

PUBLIC LANDLORDS AND TENANTS: A SURVEY OF THE DEVELOPING LAW

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The Housing Act of 1937, as amended,¹ sets forth a federal policy "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . [by vesting] in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program"² "Low-rent housing" is defined as "safe, and sanitary dwellings within the financial reach of families of low income"³ This survey

¹ 42 U.S.C. § 1401-30 (1964), as amended, 42 U.S.C.A. §§ 1401-22 (Supp. 1968).

² *Id.* § 1401.

³ *Id.* § 1402(1).

examines the management policies of public housing projects presently in operation under the Act,⁴ determines the extent to which these projects are accomplishing the stated purposes of the federal housing program and related anti-poverty programs, and explores the remedies available to the Government and the public housing tenant to force compliance with these purposes.

It is not the purpose of this study to delve into the myriad of factors which have caused the acute shortage of decent low-rent public housing in this country.⁵ Instead, this undertaking is limited to an evaluation of existing projects—the problems in project management, such as the extreme dilapidation of older sites, peculiar to particular types of projects, as well as the generally more prevalent problems of mismanagement, funding, repair, social services, and tenant eligibility.

I. SUB-STANDARD PUBLIC HOUSING

The declared purpose of the Housing Act was to provide low income families with “decent, safe and sanitary dwellings.” However, projects constructed in the early stages of public housing as well as more recent structures have fallen into varying states of disrepair ranging from grossly dilapidated projects which can be classified “public housing slums”⁶ to projects which, although not in advanced stages of deterioration, are not properly maintained.

Tenants cite incompetent and unsympathetic management as the cause of public housing deterioration⁷ while public housing

⁴ The locally owned and federally supported public housing program authorized by the 1937 Act has been implemented in every state, and the great majority of public housing units are encompassed by it. See Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 642-43 n.7 (1966); Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561 n.3 (1968). Under this program Local Authorities build, own and operate low-rent public housing as public corporations under state enabling legislation. Loans and annual “Contributions” (subsidies) are provided by the federal government to aid in paying the interest and amortization of bonds sold by the Local Authorities to finance construction. See 42 U.S.C. §§ 1401-10 (1964); Friedman, *supra*, at 648; 68 COLUM. L. REV., *supra*, at 561.

⁵ The 1960 census indicated that 10.6 million of the available 58.3 million housing units in the U.S. were substandard. See Davis, *Cooperative Self-Help Housing*, 32 LAW & CONTEMP. PROB. 409 (1967).

⁶ See H. SALISBURY, *THE SHOOK-UP GENERATION* 74 (1958); Friedman, *supra* note 4, at 644; Mulvihill, *Problems in the Management of Public Housing*, 35 TEMP. L.Q. 163, 179 (1962); 68 COLUM. L. REV., *supra* note 4.

⁷ See, e.g., NAT'L ASSOC. OF HOUSING & REDEVELOPMENT OFFICIALS, *PUBLIC HOUSING*

authorities point to increasing costs of labor and materials,⁸ decreased revenues from project operation, and excessive misuse of the units as reasons for their failure to repair.⁹ Yet, Housing Assistance Administration (HAA) officials and local management, at least until recently, have placed a major emphasis upon producing high residual receipts to reduce federal contributions and have not plowed income back into maintenance programs.¹⁰ All these elements contribute to the problem, but principal blame can be placed on two factors: first, a manifest lack of clearly defined guidelines and, second, inadequate provisions for financing the badly needed repairs and maintenance.

The Statutory Framework

The Housing Act is silent as to any specific program or procedure for maintenance and rehabilitation of public housing, stating merely that the purpose of the legislation is to provide housing (for the poor) in a decent, safe and sanitary condition,¹¹ and that the annual contributions from the HAA to the Local Authority are "to assist in achieving and maintaining the low-rent character of their housing projects."¹² State enabling legislation also mentions the goal of providing low-rent, safe and decent housing for persons of low income and most enabling acts specifically apply local housing codes to the project.¹³

The Annual Contributions Contract (ACC) between the federal government and the Local Authority emphasizes the construction

IS THE TENANTS 23 (Changing Concepts of the Tenant-Management Relationship, Issue III, Feb. 1967) [hereinafter cited as PUBLIC HOUSING IS THE TENANTS].

