement of Contracts* does away with the categories of "creditor" and "donee" beneficiaries.[551] A second problem is that the tenant beneficiary is not ascertainable at the time the Annual Contributions Contract is made, although he is in the class to be benefited.[552] The *Restatement* states, however, that it is not essential that the beneficiary be identifiable at the time the contract is made.[553] If, as with public housing tenants, the beneficiaries are clearly identifiable when performance is due, they may maintain a cause of action.[554]

In *Shell v. Schmidt*[555] a group of veterans sued as third party beneficiaries of a contract between the Federal Housing Authority (FHA) and a building contractor. The FHA had been authorized by the Veterans Emergency Housing Act of 1946[556] to have these houses built for the benefit of veterans. Plaintiffs, who had bought the houses, brought a suit for damages alleging that the builder had failed to follow certain specifications. The California District Court of Appeals held that the plaintiffs could recover as third party beneficiaries because where the contract is for the benefit of a class, any member of the intended class may enforce it. The court also noted that the presence of the government, as one of the contracting parties, did not affect the applicability of the third party beneficiary doctrine.[557] Although this court awarded damages, specific performance is also available to third party beneficiaries[558] and, in

549. *Id.* at § 133(1)(b).

550. *See, e.g.*, Baurer v. Devenis, 99 Conn. 203, 121 A. 566 (1923); Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918); *see* 2 S. WILLISTON, CONTRACTS § 368, at 892 (3d ed. 1959); *cf.* German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 33 S. Ct. 32 (1912); P. National Bank v. Grand Lodge, 98 U.S. 123 (1878).

551. RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Draft No. 3, 1967).

552. In Erickson v. Grande Ronde Lumber Co., 162 Ore. 556, 574-76, 92 P.2d 170, 176-77 (1939) the distinction of being in the benefited class was made, but the court held that the beneficiary need not have been idenitifed when the contract was made.

553. RESTATEMENT OF CONTRACTS § 139 (1932). *See* 4 A. CORBIN, CONTRACTS § 781, at 70 (1951); 2 S. WILLISTON, CONTRACTS § 368, at 954 (3d ed. 1959).

554. *See* 4 A. CORBIN, CONTRACTS § 781, at 70 (1951).

555. 126 Cal. App. 2d 279, 272 P.2d 82, *cert. denied*, 348 U.S. 916 (1954).

556. Act of May 22, 1946, ch. 268, 60 Stat. 207.

557. 126 Cal. App. 2d at 290, 272 P.2d at 89.

558. *See* 4 A. CORBIN, CONTRACTS § 810, at 230-32 (1951); 2 S. WILLISTON, CONTRACTS, § 379, at 981-85 (3d. ed. 1959); RESTATEMENT OF CONTRACTS § 138 (1932).

the case of a public housing tenant, would be more appropriate. The circumstances surrounding the *Shell* case closely parallel the public housing situation in the local housing authority's promise to maintain projects in "good repair, order, and condition"[559] in exchange for federal funds authorized by a federal statute. The intended beneficiaries under the Annual Contributions Contract are low-income families.[560]

Since the Annual Contributions Contract is a federal contract designed to implement a federal statute, it should be interpreted by federal law to provide uniform application and to carry out the statutory scheme of the United States Housing Act of 1937.[561] In analogous situations courts have held that mortgage agreements entered into pursuant to the National Housing Act[562] between the Federal Housing Administration and its mortgagors are to be interpreted by federal law.[563] In addition in *International Association of Machinists v. Central Airlines*—[564]a case involving a board of adjustment established between a union and an employer as required by section 204, Title II, of the Railway Labor Act—the Supreme Court approved federal question jurisdiction on the theory that the contract must be understood in the context of the federal statutory scheme. Although the same reasoning should apply to the Annual Contributions Contract, in *Potrero Hill Community Action Committee v. Housing Authority*[565] a federal district court denied federal jurisdiction to the plaintiff-tenants who sued as third party beneficiaries under an Annual Contributions Contract. Despite the tenants' reliance on *Machinists*, the court distinguished it on the ground that labor relations law is subject to a uniform federal statutory scheme.[566] Since the Supreme Court based its holding in *Machinists* on the close connection between the type of contract

559. Department of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract, pt. II, § 213 (PHA - 3011, October 1957) [hereinafter cited as Annual Contributions Contract].

