PUBLIC UTILITY DISCONTINUANCE AND THE RESIDENTIAL LEASE: PROVIDING A REMEDY FOR THE RESIDENTIAL TENANT'S RIGHT TO SERVICE

THE PROBLEM

For tenants in residential dwellings a deficiency in the law exists today in the important area of utility service. A tenant in a three-family, non-owner-occupied building,[1] for example, whose landlord is obligated to pay for utility service, can be denied that service because the landlord defaults in the bill even though the tenant is current with the rent. When this tenant contacts the utility company after the service has been discontinued, he finds that he can have the service restored only if he pays the landlord's outstanding bill,[2] a figure most likely beyond his resources. The problem this tenant faces is how, within the law, to have utility service restored as rapidly as possible so as to prevent injury to himself and his family.

In a jurisdiction such as New Jersey, which has manifested a sensitivity to the plight of tenants, remedies appear to abound in favor of a tenant who is not receiving what he has contracted for. It is clear that under the decision in *Marini v. Ireland*,[3] certain covenants in a lease are mutually dependent. Thus, the tenant is excused from paying rent if the landlord fails in his responsibility to provide habitable living quarters.[4] As viewed by the *Marini* court, however,

[1] For some reason, there exists, in the sphere of landlord-tenant law, a great deal of distinction between buildings which are owner occupied and have two or less rental units and all other residential apartments. For example, the recent amendments to the summary dispossess statute, N.J. STAT. ANN. § 2A:18-53 (Supp. 1975-76), called by some the tenants' bill of rights, are applicable for apartments "other than owner-occupied premises with not more than two rental units." *Id.* § 2A:18-61.1. Likewise, in a rent control situation, the Newark rent control law, providing for a maximum yearly rental increase of no more than 5%, except where hardship is shown, is not applicable to "owner occupied two and three family housing space units." NEWARK, N.J., REV. ORDINANCES § 15:9B-2(b) (Supp. 1974).

[2] The utility cannot, however, require a tenant to pay the back bills if that tenant did not live in the premises during the period for which the bill accrued. *See* N.J. STAT. ANN. § 48:3-3.1 (1969).

[3] 56 N.J. 130, 265 A.2d 526 (1970).

[4] *Id.* at 145-46, 265 A.2d at 534-35. The court indicated that, by letting the premises, the landlord impliedly covenants that the

> facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.

the tenant's remedies were limited to either making the repairs and deducting the cost from the succeeding month's rent or moving out of the apartment under the theory of constructive eviction.[5] Since *Marini,* tenant remedies have been extended by lower courts to allow for rent abatements, especially in those situations where a tenant could not possibly afford the repair costs.[6] Even if the tenant is allowed to withhold rent under the abatement theory, this remedy will not provide immediate restoration of essential services such as heat and electricity.

In 1973, the New Jersey supreme court again extended a tenant's available remedies by providing that a tenant, whose premises were uninhabitable, could bring affirmative action against the landlord.[7] In *Berzito v. Gambino,*[8] the court permitted an assessment of

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Id. at 144, 265 A.2d at 534. Thus, in a situation where the landlord failed to act after reasonable notice and the tenant repaired a toilet and deducted the cost from her rent, the court allowed the remedy of repair and offset. *Id.* at 146-47, 265 A.2d at 535.

The problem, of course, arises as to defining the word "habitable." In Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 403, 261 A.2d 413, 417 (L. Div. 1970), the court, while not defining the word, did indicate that "[n]ot every transient inconvenience of living attributable to the condition of the premises will be a legitimate subject of litigation." In Berzito v. Gambino, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973), the supreme court provided a more definite standard:

> Not every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person.

Some jurisdictions have adopted the local housing code as the basis of the standard of habitability. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072-73, 1081-82 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Steele v. Latimer, 214 Kan. 329, 336, 521 P.2d 304, 309-10 (1974). Other jurisdictions use an approximation of the housing code. *See* Green v. Superior Court of the City and County of San Francisco, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974) ("substantial compliance with those applicable building and housing code standards which materially affect health and safety"); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972) (habitability "is fulfilled by substantial compliance with the pertinent provisions of the . . . building code").

[5] 56 N.J. at 146-47, 265 A.2d at 535. The remedy of constructive eviction suggested by the court reaffirmed a remedy first enunciated in Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). The problem with constructive eviction, however, is that a tenant must have a place to move. As has been suggested by a number of courts, finding a new place may be difficult in light of critical housing shortages which exist throughout the state. *See* Samuelson v. Quinones, 119 N.J. Super. 338, 343, 291 A.2d 580, 583 (App. Div. 1972); Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 318, 293 A.2d 720, 737-38 (L. Div. 1972), *modified,* 62 N.J. 521, 303 A.2d 298 (1973); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 480, 268 A.2d 556, 558 (Essex County Dist. Ct. 1970).

[6] In Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 483, 268 A.2d 556, 559-60 (Essex County Dist. Ct. 1970), the court held that a tenant was not restricted in his remedies to either moving out or fixing the repair. The case involved the malfunctioning of the heating system, as well as other vital services, in a 400-unit apartment, the court indicating that it was unreasonable to expect the tenant to undertake repairs in a building of that size. *Id.* at 484, 268 A.2d at 560. Rather, the court allowed the remedy of rent abatement. *See id.*

[7] Berzito v. Gambino, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973).

[8] 63 N.J. 460, 308 A.2d 17 (1973).

money damages based upon the rent paid less the rental value of the apartment as it existed with the habitability defects.[9] In so doing, the *Berzito* court effectively expanded the tenant's available remedies for enforcement of the covenant of habitability:

> We now hold that the covenant on the part of a tenant to pay rent, and the covenant . . . on the part of a landlord to maintain the demised premises in a habitable condition are for all purposes mutually dependent.[10]

While *Berzito* marks a significant advancement for the tenant, like *Marini* and its progeny it offers no effective recourse to a tenant who seeks immediate restoration of utility service.

An additional remedy, provided by the New Jersey legislature,[11] permits the tenant, by petition, to allege specific defects of habitability and to request the appointment of a rent receiver whose duty would be to collect the rents and to insure that necessary repairs are made.[12] In cases of utility termination, this remedy is not immediately effective since payment to the utility company is dependent upon the receiver's ability to secure rental payments. In the interim, however, the tenant is still without service.