⁸ A related problem is featherbedding—unions demand that electricians replace light bulbs and that carpenters replace screws in brackets. Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 490, 509 (1967). Rigged bidding and bribery are also costly. *Id.*; N.Y. Times, Oct. 19, 1966, at 1, col. 8.

⁹ In New York City, vandalism may cost as much as \$40,000 per project annually. Mulvihill, *supra* note 6, at 179. Much-needed funds for renovation are expended to improve lighting, install unbreakable fixtures and enclose light bulbs to prevent vandalism. Ledbetter, *supra* note 8, at 508; see Wall Street Journal, Sept. 26, 1966, at 18, col. 4.

¹⁰ Interview with Kenneth Cavanaugh, Deputy Director of Tenants' Services Branch, Dep't of Housing and Urban Development, in Washington, D.C., Oct. 29, 1968.

¹¹ 42 U.S.C. § 1401 (1964).

¹² 42 U.S.C. § 1410 (1964).

¹³ The Housing Assistance Administration model enabling act contains the following provision: "All projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the project is situated." HOUSING ASSISTANCE ADMINISTRATION, DRAFT ENABLING ACT § 15 (1965).

and maintenance of decent housing quarters. Section 213 of the Contract requires the Local Authority to maintain the property in good repair and to restore housing units destroyed by certain casualties.¹⁴ Moreover, if the Local Authority has not met its maintenance obligations, the federal government may then seek several remedies through the HAA, the administrator of the federal program.

The HAA has the right to reduce or terminate annual contributions payable under the ACC upon breach of the condition that requires preservation of "each Project in good repair, order, and condition."¹⁵ Upon the occurrence of certain contractual defaults the HAA can require the Local Authority to convey title or deliver possession of the project to the Agency. If a "substantial default"¹⁶ occurs the HAA has the option of requiring either the conveyance of title or possession of the projects; if a "substantial breach"¹⁷ occurs, however, the Local Authority is required to deliver possession of the project to the HAA.¹⁸ The Local Authority's funds may also be impounded for a substantial default or breach¹⁹ and the interest on HAA loans may be increased if such a breach occurs.²⁰ In addition to these remedies HAA is empowered to "maintain any and all actions at law or in equity against the Local Authority to enforce the correction of [or enjoin] any . . . default or breach."²¹ It would seem that in cases of nonfeasance in maintenance the federal government could seek an injunction ordering necessary repairs. Such action would also seem appropriate in cases of inordinate delay in making repairs. One other remedy potentially available to the government is a writ of mandamus. For mandamus to lie the Government must allege the existence of a duty sought to be enforced, a right legally demandable from the person to whom the order must be directed,

¹⁴ Dep't of Housing and Urban Development, Low-Rent Public Housing Program: Consolidated Annual Contributions Contract, Pt. 11, §§ 213-14 (HUD-53010B, May 1967) [hereinafter cited as HUD, ACC].

¹⁵ Public Housing Administration, Consolidated Annual Contributions Contract, Pt. 11, § 213 (PHA-3011, Oct. 1957) [hereinafter cited as PHA, ACC].

¹⁶ *Id.* §§ 501, 506.

¹⁷ *Id.* § 507.

¹⁸ *Id.* § 502.

¹⁹ *Id.* § 406(c).

²⁰ 42 U.S.C. § 1415(1) (1964).

²¹ PHA, ACC, *supra* note 15, § 508(B).

the respondent's power to perform the duty required, the petitioner's clear right to the relief sought, and the respondent's refusal or failure to perform the acts sought to be enforced. The ACC has clearly set out the Local Housing Authority's duty to maintain and repair the premises; it appears that a breach of this duty would be a failure to perform a ministerial non-discretionary act, and, therefore, subject to Government enforcement by mandamus.

All these remedies are obviously available in a situation of gross disrepair and deterioration resulting from neglect or misfeasance on the part of the Local Authority. Even when confronted with severe breaches, however, the federal government is reluctant to pursue those remedies which would result in its becoming the owner and operator of public housing projects, and thus a number of remedies are only theoretically available. It would also be inequitable for the federal government to avail itself of many of these remedies when the Local Authority's breach of a condition results merely from the lack of funds to make needed repairs. Under such circumstances the Government should instead institute a grant program, making funds expressly applicable to the refinancing of improvements for the project.²²

Federal Directives and Regulations

Under the Housing Act responsibility for the operation of projects remains in the Local Housing Authority.²³ The federal government, however, does assist the Authority through supervisory directives such as those published in Management Handbooks. Some directives are mandatory;²⁴ others are merely suggestive.