560. *Id.* § 201.

561. *See* Note, supra note 547, at 579. The third party beneficiary theory would apply under state law, but its application would not be uniform throughout the country.

562. 12 U.S.C. §§ 1701-50 (1964).

563. *See, e.g.*, Clark Investment Co. v. United States, 364 F.2d 7 (9th Cir. 1966); United States v. Chester Park Apartments, Inc., 332 F.2d 1 (8th Cir.), *cert. denied*, 379 U.S. 901 (1964). The agreements in question arose under the National Housing Act, 12 U.S.C. §§ 1701-50 (1964).

564. 372 U.S. 682 (1963).

565. Civil No. 46622 (N.D. Cal., filed June 2, 1967) (unreported).

566. *Id.* at 4.

involved and the legislation providing for its creation, it is submitted that the *Potrero Hills* holding is wrong. Certainly the federal government has entered the field of public housing with an extensive statutory scheme. For all aspects of public housing administration to be applied with uniformity and fairness, the federal courts must apply federal law to carry out the congressional policy.

In summary, the remedies under contract law are generally satisfactory for the public housing tenant in theory but have enjoyed only limited actual application. In an action for rent, the defense of failure of consideration is not likely to be accepted due to the long adherance to the doctrine of independent covenants for leasehold interest. Similarly, if the argument of adhesion contract were accepted, it would apply only in limited situations where there had been an exculpatory clause in the public housing lease. In view of the recent *Southhall Realty* case, the defense of illegal contract has merit and together with the third party beneficiary doctrine should be utilized by the public housing tenant.

3. *Tort law.*—Under the present system of housing code enforcement the public housing tenant is the victim of paternalism, as he is dependent upon a governmental agency to enforce compliance with the housing code. In addition if enforcement is successful, the tenant receives no compensation other than the intangible satisfaction of knowing that the defect has been repaired. In many instances the substandard conditions of low-rent housing are attributable to the tenants themselves, but very little has been done to give them the incentive to maintain the property they rent.[567] A private tort action, which could result in the awarding of substantial damages to the tenant who is not culpable himself, may promote that incentive to self-help and self-reliance which is so important when dealing with public housing tenants.[568]

The relatively new tort of intentional infliction of mental distress arises when one intentionally engages in "extreme and outrageous conduct" and that conduct "causes severe emotional distress to

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567. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 873 (1967).

568. The public housing tenant would bring action against the local housing authority which usually is a public corporation. Even where the landlord is a governmental agency, the tenant should not encounter much difficulty in bringing a tort action, since the federal government and most states have exposed themselves by statute to tort liability. *See* W. PROSSER, TORTS § 125, at 1001-10 (3d ed. 1964). For a detailed discussion of the theory behind a private tort action against the landlord *see* Sax & Heistand, *supra* note 567. *But see* Blum & Dunham, *Slumlordism as a Tort – A Dissenting View*, 66 MICH. L. REV. 451 (1968).

another . . . ."[569] This tort is designed to redress conduct "regarded as atrocious, and utterly intolerable in a civilized community."[570] Recovery is permitted only for serious encroachments which cause such reactions as "fright, horrow, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."[571] In testing the severity of these reactions, the *Restatement of Torts* notes that "normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe."[572] When a landlord subjects a tenant to the cumulative effects of dangerous, unsanitary, and unhealthy housing, the landlord's conduct infringes a substantive human interest beyond that which any civilized society can tolerate. Under such conditions a court could easily find that the tenant suffered emotional distress and bodily harm.[573] On the other hand, the most obvious difference between the tort and constitutional law cases is that the former have required the victim to suffer severe emotional distress. Although the tenant might be able to convince thc court that he qualifies under the traditional tort requirements, it is strange that no such requirements are necessary for recovery of damages in constitutional cases.