On the municipal level, a tenant can pursue a derivative action through the local board of health's housing code enforcement process. As the local repository of the state's police power jurisdiction in matters of health, the municipal board of health is an agent of the state, not the municipality.[13] Thus, despite the fact that the munici-

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[9] *Id.* at 469, 308 A.2d at 22. The court also noted that, while not applicable to the instant case because it was effective after the commencement of the action, the state legislature had authorized affirmative action by the tenant. *Id.* at 471-72, 308 A.2d at 23 (citing N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1975-76)). For a further discussion of this statute see notes 11-12 *infra* and accompanying text.

[10] 63 N.J. at 469, 308 A.2d at 21.

[11] N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1975-76).

[12] The legislative findings indicate that the purpose of the statute is to encourage owners of substandard dwellings "to provide safe and sanitary housing accommodations for the public," thereby assuring the health, safety, and welfare of each inhabitant. *Id.* § 2A:42-85(b).

[13] As stated by Chief Justice Vanderbilt in Zullo v. Board of Health, 9 N.J. 431, 435, 88 A.2d 625, 627 (1952):

> Local boards of health are governmental agencies created in every municipality under statutory mandate . . . *for the purpose of exercising locally the inherent police powers of the state* with respect to matters pertaining to public health.

(Citation omitted) (emphasis added). *See also* Itzen & Robertson, Inc. v. Board of Health, 89 N.J. Super. 374, 379, 215 A.2d 60, 63 (L. Div. 1965), *aff'd*, 92 N.J. Super. 241, 222 A.2d 769 (App. Div. 1966); Grosso v. City of Paterson, 55 N.J. Super. 164, 170-72, 150 A.2d 94, 97-99 (L. Div. 1959).

Thus, even though boards of health are " 'established in and by cities,' " and even though the municipality determines both the membership and the budget of the local board, it is not a creation of the municipality. Grosso v. City of Paterson, *supra* at 173, 150 A.2d at

pality adopts ordinances governing certain housing standards,[14] it does so under the aegis of a grant of power from the state.[15] Likewise, the state, not the municipality, prescribes the sanctions imposed for housing code violations.[16] In New Jersey, those sanctions are limited to a fine for such a violation, and imprisonment for failure to pay the fine.[17] Thus, even a rigorous and effective code enforcement process, something several commentators maintain is virtually impossible,[18] may fail to afford a remedy which inures to the benefit of the tenant. Instead, it results only in revenue to the locality. Barring code enforcement, the only other municipal remedy, total condemnation, is also clearly ineffective from the tenant's standpoint. Also authorized by the state, condemnation is permitted when a building is deemed

> unfit for human habitation . . . due to other conditions rendering such building . . . unsafe or insanitary, or dangerous or detrimental to the health or safety . . . of the residents . . . .[19]

The final remedy which might be available to a tenant is a suit in equity to restrain the landlord from interfering with the use and enjoyment of the apartment.[20] If the landlord is poor or simply does

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99 (quoting from Board of Health v. New York & L.B.R.R., 77 N.J.L. 15, 16, 71 A. 259, 259 (Sup. Ct. 1908)).

[14] *See, e.g.*, NEWARK, N.J., REV. ORDINANCES § 15:1-1 *et seq.* (1966).

[15] N.J. STAT. ANN. § 26:3-1 (1964) provides in pertinent part that "[t]here shall be a board of health in every municipality in this State."

[16] *See id.* §§ 26:3-70 to -70.1 (Supp. 1975-76); *id.* §§ 26:3-71 to -82 (1964).

[17] *Id.* § 26:3-70 (Supp. 1975-76); *id.* § 26:3-77 (1964). Both of these provisions are adopted into the Newark Housing Code. *See* NEWARK, N.J., REV. ORDINANCES § 15:2-7 (Supp. 1974).

[18] In 1973, a congressional hearing indicated that a "criticism of housing codes concerns the way in which they are enforced." *Hearings before the Subcomm. on Housing of the House Comm. on Bank. and Curr.*, 93d Cong., 1st Sess. 2222 (1973). In 1971, an article written by a University of Pennsylvania law professor indicated that even the policy makers who draft and implement housing codes "are not convinced that strict enforcement of even an ideal code will really benefit the tenants whom the code is intended to 'protect.' " Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Code, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095 (1971).

[19] N.J. STAT. ANN. § 40:48-2.3 (1967). If a tenant is forced to move by this process, he qualifies as a displaced person under the Relocation Assistance Act. *Id.* § 20:4-1 *et seq.* (Supp. 1975-76). The tenant, under that Act, would be entitled to certain assistance including moving and related expenses, and, possibly, an actual housing allowance. *See id.* § 20:4-4, -6.

[20] The covenant of quiet enjoyment

> is not an absolute covenant for the protection of [the lessee's] possession against the acts of the whole world. It extends only to the acts of the landlord and of strangers asserting a paramount title. The lessor does not warrant against the acts of strangers who do not claim a superior title. But in order that his own acts may constitute a breach of the covenant, they must amount to an eviction. . . . When the covenant of quiet enjoyment is broken, the obligation for payment of rent is suspended . . . .

C. TIEDEMAN, THE AMERICAN LAW OF REAL PROPERTY § 144, at 183-84 (4th ed. 1924) (footnotes omitted).

not have the money to pay the utility, due perhaps to rising fuel prices, it is possible that while the suit would lie, enforcement of the restraining order would be impossible.[21]

Thus, despite the statutes and ordinances that compel a landlord to supply heat[22] and hot water,[23] there exists no remedy that ensures restoration of utility services shut off because of the landlord's delinquency. For any such remedy to be fully effective, it should work not only against the landlord, but also against the utility to prevent it from initially discontinuing service.

POSSIBLE SOLUTIONS

The Due Process Clause

As a general proposition it has been suggested that no public utility should be allowed to discontinue service to its customer without affording the procedural due process requirements of notice and the opportunity to be heard.[24] Before the safeguards can be judicially mandated in utility discontinuation cases, as in other cases, it must be

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[21] In a recent case, Jones v. Buford, Civ. No. L-10159-74 (N.J. Super. Ct., L. Div., Nov. 22, 1974), *rev'd*, 132 N.J. Super. 209, 333 A.2d 279 (App. Div. 1975), the trial court considered the applicability of an action in chancery by a tenant against a poor landlord, the court saying: "The record will reflect that after listening to the owner, even a suit in Chancery would be an effort in futility." Transcript at 20, Jones v. Buford, Civ. No. L-10159-74 (N.J. Super. Ct., L. Div., Nov. 22, 1974).