²² HUD has recently implemented a significant program to rehabilitate public housing. See HOUSING ASSISTANCE ADMINISTRATION, DEP'T OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT MANAGEMENT MANUAL § 1.9 (Dec. 1967, April 1968) [hereinafter cited as LOW-RENT MANAGEMENT MANUAL]; Dep't of Housing and Urban Development, Circular (Nov. 14, 1967); notes 39-43 *infra* and accompanying text.

²³ 42 U.S.C. §§ 1401(11), 1404, 1409, 1410 (Supp. III, 1968).

²⁴ HAA distinguishes between manuals, which are mandatory and specifically supplement the provisions of the ACC, and bulletins, handbooks and booklets which may be mandatory or merely advisory. The Low-Rent Management Manual sets out the distinction as follows: "This Management Manual contains PHA requirements which supplement provisions of the Annual Contributions Contract applicable to project management. These requirements are the minimum considered consistent with fulfilling Federal responsibilities under the United States Housing Act of 1937, as amended. . . . Advisory material is available in Local

Unfortunately, rather than developing coherent programs or guidelines to cope with deterioration and obsolescence, the chief concerns of the directives, until recently, have been technical procedures and mechanics of repair and maintenance.

Federal officials apparently feel that tenant complaints concerning the absence of, or delay in, repair are better left to the Local Authority's discretion with the Public Housing Authority (PHA) applying only persuasion and gentle pressure. PHA's major weapon is its program of periodic inspections of all projects with a report and recommendation to the Authority on what action is necessary to bring the projects up to habitable standards,²⁵ but failure to act is met only by continued urgings of compliance. Nevertheless, this system of inspections would seem to adequately assure the proper upkeep and modernization of projects if coupled with responsible management and adequate funding.

Financing Project Improvements

A lack of funds has perennially plagued Local Authorities and deterred them from upgrading the physical condition of their

Housing Authority Management Handbooks on specific subjects." LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § O. (April 1962). However, "[t]he permissive nature of the language of the Handbook[s] should not be construed as modifying any of the requirements imposed by the U.S. Housing Act of 1937, as amended, or by the Annual Contributions Contract." HOUSING ASSISTANCE ADMINISTRATION, DEP'T OF HOUSING AND URBAN DEVELOPMENT, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Pt. I, § 7, ¶ 10, § c (Aug. 1963) [hereinafter cited as LOCAL AUTHORITY HANDBOOK].

"Circulars issued by the PHA are of two types, procedural and nonprocedural. Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such. Other circulars are merely informative or, if procedural, are for one time, nonrecurring use and do not affect the manuals or other more permanent publications. The Low-Rent Housing Bulletins contain detailed technical treatments of specific subjects and may be either (a) wholly or partially mandatory, or (b) wholly nonmandatory. The distinction is made clear in each bulletin or in the reference to it in the appropriate manual." HOUSING ASSISTANCE ADMINISTRATION, DEP'T OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT HOUSING MANUAL § 100.2(2)(b) & (c) (Nov. 1967).

²⁵ PHA regulations provide for the following inspections: Management reviews, utilities reviews, engineering surveys, occupancy audits, generalist reviews, coordinated reviews, partial reviews of large local authorities, and special reviews. HOUSING ASSISTANCE ADMINISTRATION, DEP'T OF HOUSING AND URBAN DEVELOPMENT, ADMINISTRATIVE MANUAL, Staff Procedures, Low-Rent Program Operations § 86-5-1 (June 1966). The engineering survey is specifically applicable to the physical conditions of projects. *Id.* § 86-5-6 (Aug. 1965). It is to be made every two years, but is not so held because of staff reductions, and reallocation of workloads.

projects.²⁶ Fortunately, HUD has recently committed a portion of its development funds to a program for "modernizing" public housing projects.²⁷ Since the serious deficiencies and inadequacies in prior operations are the primary causes of present deterioration, an evaluation of HUD's new program will be attempted to determine if the more serious inadequacies in this area have been alleviated.