For example, in *Land v. Wilson* the Supreme Court held that a Negro citizen had a claim for damages for being deprived of his right to vote. Historically the right to vote is extremely important in our system of government, but deprivation of that right does not usually result in severe emotional distress in the tort sense. More recently Negroes have been allowed recovery for deprivations of the right to be free from racial discrimination. These recoveries have been based on statutory guarantees, but is there any less wrong done to a victim who is not provided with a statutory means of recovery? Early tort law was designed in part to protect substantive liberties rather than emotional tranquility—for example, the only proof required for false imprisonment was that one's liberty be restrained. These examples seem to indicate that there is a firm basis on which to dilute the severe emotional distress requirement where conduct is intolerable in a civilized society.

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569. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

570. *Id.* § 46, comment *d* at 73.

571. *Id.* § 46, comment *j* at 77.

572. *Id.* § 46, comment *k* at 78.

573. *See generally* Sax & Hiestand, *supra* note 567 for an excellent discussion developing the use of this tort as a tenant remedy.

In pointing out the inadequacies of present tort law it has been noted that:

> The man who tricks a crazy little old lady into believing that she has discovered the pot of gold at the end of the rainbow receives the profound attention of the court, but the thousands of landlords who daily subject their tenants to life in rat and garbage infested tenements, with no heat in winter and no ventilation in the summer, seem to have been completely ignored.

As is suggested in the above quotation the public housing tenant does not suddenly experience a traumatic shock which causes horror, grief or nausea; he is, however, the victim of the cumulative effects of a more subtle form of outrageous conduct. In the field of antitrust law, individual acts are tested, not in isolation, but by whether in the aggregate they tend to create a monopoly. A treble damage remedy is the penalty even for a single and apparently insignificant act which moves an organization only slightly toward a monopoly. The courts might similarly apply the antitrust theory of cumulative effects to the long range effects on the public housing tenant.

The theory of tort recovery is based on the proposition that one who undertakes to perform a service must act in conformity with the law and with minimum social standards. The conduct is tortious not where there is failure to construct housing but where there is an undertaking resulting in indecent conditions. Where the victim had no meaningful alternative but to deal with the wrongdoer, he should be allowed to recover damages in a tort action. The public housing tenant is unable to avoid the housing project since he is financially immobile and thus cannot obtain other suitable accommodations.

From a policy standpoint the tort remedy provides an acceptable solution. It would provide monetary recovery for damages caused from the housing authority's failure to repair. In addition since the landlord would have a defense where the tenant contributed to the cause of the housing conditions, in order to recover in a tort action the tenant would be required to have made every effort to maintain his habitation in good condition. Accordingly, this remedy would have the additional advantage of encouraging responsibility and promoting individual dignity among public housing tenants.

4. *Statutory Law.*—By arguing that failure to enforce housing codes deprives one of the rights guaranteed by the fourteenth amendment, the public housing tenant might be able to obtain appropriate relief under section 1983 of Title 42, United States Code.[574] Recent judicial interpretations of this statute indicate a

574. For full text of § 1983, see note 303 *supra*.

definite trend toward allowing recovery in a variety of cases involving less fundamental interests than decent living conditions.[575]

Section 1983 is an ideal tenant remedy since the statute was designed to provide relief where existing local law had become so corrupt or unresponsive as to be virtually unavailable.[576] For example, the public housing tenant's problems could be reduced by adequate housing code enforcement. By attacking the regulatory agency under section 1983 the tenant can not only acquire a remedy for his immediate wrong, but also begin to create the pressure which may have the effect of stimulating meaningful future enforcement by the agency. There is no "color of law" problem in connection with code officials, but the defendant could be expected to assert that his duties were discretionary and that he was, therefore, immune. Recent cases indicate, however, that the courts are reluctant to allow such immunity defenses.[577]

Probably the tenant could also reach the public housing officials under section 1983. It could be argued that the state has invested the local housing authority with what is inherently a public function to which fourteenth amendment standards attach.[578] In *Mulkey v. Reitman*[579] Justice Douglas, in his concurring opinion, argued that the state cannot authorize indirect racial discrimination, something it cannot do directly. The contravention of regulations and rights pertaining to decent housing is analogous to the misuse or non-use of state sanction in the area of racial discrimination specifically condemned in *Mulkey*.[580] Thus where the government has withdrawn to a position of passive neutrality, section 1983 establishes a proper remedy for those aggrieved.