[22] N.J. STAT. ANN. § 26:3-31 (Supp. 1975-76), gives the local board of health the power to enact regulations to require a landlord to supply heat between October 1 and May 1 at a level of 68 degrees during the day whenever the outside temperature falls below 55 and at a level of 55 degrees at night whenever the temperature falls below 40. *Id.* § 26:3-31m. The city of Newark also has an ordinance compelling a similar standard. *See* NEWARK, N.J., REV. ORDINANCES § 15:4-14(c) (Supp. 1973).

[23] *See, e.g.*, NEWARK, N.J., REV. ORDINANCES § 15:4-17 (1966) which provides:

> Hot water shall be supplied at all times . . . at a temperature of not less than 120 degrees Fahrenheit, between the hours of 6:00 A.M. and 10:00 P.M.

[24] Cases finding that due process is required include: Palmer v. Columbia Gas, 479 F.2d 153, 165-68 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566, 568, 570 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Hattell v. Public Serv. Co., 350 F. Supp. 240, 245-46 (D. Colo. 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 722 (D. Kan. 1972).

Contra, Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 627 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969) (affirming a dismissal of suit for damages).

These cases were all brought under 42 U.S.C. § 1983 (1970). However, in such cases, " 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794 n.7 (1966). *See also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 & n.7 (1970).

See generally Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477 (1973); Note, *Light a Candle and Call an Attorney—The Utility Shutoff Cases*, 58 IOWA L. REV. 1161 (1973); Note, *Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.U.L. REV. 493 (1973).

established that the offensive conduct constitutes state action.[25] In 1974, the Supreme Court confronted this issue in *Jackson v. Metropolitan Edison Co.*[26] and held that there was no state action when a public utility, privately owned, discontinued service to a defaulting customer.[27] Consequently, if the residential tenant is to have a due process remedy, it must be compatible with *Jackson.*

In *Jackson,* a Pennsylvania utility, without notice or hearing, discontinued service to the family home of the customer because of a default in payments.[28] The utility, though privately owned and oper-

[25] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972) (no state action); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722-26 (1961) (state action); Civil Rights Cases, 109 U.S. 3, 11 (1883).

[26] 419 U.S. 345 (1974).

[27] *Id.* at 358-59.

Prior to the *Jackson* case, the lower court cases were split on whether due process was involved in utility termination. Most of these cases conflicted on state action grounds.

One of the first cases, according to one commentator, to hold that there was state action in a private utility situation was Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972). *See* Haydock, *Public Utilities and State Action: The Beginning of Constitutional Restraints,* 49 DENVER L.J. 413, 413 (1973).

Prior to *Ihrke,* the Seventh Circuit had found no state action in a case where utility service was discontinued pursuant to a tariff which the utility had filed with the state commerce commission. *See* Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624, 625 n.1, 627 (7th Cir.), *cert. denied,* 396 U.S. 846 (1969). *Compare id. with* the rationale used by the Supreme Court in *Jackson,* 419 U.S. at 358. In a concurring opinion, Judge Kerner in *Kadlec* indicated several factors which should be considered in a determination of state action in a utility case:

> Some of the factors which should be considered are whether 1) the entity is subject to close regulation by a statutorily-created body (such as the Illinois Commerce Commission), 2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given a total or partial monopoly by the regulatory body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity, 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law.

407 F.2d at 628 (Kerner, J., concurring). *Compare id. with* notes 41-49 *infra* and accompanying text (discussing the regulations as they exist in New Jersey).

Relying on these seven factors, the Eighth Circuit decided *Ihrke,* a situation in which delinquent customers had their utility service discontinued without notice or hearing. 459 F.2d at 567-69. The court found that, under these factors, there was sufficient regulation by a city to bring the acts of the utility under color of state action. *See id.* at 569-70.

In addition to the *Ihrke* decision, two federal district courts had held the activities of a public utility to be state action. *See* Stanford v. Gas Serv. Co., 346 F. Supp. 717, 722 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241, 246 (N.D. Ohio 1972). For a discussion of the due process aspects of utility termination see Note, *The Emerging Constitutional Issues in Public Utility Consumer Law,* 24 U. FLA. L. REV. 744, 755-59 (1972).

While not relying on constitutional issues, another federal district court required the city of Washington, D.C., to provide free utility service to poor tenants whose landlord had defaulted in payment, at least until the tenants were relocated. *See* Masszonia v. Washington, 315 F. Supp. 529, 530, 533 (D.D.C. 1970).

[28] 419 U.S. at 347-48. There was also a question as to whether or not the meter was intentionally damaged. *Id.* at 347.

ated, was heavily regulated by the state.[29] The utility submitted the procedure for discontinuance as part of a general tariff. That procedure became effective because the state public utility commission had failed to disapprove.[30] The discontinuance was challenged on federal due process grounds, the customer alleging that the utility's monopolistic status, its essential service nature, the public interest function of the utility, and the substantial state regulation provided sufficient state involvement to give the termination procedure constitutional magnitude.[31] In framing the standard of state action in terms of both *Burton v. Wilmington Parking Authority,*[32] in which the Court had found state action in the case of a privately operated cafeteria, leased from the state and located within a state parking garage,[33] and *Moose Lodge No. 107 v. Irvis,*[34] in which no state action was found in the state's granting a liquor license to a private club,[35] the Court perceived the issue in *Jackson* as essentially whether "this case should fall on the *Burton* side of the line . . . rather than on the *Moose Lodge* side of that line."[36] Rejecting all of the state action

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[29] *Id.* at 350.

[30] *Id.* at 354-55. The commission had held hearings on certain provisions of the general tariff, (for example, rates) but it had never specifically dealt with the termination procedure provision. *Id.*

[31] *Id.* at 351-54.

[32] 365 U.S. 715 (1961).

[33] *Id.* at 716, 725-26.

[34] 407 U.S. 163 (1972).

[35] *Id.* at 171, 177.

[36] 419 U.S. at 351. For the relevant discussion of both *Burton* and *Moose Lodge* in *Jackson* see *id.* at 351-52, 357-58.