The main source of financing maintenance and modernization continues to be the local project's operating income;²⁸ deficit spending is permitted only when the Local Authority undertakes the elimination of immediately serious hazards to life, health, or safety.²⁹

When operating income proves insufficient for proper maintenance and repairs, further sources of funds have been quite limited. After the payment of normal expenditures Local Authorities are permitted to build up a reserve from operating income for unforeseen contingencies. For projects of over 200 units the recommended maximum reserve is one-half of the estimated total routine expenditures as projected for the subsequent fiscal year's budget.³⁰ This reserve was originally not intended for major rehabilitation and modernization, and even had it been designed for such purposes, few projects experiencing dilapidation and obsolescence are capable of building up operating reserves. On the other hand, it would appear not only unconscionable but also in direct contravention of the purposes of the public housing program for an Authority to build up operating reserves and simultaneously neglect, through lack of a modernization and rehabilitation program, to provide "safe and sanitary dwellings [for] . . . families of low income."³¹

²⁶ As Judge Holtzhoff of the District Court for the District of Columbia pointed out in a case dealing with a federal hospital's duty to treat mentally ill individuals, the courts "certainly cannot mandamus Congress [to] . . . hire more personnel." Record at 409, *Rouse v. Cameron, Habeas Corpus No. 287-65 (D.D.C., Jan. 17, 1967), rev'd. 373 F.2d 451 (D.C. Cir. 1967).*

²⁷ See PUBLIC HOUSING ADMINISTRATION, *Low-Rent Housing Manual* § 217.1 (1962); LOW-RENT MANAGEMENT MANUAL, *supra* note 22; Dep't of Housing and Urban Development, Circular (Nov. 14, 1967).

²⁸ See *Low-Rent Housing Manual, supra* note 27, at § 217.1(5); PHA, ACC, *supra* note 15, § 407.

²⁹ See LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 2.7(b)(1) (Mar. 1966); PHA, ACC, *supra* note 15, § 407(H); 68 COLUM. L. REV., *supra* note 4, at 575.

³⁰ LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 2.9(b) (Mar. 1966).

³¹ 42 U.S.C. § 1402(1) (1964). Such a practice seems to have been prevalent in the past.

The only other source previously available for upgrading was a Housing and Urban Development Loan,³² a source of limited value since it is an interest bearing short-term (up to ten years) loan which must be paid by the Authority out of its operating income.³³ Obtaining such a loan is contingent upon the Authority's demonstrating an ability to repay it from operating income within the stated time limit,³⁴ and thus this financing device is not feasible for those deteriorating projects whose operating income is insufficient for proper maintenance.

Prior to its modernization program HUD had been reluctant to reopen a project's development cost and increase bonded indebtedness for purposes of rehabilitation because of concern that development funds authorized by Congress could not be legally diverted from new housing construction to modernization of existing projects.³⁵

A study of past practices indicates that too great an emphasis has been placed on fiscal integrity in the operation of public housing units. This concern has focused, at least until recently, on

For example, the National Capital Housing Authority in the District of Columbia was prodded by a public outcry about the deplorable conditions of its Barry Farms Project to apply \$385,000 from its operating reserve to a partial refurbishing of that project. *Washington Post*, May 29, 1966, at A5, col. 4. Subsequently, however, a detailed proposal for the complete rehabilitation of Barry Farms was submitted to PHA with a request for \$1,500,000 in funds to be provided through the sale of additional bonds increasing the bonded indebtedness of the project. NAT'L CAPITAL HOUSING AUTHORITY. ANN. REP. (1966). PHA approved this request in the amount of \$1,354,000. Telephone conversation with Lester Morton, Deputy Director, NCHA, on November 11, 1968.

³² See PUBLIC HOUSING ADMINISTRATION, *Low-Rent Housing Manual* § 217.1 (1962).

³³ These requirements are not contained in any of HUD's publications; rather, they are internal guidelines by which the grants of such loans are regulated. Interview with George Kaplan, Chief, Financial Review Section, Dep't of Housing and Urban Development, in Washington, D.C., Oct. 29, 1968; Telephone conversation with Milton Slifkin, Financial Review Officer, Dep't of Housing and Urban Development, Nov. 3, 1968.