### B. *Administrative Law*

1. *Federal Law.*—A public housing tenant should be able to receive relief by addressing his complaint regarding defective living

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Note, *Decent Housing as a Civil Right—42 U.S.C. § 1983—Poor People's Remedy for Deprivation*, 14 How. L.J. 338 (1968).

575. *See* Comment, *Civil Actions for Damages Under Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015, 1021 & nn.33-45 (1967) for a collection of cases involving rights which have been protected by use of § 1983.

576. *See* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-282 (1965).

577. Note, *supra* note 574, at 352.

578. *See* Terry v. Adams, 345 U.S. 461 (1953).

579. 387 U.S. 369, 384-86 (1967).

580. Note, *supra* note 574, at 356-59.

conditions in federally-assisted projects to HAA. Such action on the part of the tenant might, however, prove to be a frustrating and fruitless experience, since the United States Housing Act of 1937 provides no formal administrative procedures through which tenants can seek better living conditions.[581] Ideally there should be an easily accessable agency to which the public housing tenant could report malfunctions. If the local housing authority fails to make needed repairs, the federal agency could exercise its power to reduce or terminate annual contributions payable under the Annual Contributions Contract.[582] The HAA possesses the power to force the local authority to act, but to compel the HAA to use its power the tenant must ask a court for judicial review of the HAA's inaction under the Administrative Procedure Act (APA).[583] The public housing tenant must, however, overcome several obstacles before he can successfully bring a suit under this Act. First, there is some disagreement as to the extent to which discretionary agency action is reviewable.[584] Although it could be argued that, despite the HAA's discretion, the courts cannot allow a federal agency to continue to subsidize housing projects which have deteriorated, it is doubtful that a tenant complaining of a relatively small defect would find relief under the APA.[585] Second, the tenant must show that he has standing to sue by demonstrating that he has suffered a "legal wrong"[586] from the HAA's failure to require projects to be maintained in a safe and sanitary condition. Finally, the tenant must establish a basis for federal jurisdiction. Although there is some feeling that the controversy must involve an amount sufficient to warrant federal jurisdiction, most commentators feel that the APA confers an independent ground for jurisdiction.[587] Since the courts are not in

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581. Note, *supra* note 547, at 565.

582. 42 U.S.C. § 1415(3) (1964). The Housing Act provides that " 'low-rent housing' means decent, safe, and sanitary dwellings . . . ." 42 U.S.C. § 1402(1) (1964). The Annual Contributions Contract states: "The Local Authority shall at all times maintain or cause each Project to be maintained in good repair, order, and condition." Annual Contributions Contract, Pt. II, § 213.

583. 5 U.S.C. § 702 (Supp. II, 1966).

584. *See* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); 4 K. DAVIS, ADMINISTRATION LAW TREATISE § 28.16 (Supp. 1965).

585. Note, *supra* note 547, at 566.

586. *See* 5 U.S.C. § 702 (Supp. II, 1966).

587. *See* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 326 (1967).

agreement,[588] the public housing tenant's position under federal procedure remains vague and uncertain.

2. *Housing Code Enforcement.*—Public housing projects are usually subject to state and local building codes.[589] Although many of these codes—which establish minimal standards of maintenance, health, and habitability—are antiquated,[590] enforcement would, nevertheless, in many instances relieve the public housing tenant of the frustrating and lengthy judicial remedies to which he is forced to resort.[591] To enforce the existing codes the tenant must rely on the discretionary action of a government agency which is sometimes less than enthusiastic about receiving the public housing tenant's complaint. Routine inspections do not bring enforcement for several reasons. Often, there are not enough building inspectors. Also, there is a great deal of political discretion in enforcement.[592] Even where there is adequate code enforcement the standards established by that code have often become outmoded.