Burton involved a privately owned restaurant leased from and located within a parking facility owned and operated by a state agency. 365 U.S. at 716. The Authority was created by statute. *Id.* at 717. It had the power to construct parking facilities or to acquire property "by lease, purchase or condemnation," to lease some of its space for commercial purposes, and to issue tax exempt revenue bonds. *Id.* at 718. The Authority's property was exempt from state taxes. *Id.* The restaurant leased internal space from the Authority but did not have an entrance way connected to the parking facility. Additionally, the Authority installed certain necessary fixtures and some " 'decorative finishing.' " *Id.* at 719. Also, any restaurant improvements attached to the Authority property were tax exempt. *Id.* Further, the Authority covenanted to provide heat and gas and to make structural repairs. *Id.* at 720.

The *Burton* Court, realizing that state action was not susceptible of concrete definition, stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722. Furthermore, the Court examined all facts and their interrelationships and their cumulative effect to arrive at its holding:

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. . . . The State has

arguments, the Court found that the utility was merely heavily regulated and partially monopolistic.[37] Additionally, the Court determined that the manner of termination of services had been "elected" by the utility and only permitted by the public utilities commission.[38] As a result, the Court concluded that the state was

> not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment.[39]

As a result of *Jackson,* then, if a privately owned public utility submits a regulation allowing discontinuance without notice and hearing as part of its tariff, this action falls "on the *Moose Lodge* side of that line."[40] For the residential tenant, the test of state action will revolve around the powers, duties, and regulations of the public utility. If the utility is privately owned and the regulations allowing discontinuance are proffered by the utility, then, under *Jackson,* state action probably does not exist.

Not all states function as does Pennsylvania. In New Jersey, control of public utilities is exercised by the Department of Public Utilities, a principal department of the state's executive branch of government.[41] State regulation of utilities has been the outgrowth of changing society:

> [D]uring the present generation, people have largely ceased sup-

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so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity . . . .

Id. at 724-25.

On the other hand, in *Moose Lodge,* the state involvement was not considered sufficient to pass the private action across the threshold into state action. The Moose lodge was "a private club in the ordinary meaning of that term." 407 U.S. at 171. The club owned its own building and did not receive any public monies. *Id.* Nor did the club perform the type of function that a state would perform if the club did not exist. *Id.* at 175. The club, however, did have a state liquor license and was required to fulfill certain conditions to attain and keep this club license, such regulations being enforced by a state agency. *Id.* at 176. But the Court held that the regulation by the state did not "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise," hence the state was "not sufficiently implicate[d]" in the club's discriminatory practices to warrant a finding of state action. *Id.* at 177. And there was nothing similar to the "symbiotic relationship" that existed in *Burton. Id.* at 175.

[37] 419 U.S. at 358.

[38] *Id.*

[39] *Id.* at 358-59.

[40] *Id.* at 351.

[41] N.J. STAT. ANN. § 48:2-1 (Supp. 1975-76) provides in part:

> There is hereby established in the Executive Branch of the State Government a principal department which shall be known as the Department of Public Utilities. The Board of Public Utility Commissioners . . . is designated the head of such principal department.

> plying their own water and light, and these essential needs of life have been furnished by public service corporations .... This service furnished by public utilities is of such importance to the public that the states usually assume jurisdiction over service matters. Jurisdiction may be exercised by direct legislation, or more often through a Commission. It seems to be an established rule that service may be regulated. A company accepting a charter from the state consents to regulation.[42]

Regulation in New Jersey is effected through a board of public utility commissioners.[43] The board, composed of three citizens, each of whom serves a six-year term, is appointed by the governor with the advice and consent of the state senate.[44] The grant of power to the board gives it preeminent regulatory and supervisory control of public utilities, "their property, property rights, equipment, facilities and franchises," to the extent necessary to carry out the purposes of the act.[45] Under this statutory grant, the board proposes regulations which become part of the New Jersey Administrative Code,[46] and are thus binding on public utilities. One of these regulations provides that there can be discontinuation of service only after notice to the customer of the intent to discontinue,[47] and then only for "[n]onpayment of a valid bill due for service furnished at a present or previous location."[48] The procedure in New Jersey, then, is a three step process involving: first, a failure to pay; second, a notice to the customer of an intent to discontinue; and third, discontinuance.

Because the board of public utility commissioners, an adjunct of the executive, has enacted these regulations, it would seem that this situation is distinguishable from *Jackson,* wherein the utility itself submitted the shut-off procedure and the Board tacitly approved.

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[42] E. NICHOLS, PUBLIC UTILITY SERVICE AND DISCRIMINATION 1 (1928) (footnotes omitted).

[43] N.J. STAT. ANN. § 48:2-1 (Supp. 1975-76).

[44] *Id.* Further, no more than two persons may be of the same political party. *Id.*

[45] *Id.* § 48:2-13. "Public utility" is defined to

> include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, ... canal, express, subway, pipeline, gas, electric light, heat, power, water, oil, sewer, ... telephone or telegraph system, plant or equipment *for public use,* under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

Id. (emphasis added).

[46] *See* N.J. ADMIN. CODE § 14:3-3.6 *et seq.* (1973) for those regulations relating to discontinuance of service. The board's authority is pursuant to N.J. STAT. ANN. § 48:2-12 (1969).

[47] *See* N.J. ADMIN. CODE § 14:3-7.12 which provides in part:

> A public utility may discontinue service for nonpayment of bills provided it gives the customer at least seven days' written notice of its intention to discontinue.

[48] *Id.* § 14:3-3.6(a)(3)(i).

Based on this distinction, it can be argued that, in New Jersey, state action is present. This conclusion is reinforced by the regulation which requires notice to the customer.[49] This notice, however, which goes only to the customer and not the tenant, is only of the intent to discontinue and thus comes too late to effectuate procedural due process for the tenant, who is unaware of the landlord's default and who is helpless to prevent the termination.

For due process to apply to the tenant, once state action is found to be present, the tenant must show that he is deprived of a "right."[50] In a tenancy situation, this right could devolve first from the fact that "[a] landlord and tenant have separate and distinct estates in the demised lands."[51] As a result, during the term of the tenancy, "[t]he law regards a lease as the equivalent of a sale of premises for the term."[52] Thus, a tenant has a property right as a leaseholder.

A tenant involved in a utility shut-off situation may also have a contract right which deserves protection—the rights of a third-party beneficiary to the contract between the utility and the landlord. In New Jersey, these rights are guaranteed by statute:

> A person for whose benefit a contract is made . . . may sue thereon in any court and may use such contract as a matter of defense in an action against him although the consideration of the contract did not move from him.[53]

Because the key phrase of the statute is "for whose benefit," in an action by a supposed third-party beneficiary, the court must determine if the contract between promisor and promisee was for the benefit of the third party. "[T]he real test," as stated by the court in *Borough of Brooklawn v. Brooklawn Housing Corp.*,[54] "is whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts."[55]

In *Brooklawn,* the housing corporation had contracted with the

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[49] *Id.* § 14:3-7.12.