³⁴ *Id.*

³⁵ Interview with Kenneth Cavanaugh, Deputy Director of Tenants' Services, Dep't of Housing and Urban Development, in Washington, D.C., Oct. 29, 1968. Section 3679(a) of the Anti-Deficiency Act forbids an officer from obligating the government in excess of the amount Congress has made available. 31 U.S.C. § 665(a) (1964). However, the section also contains an exception which authorizes apportionment or reapportionment in excess of appropriations where such action is required because of "emergencies involving the safety of human life" and "the protection of property." 31 U.S.C. § 665(e) (1964). In at least two instances, however, development funds were so committed—for the modernization of the Pruitt Igoe Project in St. Louis, see Interview with Kenneth Cavanaugh, *supra*, and for the rehabilitation of Barry Farms in the District of Columbia, see note 31 *supra*.

the profitable operation of the projects and the use of profits, termed "residual receipts"³⁶ by public housing officials, to reduce the government's annual guaranteed contributions to the payment of principal and interest on capital indebtedness.³⁷ Further, HAA's inspection programs seem overly to emphasize fiscal solvency, in that inspections and recommendations appear concerned primarily with the operation of projects as economically viable units.

The emphasis in federal housing programs must shift from fiscal responsibility to rehabilitation and modernization. What has been needed at the federal level is official recognition that projects built to rigid standards with projected useful lives of 60 years have become alarmingly obsolete. Additionally, the institution of a full-scale federal program is needed to combat public housing obsolescence and deterioration. A complete survey of public slum housing should be made to determine the exact dimensions of the problem and the cost of rehabilitation. Most importantly, the initiative and responsibility should not be left with the Local Authorities to determine their own needs in this area nor should the Authority be permitted to apply for its financing.

³⁶ See PHA, ACC, *supra* note 15, § 406(d).

³⁷ HUD's concern with residual receipts was stimulated by pressure from Congress. Interviews with Kenneth Cavanaugh, Deputy Director of Tenants' Services; George Kaplan, Chief, Financial Review Section; and Clara Rawlings, Chief, Occupancy and Rental Section, Dep't of Housing and Urban Development; in Washington, D.C., Oct. 29, 1968. An example of this pressure is the following remark by the chairman of a Housing subcommittee on appropriations:

[T]he committee has had it in the back of its mind for the last 2 or 3 years of putting a limitation on these expenditures. If you think it cannot be done, we will show you how to do it. You had better tighten it up. If you do not, we are going to tighten up for you right in here.

There is no occasion for letting these local housing authorities go a little bit on the lax side. It is not their money they are spending. They have been turned footloose.

It appears now that you might be tightening up on your auditing functions with some limitations, but there ought to be larger residuals, and the reason there are not larger residuals is your [the local authorities'] high administrative expense. If you break down the Administrative expense of the average housing authority, compared with its revenues, instead of being 7 percent, I imagine it is nearer 9 or 10 percent. We will ask you to advise us on that. If it continues to go up, there is only one thing to do, and that is to put a limitation on it. It can be done very effectively.

So you just as well get that in your thinking now. We do not want to do it unless we have to, but it has to be held down, and it is not being held down. It is going up. *Hearings on Independent Offices Appropriations for 1964 Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 1st Sess., pt. 2, at 1291 (1963) (remarks of Rep. Albert Thomas, Chairman, Subcomm. on Independent Offices).

Many commentators have suggested that the concept of public housing as an economically viable operation is outmoded.³⁸ Thus, aside from coping with the need for instant rehabilitation, a preventive program must be instituted involving greater federal direction and participation and based more on a "subsidy" approach to public housing. A federal program has been instituted for upgrading substandard low-rent housing projects.³⁹ Under this program, HUD made available from authorized and appropriated development funds sufficient annual contributions to permit expenditure of approximately \$125,000,000 annually for modernization and rehabilitation of existing projects for fiscal years 1968 and 1969. HUD readily admits, however, that these sums fall far short of overall modernization needs, and that HUD had to establish priorities in allotting funds based on a demonstration of the greatest need and the most good to be accomplished. The program seems to be a significant departure from HUD's former view that local projects should be primarily economically independent operations, and seems to reflect a trend toward the "subsidy" approach. It also recognizes the concomitant needs for upgraded management, increased tenant involvement, and more meaningful social services for tenants.⁴⁰

The trend away from the fiscal integrity concept is also reflected in HUD's encouraging Local Authorities to apply residual receipts to modernization work.⁴¹ In addition, the program includes, for the

³⁸ See generally Friedman, *supra* note 4; Symposium, *Housing Part II: The Federal Role*, 32 LAW & CONTEMP. PROB. 371 (1967).