In the past, criminal prosecution has been the routine sanction for code violations.[593] Criminal procedures and remedies, however, are inappropriate for coping with code enforcement, even when private landlords are involved. Where there is a criminal prosecution the court is concerned with the culpability of the defendant, rather than the condition of the building. In most instances fines have remained

588. *Compare* Mulry v. Driver, 366 F.2d 544, 547 (9th Cir. 1966) *and* Freeman v. Brown 342 F.2d 205, 212-13 (5th Cir. 1965) holding that APA does not confer independent ground for jurisdiction, *with* Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960) (dictum) *and* Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 931-32 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955) (dictum), saying that it does.

589. *See, e.g.*, ALA. CODE tit. 25, §§ 17, 43 (1958); CAL. HEALTH & SAFETY CODE 34326; MASS. ANN. LAWS ch. 121, § 26S (1965); N.Y. PUB. HOUSING LAW 155; PA. STAT. ANN. tit. 35, § 1556 (1964).

590. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 480 (Bantam ed. 1968). State and local governments should modernize their codes, and the possibility of formulating a uniform national code should be explored.

591. To the unsophisticated tenant the prospect of a long and possibly fruitless judicial fight is enough to persuade him to refrain from taking action at all.

592. The dilemma of the code enforcement official has been described: "Poor tenants complain of housing code violations and are evicted, but they cannot move away. They are immobilized by lack of funds or by their race. Code administrators hesitate to act because if a building is officially condemned, it may mean more evicted tenants with no place to go." WALD, LAW AND POVERTY: 1965, REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 14 (1965).

593. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1275 (1966). This is one reason for the necessity of municipal rather than private enforcement of housing codes.

minimal which makes it cheaper to pay the fine than to make the repair. Jail sentences are seldom imposed, but if they were, the tenant has gained nothing if the condition of the dwelling remains the same, and because there can be no criminal proceeding without the defendant's presence, there is an incentive to stay away from court. After all of the delaying tactics are exhausted, the defendant can plead for an opportunity to meet code requirements.[594] The tenant's demand is for a remedy which will lead to the improvement of substandard housing, and criminal sanctions have just not worked.[595] Since criminal prosecution has not succeeded in the private sector, it is not suggested as a remedy in the public system, even if it were feasable to criminally prosecute a local housing authority.

Code enforcement through civil actions presents a more reasonable solution for both private and public housing. Mandatory economic penalities established according to the seriousness of the violation and length of condition have been suggested.[596] This remedy could be applied effectively to public housing since local housing authorites could ill afford to surrender large amounts in fines. Special civil courts or administrative courts have been suggested to handle code violations.[597] Presumably these courts would be receptive to the complaints of public housing tenants, and could determine more fairly the legitimacy of such complaints and alleged inaction.

The net result is that even with the addition of the proposed civil remedies the tenant is still dependent upon municipal action. Since it is a frustrating experience for the tenant to rely on the city for quick and meaningful action, these new proposals, though an improvement, do not provide the public housing tenant with the remedy he needs. Housing code standards must be upgraded, and the public housing tenant must be able to enforce them through private action or with the assistance of a tenant organization.

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594. In People v. Aster, 281 App. Div. 963, 120 N.Y.S.2d 545 (1953) the appellate court held a jail term for code violations inappropriate because the trial court had not given the defendant a fair opportunity to correct the violations.

595. Reliance on criminal liability to deal with economic and administrative offenses has been criticized from several quarters. *See, e.g.*, HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 327-31 (2d ed. 1960); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422-25 (1958); Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952).

596. Gribetz & Grad, *supra* note 593, at 1281-190.

597. REPORT ON A NATIONAL CONFERENCE ON LEGAL RIGHTS OF TENANTS, TENANTS RIGHTS: LEGAL TOOLS FOR BETTER HOUSING, 21-22 (1967). Analogous courts are domestic relations and juvenile courts of some cities.