[50] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970).

[51] Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 707, 61 A.2d 180, 182-83 (Ct. Err. & App. 1948).

[52] Longi v. Raymond-Commerce Corp., 34 N.J. Super. 593, 600, 113 A.2d 69, 72 (App. Div. 1955).

[53] N.J. STAT. ANN. § 2A:15-2 (1952).

[54] 124 N.J.L. 73, 11 A.2d 83 (Ct. Err. & App. 1940).

[55] *Id.* at 77, 11 A.2d at 85. *See also* Graybar Elec. Co. v. Continental Cas. Co., 50 N.J. Super. 289, 294-95, 142 A.2d 114, 117 (App. Div. 1958), wherein the court, citing *Brooklawn,* indicated:

> The primary concern in ascertaining the rights of third-party beneficiaries is to discover the intention of the parties to the contract out of which the alleged rights emanate.

United States to purchase specified properties.[56] The corporation, as part of the contract, agreed to pay all municipal assessments to the borough.[57] Although the contract was performed, the corporation failed to pay the assessments and the borough brought suit under the contract as a third-party beneficiary.[58] The court indicated that the only means of determining whether the contract was designed to benefit the borough was to examine the intentions of the contracting parties:[59]

> They are the persons who agree upon the promises, the covenants, the guarantees; they are the persons who create the rights and obligations which flow from the contract.[60]

While the *Brooklawn* court indicated that the designation of the third party in the contract was evidence of an intention to confer a benefit,[61] it concluded that the borough could not maintain the suit because the contract specifically gave the United States the exclusive control for enforcement.[62]

More recently, the third-party beneficiary doctrine has been applied to a leasehold situation in *Moorestown Management, Inc. v. Moorestown Bookshop, Inc.*,[63] in which the landlord of a shopping mall sued some of the tenants to enforce certain lease provisions.[64] The Moorestown Mall Merchants Association (Association) also joined as a party plaintiff, claiming as a third-party beneficiary.[65] One of the lease clauses required the tenants to join the Association.[66] The court indicated that the Association would qualify as a third-party beneficiary if it could "prove that the contract was made and intended for" it.[67] The underlying rationale for permitting such a party to maintain an action once such proof is established is that

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[56] 124 N.J.L. at 74, 11 A.2d at 84.

[57] *Id.*

[58] *Id.* at 74-75, 11 A.2d at 84.

[59] *Id.* at 76-77, 11 A.2d at 85.

[60] *Id. Accord,* Graybar Elec. Co. v. Continental Cas. Co., 50 N.J. Super. 289, 294, 142 A.2d 114, 117 (App. Div. 1958).

[61] 124 N.J.L. at 77, 11 A.2d at 85.

[62] *Id.* The general rule from *Brooklawn,* however, is that a third-party beneficiary can maintain a suit. That this can be done, even though no consideration flowed from the third party to the promisee, has been the law in New Jersey for some time. For two representative cases see Burlew v. Hillman, 16 N.J. Eq. 23, 25 (Ch. 1863) ("a party beneficially interested in a contract may maintain a suit in equity"); Van Dyne v. Vreeland, 11 N.J. Eq. 370, 379 (Ch. 1857) ("[t]he party for whose benefit the agreement is to be performed . . . has the legal right to enforce it").

[63] 104 N.J. Super. 250, 249 A.2d 623 (Ch. 1969).

[64] *Id.* at 254-56, 249 A.2d at 626.

[65] *Id.* at 255, 257, 249 A.2d at 626-27.

[66] *Id.* at 255-57, 249 A.2d at 626-27.

[67] *Id.* at 258, 249 A.2d at 628. In this case, the court found the association to be a "donee"

> he has a sufficient interest in the enforcement of the promise so as to entitle him to sue for damages or to invoke the aid of a court of equity if the remedy at law is inadequate.[68]

When these principles of intent are applied to the landlord-utility contract, it would seem clear that a landlord intends to confer upon the tenant the rights of a third-party beneficiary. In return for the execution of the lease, the landlord agrees to contract with the utility for the benefit of the tenant. As the *Moorestown* court indicated, the contract is "in satisfaction of a . . . duty or obligation owed by the [landlord]."[69] Thus, if the utility discontinues service, it has breached the contractual provision designed to benefit the third-party tenant.

Regardless of whether the proprietary or contractual rationale is used, it seems that "utility service is an interest of sufficient worth to require due process protection."[70]

The problem in a tenancy situation, however, is whether notice would serve any useful purpose. The utility of notice to the tenant was considered by a federal district court in *Davis v. Weir*,[71] which involved the discontinuance of water service by a municipality. In *Davis*, a lease provided that the landlord would supply water at no extra charge to the tenant.[72] When the landlord refused to pay the bill, the municipality discontinued the service and the tenant sought to restrain the city from further discontinuance.[73] While the court would require notice of the proposed shut-off, it rejected the idea that any due process rights of the tenant were violated by the utility's failure to offer him the opportunity to be heard, since none of the parties ever claimed that the tenant was liable for the water charges. As a result, a hearing would serve no purpose.[74] The *Davis*

beneficiary. *Id.* While it could be argued that, in a tenancy, the tenant is a "creditor" beneficiary, the same standard of proof as used in *Moorestown* would apply. *See id.*

[68] *Id.* The court then discussed the benefit conferred upon the Association and concluded that the Association was a third-party beneficiary and could join as a plaintiff:

> In this case the promisee, Moorestown, expresses a clear intention and purpose . . . to confer a benefit upon [the] Association . . . . Accordingly, the Association as a donee beneficiary has a sufficient interest in the enforcement of these covenants and is a proper party to this action.

Id.

[69] *Id.*

[70] Note, *The Emerging Constitutional Issues in Public Utility Consumer Law*, 24 U. FLA. L. REV. 744, 755 (1972). This comment compares utility service to wages and welfare payments in terms of protectible interests. *Id.* at 747.

[71] 328 F. Supp. 317 (N.D. Ga. 1971).

[72] *Id.* at 318.