³⁹ See LOW-RENT MANAGEMENT MANUAL, *supra* note 22; Dep't of Housing and Urban Development, Circular (Nov. 14, 1967).

⁴⁰ The Low-Rent Management Manual emphasizes these dual goals as follows: "The program calls not only for upgrading of the physical plants, but for certain changes in management as well. These two aspects of the program cannot be separated. Local Authorities obtaining modernization funds will be expected to develop long- and short-range programs in the following areas: (a) Modernization and rehabilitation of buildings and grounds; (b) Involvement of the tenants in the plans and programs for the modernization of the project, changes in management policies and practices, and expanded services and facilities; (c) Expansion of community service programs and of community facilities where needed to meet the requirements of the program; (d) Intensification of efforts to assist low-income families to realize their potential for economic advance; (e) Increased employment by Local Authorities of low-income tenants.

"All of these lines of activity reflect the Administration's concern that all programs for low-income families should help such families rise out of their poverty into self-dependence." LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 1.9(3).

⁴¹ See *id.* § 1.9(d).

first time, authorization for local projects to use a portion of their operating reserves for rehabilitation and modernization.⁴² HUD's modernization program has been in operation too short a time to fully commit available funds or produce concrete results.⁴³ Because the immediate need for upgrading is so acute, it is to be hoped that HUD will accelerate its pace in applying funds to this task.

In addition to the inadequacy of funds earmarked for rehabilitation and HUD's slow pace in allotting the available funds, another shortcoming of the new program lies in its failure to designate HUD as the prime movant in determining the exact dimensions of the substandard public housing problem and in initiating individual rehabilitation programs. If the federal government is more completely to underwrite modernization costs, it should be the sole judge of where funds are most needed and can best be applied. If the determination and scope of need must await local action, HUD cannot be assured that its funds are being properly and most advantageously employed. This criticism is not meant as a condemnation of HUD's new program, which is a long overdue and welcomed reform; the program is concrete evidence of re-evaluation and re-definition of the goals of public housing and is an excellent start toward achievement of those goals.

Private Remedies

The Government's responses to substandard public housing are limited; however, there remains the possibility of the tenant bringing a suit on his own behalf against the Local Authority.⁴⁴ One inherent obstacle to this is the lack of formal administrative procedures available to public housing tenants. While informal complaints may well be heard by state agencies, there is no direct right to judicial review under local law, although it has been suggested that tenants seek review of HAA inaction on their

⁴² The program requires that current residual receipts and existing operating reserves in excess of 50 percent of normal maximum reserves first be tapped as a source for upgrading funding before application is made for use of development funds.

⁴³ As of November 1, 1968 only \$73,432,000 of the \$250 million of development funds earmarked for this program have been approved by HUD. Telephone conversation with George Kaplan, Chief, Financial Review Section, Dep't of Housing and Urban Development, Nov. 1, 1968.

⁴⁴ See generally 68 COLUM. L. REV., *supra* note 4.

complaints under the Administrative Procedure Act⁴⁵ which makes reviewable a "failure to act."

Two possible problems exist in the effective utilization of the latter approach: (1) What constitutes "an abuse of discretion";⁴⁶ and (2) do tenants suffer a "legal wrong,"⁴⁷ and thus gain standing when the HAA ignores their complaints? Federal courts have accorded standing to those classes who allege harm to an interest Congress intended the agency to protect.⁴⁸ Substandard housing is the type of injury the congressional statute was designed to prevent. The aim of the legislation was clearly to protect the tenant,⁴⁹ and it appears that some authorities have breached their duty to provide decent, safe and sanitary housing.