### C. *Tenant Organizations*

1. *Tenants Unions.*—Public housing tenants might be more successful in their demands for better living conditions if they organized and worked as a group. As was the case of unorganized labor, the public housing tenant has been able to do little to improve his living conditions by individual effort. The complexities of modern life coupled with the apathy of powerlessness which afflicts many low-income individuals has forced the public housing tenant into a state of substantial dependence. The absence of education and self-confidence adds to their plight.

Recently, slum tenant organizations have been established not only to improve living conditions by collective bargaining, but also to permit tenants to play some part in determining their futures.[598] Such organizations have two advantages. First, since the union, and not a governmental agency, would have the primary responsibility for insuring that needed repairs were performed, a means of private law enforcement would be accomplished at little or no expense to the state. Second, and perhaps more important, the public housing tenant would feel, and rightly so, that his legitimate grievances would be mediated on an equal basis with the local housing authority.

There are some legal obstacles in the way of public housing tenant unions. At the present time there are no statutes applicable to tenant unions as there are statutes governing labor unions. The landlord has no duty to permit organization or to bargain with the union as the agent of all public housing tenants. There is no agency such as the National Labor Relations Board to determine the rights and duties of the parties. In fact, a contract between a tenant union and landlord probably would not withstand judicial inquiry into its validity.[599] Although legislation would help the tenant union become a recognized, effective force, it is submitted that a tenant union for public housing tenants can be effective without acquiring statutory authorization.

The ultimate objective of a tenant union—to improve living conditions for its members—could be accomplished through organizing without full recognition. Tenant unions in private housing

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598. Tenant unionization has occurred on a large scale only in Chicago. *See generally* Note, *Tenant Unions: An Experiment in Private Law-Making*, 2 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 237 (1967).

599. Note, *Tenents Unions: An Experiment in Private Law-Making*, HOUSING FOR THE POOR RIGHTS AND REMEDIES 100, 121 (N.Y.U. School of Law Project on Social Welfare Law, Supp. 1, 1967).

in Chicago have had success in negotiating with landlords who apparently feared adverse publicity as much as the loss of rents.[600] Recognition is not required for picketing which has successfully aroused public sentiment and yet enjoys court protection.[601] In addition, complaints of defects in housing projects would carry more weight if made to the local housing code enforcement agency or the Federal Housing Authority by a large organized group of tenants. This type of pressure would be more effective than rent withholding, since loss of rents is not as harmful to the local housing authority as it is to private landlords, and vacancies resulting from evictions for failure to pay rent could be quickly filed from the usually long public housing waiting lists. Finally, the housing authority would be susceptable to adverse publicity.

A public housing tenant union is an immediate possibility for remedying public housing defects. It could provide not only a sympathetic representative to whom the public housing tenant could voice complaints of housing defects, but also prod the housing authority to make needed repairs promptly. In addition, if conditions warranted, the union could organize pickets and conduct a publicity campaign to point out substandard conditions. Performance of these functions should make the housing authority more responsive to the needs of the public housing tenant.

2. *Rent Strikes.*—There are statutes in a few jurisdictions which permit rent withholding or paying rent into court, either by the welfare department on behalf of tenants receiving public assistance or by tenants themselves, when code violations have gone uncorrected for a certain period of time or when the building is dangerous to life or safety.[602] There can be no doubt that the rent strike statute provides the private tenant with a meaningful remedy against his landlord, but

600. REPORT, *supra* note 597, at 16.

601. *See* Thornhill v. Alabama, 310 U.S. 88 (1940), where the right of a union to peaceful picketing was elevated to constitutional status. In Dicta Realty Associates v. Shaw, 50 Misc. 2d 267, 270 N.Y.S.2d 342 (Sup. Ct. 1966), the court refused to grant an injunction restraining a tenant from displaying pickets outside of the building criticizing the building's management and service. The court held that the tenant's personal right of assembly outweighed the picket prohibition in the lease. The court distinguished Springfield, Bayside Corp. v. Hochman, 44 Misc. 2d 882, 255 N.Y.S.2d 140 (Sup. Ct. 1964), on the ground that the picketing there had occurred at a "secondary" site. *See generally* Note, *supra* note 598, at 247.