[73] *Id.*

[74] *Id.* at 322. The court noted that the city's procedure effectively "terminate[d] an important benefit . . . without notice to the person who is the actual recipient of that benefit." *Id.* at 321-22.

court thus held that a utility must give notice to a tenant before his service may be terminated, but that a hearing is not mandated unless there are factual issues in dispute. *Davis,* however, insofar as it dealt with due process, seems to fall short of effective protection for the tenant because bare short-term notice without the right to confront the utility in no way enables a tenant to avert an imminent shut-off. This aspect of *Davis* belies the entire purpose of "fairness" inherent in due process:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.[75]

As has been demonstrated, a tenant has substantial rights—both proprietary and contractual—which are worthy of protection. By receiving notice, a tenant would perhaps be able, together with other tenants, to pay the utility bill or to seek restraints against either the landlord or the utility. If afforded the opportunity to be heard, a tenant could present his plight to the utility with the hope of achieving an equitable settlement of the matter. It is only when the tenant has had both notice and opportunity to be heard that "substantively unfair and simply mistaken deprivations of property interests can be prevented."[76]

Equal Protection

An equal protection problem may arise in the landlord-tenant-utility dilemma when the utility refuses to institute service in the name of the tenant until the tenant pays the landlord's past due bill for the tenant's apartment. An underlying notion of equal protection is that all persons similarly situated shall be treated alike in the eyes of the law.[77] The problem in the instant analysis would

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[75] Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863). *Accord,* Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

[76] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). The entire statement of the Court in this regard marks a cogent analysis of the importance of procedural due process:

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

Id. (quoting from Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

[77] *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971).

arise when the utility refuses the existing tenant, but would not refuse a new tenant. This equal protection issue was raised in *Davis v. Weir*.[78] In setting up the equal protection problem, the court noted that "[w]ith everything else equal," the municipality would accept the application of one person who was not indebted to the city and reject the application of another, likewise not indebted, solely because in the latter instance a debt is owed by a third party for past services to the apartment.[79] The benefit thus conferred on one class of persons was denied to another similarly situated class, without a rational basis for the distinction.[80] In rendering its decision, the court rejected the municipality's contention

> that the outstanding debt is so inextricably tied to the premises that its existence prevents the person occupying the premises, who is not liable for the debt, from obtaining water service.[81]

Thus, in a situation where the utility could bill the tenant for service in his own name, a failure to do so simply because of the default in payment by the landlord may raise serious equal protection problems. Because a prerequisite for the application of equal protection is a duality of classes, however, the equal protection aspect of *Davis* may be severely limited by the character of the housing market in a given area. While the *Davis* argument works in a situation involving a multi-family house or a small apartment, either of which is likely to have separate meters for each tenant, the situation is somewhat different in a multi-story, multi-family apartment building which has only one meter for all of the units. Under such circumstances, the utility can quite convincingly argue that it is unreasonable to allow one tenant to have service in his own name because it would be impossible to determine that tenant's pro rata share. In such a case, the tenant may have to rely on due process.

New Jersey Constitution

Under the New Jersey constitution, every citizen is entitled to

> have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring,

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[78] 328 F. Supp. 317, 322 (N.D. Ga. 1971).

[79] *Id.*

[80] *Id.* The court stated:

> In such circumstances, the City is conferring a benefit on one class of persons but does not confer the same benefit on another, similarly situated class of persons, and there appears to be no justification for considering that distinction to be a rational classification.

Id. (footnote omitted).

[81] *Id.* at 323. Accordingly, the court restrained the municipality from refusing to contract with the tenant. *Id.*

> possessing, and protecting property, and of pursuing and obtaining safety and happiness.[82]

This article is part of New Jersey's state bill of rights, the whole of which "is widely recognized as the most forward-looking document of its kind in the Nation."[83] It is clear that the provisions of article 1, section 1 are not identical to the analogous provisions of the fourteenth amendment of the federal constitution.[84] Thus, the New Jersey supreme court has recognized that:

> Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.[85]

This concept was expanded by Justice Pashman, dissenting in *King v. South Jersey National Bank.*[86] Noting that it is the concept of federalism that places a state action requirement in federal due process, Justice Pashman explained that one of the central purposes of a state constitution is to fill the gaps of the federal standard by protecting "citizens against private oppression as well as oppression by the state."[87] Although this minority view has substantial basis in scholarly thought,[88] it was not adopted by the remainder of the court in *King.* The majority indicated that article 1, section 1 of the state constitution is operative in this context only where a citizen's "fundamental" rights have been violated.[89]

Clearly, a tenant deprived of all electric and gas service suffers a substantial deprivation of the use and enjoyment of the dwelling unit. If the fundamental right theory of *King* is applied to this situation, the tenant may come within the protection afforded by the state

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[82] N.J. CONST. art. 1, § 1 (1971).

[83] Milmed, *The New Jersey Constitution of 1947,* in N.J. STAT. ANN. CONST. ARTS. I TO III, at 91, 110 (1971).

[84] In Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied,* 414 U.S. 902 (1973), the court considered a challenge to school financing in New Jersey on *both* federal and state constitutional grounds. *See* 62 N.J. at 480, 490, 303 A.2d at 276, 281-82.

[85] *Id.* at 490, 303 A.2d at 282.

[86] 66 N.J. 161, 330 A.2d 1 (1974).

[87] *Id.* at 193, 330 A.2d at 18 (Pashman, J., dissenting). Justice Pashman indicated that, under the state constitution, citizens have been constitutionally protected from even wholly private conduct. *Id.*

[88] Justice Pashman's dissent cites several commentators who share this view of the constitution. *See, e.g.,* Countryman, *The Role of a Bill of Rights in a Modern State Constitution,* 45 WASH. L. REV. 453 (1970); Note, *Toward an Activist Role for State Bills of Rights,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973).

[89] *See* 66 N.J. at 178, 330 A.2d at 10.

constitution. In the recent decision of *Southern Burlington County N.A.A.C.P. v Township of Mt. Laurel,*[90] the court, while not directly so holding, clearly indicated an intent to find that safe and decent housing is a fundamental right.[91] Likewise, a 1973 decision by Justice Pashman, then in the law division, while not binding on today's court, is indicative of the thinking of one of the current justices. In *Apartment House Council v. Mayor and Council of the Borough of Ridgefield,*[92] then Judge Pashman stated:

> With more than one-third of our population living in apartments and other rental housing and one's home being the heart of privacy in America, the law cannot be so helpless that an immediate effort could not be made in the interest of proper and safe shelter. *The dignity of every human being demands a right to be housed. It is an affront to the dignity of that human to provide indecent housing even for a short spell.*[93]

The supreme court has also measured the activities of public utilities by New Jersey constitutional standards. At the very least, the court has viewed the board of public utility commissioners as a rule-making agent of the state legislature.[94] Decisions of the court have also intimated that action by the board is state action,[95] which is controlled in part by due process requirements.[96] In one case,

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[90] 67 N.J. 151, 336 A.2d 713 (1975).

[91] The court noted that constitutional protection "is confined to major questions of fundamental import." *Id.* at 175, 336 A.2d at 725. The decision then went on to say:

> We consider the basic importance of housing and local regulations restricting its availability to substantial segments of the population to fall within [this] category.

Id. It should be noted that housing has been denied the status of a "fundamental" right under the federal equal protection clause. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972).

[92] 123 N.J. Super. 87, 301 A.2d 484 (L. Div. 1973), *aff'd,* 128 N.J. Super. 192, 319 A.2d 507 (App. Div. 1974). In this case, a group of landlords (the council) challenged the constitutionality of a borough ordinance which required the landlords to deposit security with a municipal commission. 123 N.J. Super. at 89, 301 A.2d at 485. This money could then be used to make emergency repairs to an apartment in situations in which the landlord had neglected to do so after 24 hours' notice. *See id.* at 89-90, 301 A.2d at 485.

[93] 123 N.J. Super. at 94-95, 301 A.2d at 488 (emphasis added). After hearing all of the constitutional arguments, the court held the ordinance constitutional. *Id.* at 103, 301 A.2d at 493.

[94] In Central R.R. v. Department of Pub. Util., 7 N.J. 247, 257, 81 A.2d 162, 166 (1951), the court stated:

> It is clear that the Board [of Public Utilities Commissioners], an administrative body, acts as a legislative agency of the State in the exercise of its rate making powers.

See also Public Serv. Coordinated Transp. Co. v. State, 5 N.J. 196, 214, 74 A.2d 580, 589 (1950).

[95] In Central R.R. v. Board of Pub. Util. Comm'rs, 10 N.J. 255, 90 A.2d 1 (1952), *appeal dismissed,* 345 U.S. 931 (1953), a railroad appealed from a fare decision by the Board. In analyzing the railroad's arguments regarding the Board decision, the court spoke of "the state action under review." 10 N.J. at 265, 90 A.2d at 5-6. While the statement is somewhat out of context, it is indicative.

[96] *See, e.g.,* New Jersey Bell Tel. Co. v. Board of Pub. Util. Comm'rs, 12 N.J. 568, 584, 97

Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners,[97] a railroad, which had proposed to discontinue service over a certain run because of severe economic losses, [98] was ordered by the board to continue operating the trains.[99] The supreme court, in reversing the board's decision,[100] set out certain guidelines for the determination of whether a particular service should be continued.[101] If those guidelines were not followed by the board, noted the court, its decision

> would constitute an arbitrary and unreasonable taking of property for private purposes and without compensation, a violation of the "due process" provisions of our State and Federal Constitutions.[102]

From these decisions, it would appear that a tenant's best chance for success against utility discontinuance may lie within the framework of the New Jersey constitution. Cases decided under that document, while not directly on point, offer ample basis for an ultimate holding that housing is a fundamental right deserving of constitutional protection and that the board of public utility commissioners, as an agent of the state legislature, is required to meet the minimal due process safeguards of notice and the opportunity to be heard.

A Suggested Solution

Any effective remedy to the tenant's utility shut-off problem must accomplish several objectives. It must first restore utility service to the tenant. Second, it must provide a method for payment of future bills which is equitable to the utility, the tenant, and the landlord. Third, it must provide a method by which the utility can attempt to recoup some of the loss suffered by the landlord's refusal to pay.

Since the service-customer relationship between the utility and

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A.2d 602, 610 (1953), wherein the Board denied the company a rehearing on a rate hike. The court indicated that "[a] rehearing is not essential to due process of law." *Id.* at 580, 97 A.2d at 608.

[97] 5 N.J. 114, 74 A.2d 265 (1950).

[98] *Id.* at 117, 74 A.2d at 266. The evidence indicated that the daily passenger use for the two lines which the railroad wished to discontinue averaged 6.2 and 8.1 and that revenues for the two lines over an eight month period were $767.13 while costs were $9,262.28. *Id.*

[99] *Id.* at 118, 74 A.2d at 267. The Board felt bound to do so based on a prior decision. *Id.*

[100] *Id.* at 131, 74 A.2d at 274.

[101] *Id.* at 129, 74 A.2d at 272.

[102] *Id.* The type of due process here referred to, of course, is substantive, while that needed in utility shut-off cases is procedural.

the landlord is a contractual one, it is clear that the utility can sue the defaulting landlord on that contract for the money which is owing to it, thus collecting on some, if not all, of the arrearages.

In fashioning a workable remedy for maintaining utility service and for equitably distributing the cost, it is essential to recognize that at the foundation of any solution should be due process. Unless the tenant knows the landlord has defaulted and has the opportunity to protect both property and contract rights, any remedy is likely to be too late. Once due process is accepted as requisite in this situation, the remedy will to a great extent depend on the size of the apartment structure.

In a small building which has either separate meters or where the tenants have a close relationship, the most viable remedy would appear to be the one fashioned in *Davis v. Weir,*[103] wherein the court allowed the tenant to assume service in his own name.[104] This continues the service, pays the utility company, and allows the utility some recourse for recovering the remainder of the debt in a contract suit. Finally, the landlord would receive rent, although the tenant would probably be allowed to deduct the utility cost from that which he pays to the landlord under the doctrine of *Marini v. Ireland.*[105] Under this theory, because all parties have received notice of the intended shut-off, they will suffer only slightly.

In New Jersey, this solution may become obligatory upon all public utilities. Because of the critical importance of utility service, the Division of Public Interest Advocacy has petitioned for several amendments to the New Jersey Administrative Code relative to the discontinuance of utility service.[106] Under the enabling legislation creating his office, the public advocate has the power to commence "proceedings before any . . . board of the State leading to an . . . administrative rule."[107] In his petition, the public advocate has alleged that current utility "regulations work undue hardships in many cases,"[108] and, therefore, has proposed several changes in utility regulations. For poor tenants, the most important of these proposed regulations reads as follows:

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[103] 328 F. Supp. 317 (N.D. Ga. 1971).