602. *See, e.g.*, CAL. CIV. CODE §§ 1941-42 (lessor's duty to repair; deduction for repairs made by lessee); ILL. REV. STAT. ch. 23, §§ 11-23 (1967) (rent withholding by state agency on behalf of welfare recipients in substandard housing); PA. STAT. ANN. tit. 35, §§ 1700-1 (Supp. 1969) (suspension of duty to pay rent when dwelling unfit for habitation). *See generally* Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304 (1965).

the statutes do not indicate their applicability to public housing. If the housing project is strictly a local function with no involvement by the federal government, the tenant can take advantage of a local rent strike statute.[603] On the other hand, where the housing project is completely owned and operated by the federal government, state interference with a federal government function would probably not be sanctioned.[604]

As for the large majority of projects which are owned by local housing authorities and supported by the federal government through Annual Contributions Contracts, rent-strike statutes should apply.[605] The local housing authorities do not become instrumentalities of the federal government merely by contracting to receive federal funds.[606] Local housing authorities are public corporations which have been regulated by the states in such matters as building codes and zoning laws.[607] Even so, it has been held that a state may not regulate to the degree of interfering with a congressional purpose.[608] Since congressional policy for public housing is to provide decent, safe, and sanitary conditions, it should be argued that rent abatement assists in the fulfillment of this policy.[609] Looking further, the Annual Contributions Contract provides that nothing shall preclude the incurring of expenditures in emergencies where there is an immediate serious hazard to life, health, or safety of the project occupants.[610]

Where no statutes exist, the public housing tenant should not attempt a rent strike. Although the rent strike has a nuisance value and directs public attention to substandard housing conditions, there

603. Commissioner of Labor and Indus. v. Boston Housing Auth., 345 Mass. 406, 188 N.E.2d 150 (1963). The court applied the state law to the state projects but limited its application to federally supported projects.

604. Notc, *supra* note 547, at 571.

605. *Id.* at 573.

606. *Cf.* James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) (state safety regulation applicable to construction on land ceded to federal government for post office).

607. Russell v. Zoning Bd. of Appeals, 349 Mass., 532, 209 N.E.2d 337 (1965); Drake v. City of Los Angeles, 38 Cal. 2d 872, 243 P.2d 525 (1952) (authority not required to submit preliminary loan application to city planning commission); *cf.* Passaic Junior Chamber of Commerce v. Housing Authority, 45 N.J. Super. 381, 132 A.2d 813 (1957) (no violation of zoning law by site location for low rent project).

608. Pennsylvania Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 269, 271 (1943).

609. *See* Commissioner of Labor & Indus. v. Boston Housing Auth., 345 Mass. 406, 188 N.E.2d 150 (1963) where it was held that the Boston Housing Authority could not be compelled to adopt wage rates prescribed by state law unless the Public Housing Authority approved the expenditure. Here compliance with state law was held to interfere with the statutory scheme.

610. Department of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract, pt. II, § 407(H) (PHA-3011, October 1957).

is a greater chance that the tenant will lose in the long run. Unlike labor picketing, the rent strike has no limited constitutional privileges.[611] In addition, where no statute exists it is difficult to carry out an effective rent strike because tenants are reluctant to participate in such illegal activity.[612] Finally, a striking tenant not supported by law would probably be evicted. For these reasons other tactics, such as picketing, are more suitable when there is no rent strike statute.

### D. *Conclusion*

As noted, public housing usually offers the low-income tenant more desirable housing for the money than does private rental housing. This benefit should not, however, be looked upon as a take it or leave it gift with no rights for the recipient. If the public housing project is in need of repair, there should be remedies available to the public housing tenants. Although most of the traditional applications of legal concepts have not benefited the tenant, several new ideas have recently been advocated which should help the public housing tenant. Lawyers and judges have the opportunity to design remedies for tenants in substandard public housing.

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611. *See* cases cited note 601 *supra*.

612. Note, *supra* note 599, at 133.