[104] *Id.* at 323. This was based on the court's determination that a failure to allow this remedy would be violative of equal protection. *Id.*

[105] 56 N.J. 130, 146-47, 265 A.2d 526, 535 (1970).

[106] Petition, *In re* Proposed Amendments to the Board's Rules and Regulations Respecting Discontinuance and Deposits, No. 7411-803 (N.J. Bd. Pub. Util. Comm'rs, filed Nov. 7, 1974) [hereinafter cited as Petition].

[107] N.J. STAT. ANN. § 52:27E-32a (Supp. 1975-76).

[108] Petition, *supra* note 106, at 2.

> Notwithstanding any of the other provisions contained in this section, discontinuance of residential service is prohibited if,
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> . . . .
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> . . . Service is supplied to a tenant and billed to his landlord, unless the landlord supplied a statement that the premises are unoccupied; or, if occupied, a statement under oath signed by the occupant agreeing to termination; or the utility shall have offered the tenant continued service to be billed to the tenant, unless the utility demonstrates that such billing is unfeasible. However, continued service to a tenant shall not be conditioned upon payment by the tenant of any outstanding bills due upon the account of any other person.[109]

While it would seem that these new regulations would provide a reasonable solution in many instances and should, therefore, be adopted, it is likewise clear that the public advocate's proposal may be impossible to enforce in larger buildings with many units and only one meter.

The solution in this kind of building may lie in some type of receivership action, either by the tenants individually or by the tenants as the third-party beneficiaries of the contract between the landlord and the utility.[110] Under the tenant's receivership act,[111] the tenants of a multi-family building could, through a petition alleging defects in habitability, have a receiver appointed to collect rents.[112] There appears to be no substantive reason why a court could not say that a lack of utility service affects habitability in such a manner that a receiver should be appointed to collect the rents, pay the utility for the current month, and turn over the excess to the landlord.[113] Again, the utility could proceed in a contract action against the landlord for the past due bill.

In addition, it may well be that many owners of multi-story, multi-family apartment buildings are corporations. In that instance, the corporate landlord's failure to pay the utility is probably attributable to the corporation's near insolvency. Thus, proceeding to maintain utility service is likely to alleviate only part of the problem since

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[109] Proposed regulations as annexed to Petition, *supra* note 106. If enacted, these regulations would become N.J. ADMIN. CODE § 14:3-3.6(c).

[110] *See* notes 53-69 *supra* and accompanying text.

[111] N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1975-76).

[112] *Id.* § 2A:42-85. As the legislature found:

> It is necessary, in order to insure the improvement of substandard dwelling units, to authorize the tenants dwelling therein to deposit their rents with a court appointed administrator until such dwelling units satisfy minimum standards of safety and sanitation.

Id. § 2A:42-85c.

[113] The act specifically mentions as one of the grounds for the appointment of an administrator "a lack of heat or of running water or of light or electricity." *Id.* § 2A:42-90(a).

the corporation has probably also failed to pay other debts. In that case, the tenant's only remedy is a petition to have the corporation placed in state receivership.[114] To do this, the tenant must first allege that he is a creditor.[115] However, since as third-party beneficiary to the landlord-utility contract the tenant has all the rights to the enforcement of the contract, the tenant could use his status to assert the creditor rights of the utility. If this were done, a receiver would be appointed to in effect stand in the shoes of the landlord and make new contracts regarding the building. It would thus be possible for the receiver to pay the monthly bills, including the utility bill, out of the rents received for the corporation,[116] applying the remainder of monies collected to a pro rata distribution among the creditors for past debts.[117]

It should be noted that in both of these receivership actions, the rent receiver, as the court-appointed rent collector, would have standing to dispossess any tenant who failed to meet rental commitments.[118]

CONCLUSION

In a modern context, courts are evaluating the law of landlord and tenant more and more under contract, rather than property, principles.[119] But even standard contract remedies have often proved

[114] The placing of a corporation into receivership is controlled by statute. *See id.* § 14A:14-1 *et seq.* (1969).

[115] *Id.* § 14A:14-2 provides, in part, that:

> (1) A receivership action may be brought in the Superior Court by
> (a) a creditor whose claim is for a sum certain or for a sum which can . . . be made certain . . . .

"Creditor" is defined by the act as a "holder of any claim, *of whatever character*, against a corporation." *Id.* § 14A:14-1(b) (emphasis added). To be entitled to relief, the action must be based on one of the following: insolvency of the corporation; suspension of business of the corporation due to lack of funds; or great prejudice to creditors or stockholders because of severe losses currently being suffered by the corporation. *Id.* § 14A:14-2(2).

[116] Subject to court supervision, the reciever has the power to

> continue the business of the corporation, and, to that end, enter into contracts, borrow money, pledge, mortgage or otherwise encumber the property of the corporation as security for the repayment of the receiver's loans . . . .

Id. § 14A:14-5(g).

[117] Creditors are generally paid in proportion to the amount of their debt after certain expenses are deducted from the assets of the corporation. *See id.* § 14A:14-21.

[118] *Compare id.* § 14A:14-5(b), which allows the receiver to "institute . . . actions . . . on behalf of the corporation" *with id.* § 2A:42-92(b) (Supp. 1975-76), which directs that, in a rent receiver action, all rents to become due are to be paid into court, and that any attempt by the landlord to collect said rents is void.

[119] *See* Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). *See generally* Note, *Landlord's Implied Warranty of Habitability Does Not Give Rise to Strict Tort Liability for Tenant's Personal Injuries*, 5 SETON HALL L. REV. 409, 416-21 (1974).

inadequate. This is the case in the utility shut-off situation inasmuch as the contract remedy of damages clearly will not restore utility service. Neither will the remedies of rescission, if the tenant has no place to go, or specific performance, if the landlord simply cannot pay the bill. It is likewise clear that a tenant deserves to have the benefit of utility service where it is part of the lease contract. Because of the importance of utility service to the residential tenant, its continuation deserves the protection of more than just standard contract or property remedies. The nature of the relief may require that the problem assume federal or state constitutional dimensions.

What is also evident is that the remedy must inure to the benefit of the tenant in the form of immediate restoration of utility service and still provide the utility with a mechanism for obtaining payment. The solutions suggested above are means by which a modern court can provide the tenant with contracted-for essential services, thus striking an equitable balance in landlord-tenant-utility relations.

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