Furthermore, analogous to third party beneficiary suits, for which public housing tenants would have standing to maintain under the ACC,⁵⁰ is the theory that the Federal Housing Act, in providing that tenants be given decent, safe and sanitary housing, creates a private cause of action for the members of the class it was intended to benefit.⁵¹ It has long been established that some federal regulatory statutes create, by implication, a federal cause of action.⁵² The theory of extending civil remedies to a person injured by another's violation of a statute which provides for no such relief, covers two distinct situations: (1) where the *statute* may directly create a duty or prohibit certain acts and the courts create a *new* cause of action,⁵³ or (2) the statute may evidence a standard of conduct within the framework of an already *existing* cause of

⁴⁵ 5 U.S.C. § 702 (Supp. II, 1966); see 68 COLUM. L. REV., *supra* note 4, at 566-68.

⁴⁶ See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965). *Contra*, Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

⁴⁷ See 5 U.S.C. § 702 (Supp. II, 1966).

⁴⁸ See Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 126-29 (1967); notes 52-55 *infra* and accompanying text.

⁴⁹ See 42 U.S.C. § 1401 (1964).

⁵⁰ See notes 70-74 *infra* and accompanying text.

⁵¹ Although relief sought under this theory was denied on jurisdictional grounds in *Potrero Hill Community Action Comm. v. Housing Authority*, No. 22,012 (9th Cir. April 24, 1969), it is submitted that the theory of the implied cause of action may be invoked successfully to sustain the requirement of standing.

⁵² See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *The Chicago Junction Case*, 264 U.S. 258 (1924); *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798, 802, *modified* 83 F. Supp. 613 (E.D. Pa. 1947).

⁵³ *E.g.*, *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944).

action and the *courts* imply a duty.⁵⁴ A statutory duty to provide decent, safe and sanitary dwellings could be inferred from the broad policy statements of the Federal Housing Act.⁵⁵

Apart from an implied cause of action, a tenant forced to rely solely on common law must choose from a basically inadequate series of remedies. However, those tenants should be apprised of both the potentiality of several common law remedies and the problems involved in attempting to employ them.

Under common law, the landlord had no duty to maintain a dwelling in habitable condition in the absence of an express covenant.⁵⁶ Public housing leases are invariably standard form and do not include a covenant to repair. However, the contractual duty to repair set out in the ACC⁵⁷ or the statutory duty to repair set out by state and local housing codes⁵⁸ may be treated as incorporating into the lease an implied duty to repair.

The United States Court of Appeals for the District of Columbia Circuit in a 1960 decision, *Whetzel v. Jess Fisher Management Co.*,⁵⁹ held that the housing regulations create a duty on the part of the landlord to maintain the premises in a safe condition and that the landlord is liable to the tenant for injury sustained as a result of a violation. The court, citing section 2304 of the D.C. regulations, stated, "[a]t the very least, this imposes an obligation upon the landlord to put the premises in safe condition *prior to their rental.*"⁶⁰ If housing codes may impose a duty upon the landlord the breach of which will lead to recovery in tort, it seems logical to contend that those codes also impose a contractual obligation—an implied covenant that the premises are fit for decent, safe and sanitary habitation, and meet minimum standards established in the local codes, the ACC, and the HAA regulations.⁶¹

⁵⁴ See Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

⁵⁵ See 42 U.S.C. § 1401 (1964).

⁵⁶ See 1 H. TIFFANY, REAL PROPERTY § 103 (3d ed. 1939).

⁵⁷ HUD, ACC, *supra* note 14, § 213.

⁵⁸ See, e.g., *N.Y. Mult. Dwell. Law* § 78 (McKinney 1946).

⁵⁹ 282 F.2d 943 (D.C. Cir. 1960).

⁶⁰ *Id.* at 949 (emphasis added).

⁶¹ The landmark Wisconsin case of *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), implied a warranty of habitability based on the public policy implicit in legislation and regulations concerned with housing standards.

Legislation and administrative rules, such as the safeplace statute, building codes

One other possible ground in tort for implying a duty to repair may arise because the standard form lease between the Authority and the tenant generally includes a covenant allowing the Authority to enter the dwelling for purposes of repair;⁶² a few courts have held that a private landlord who merely reserves the right to enter and repair, without expressing any obligation to do so, is liable in tort to persons injured on the property by repairable defects.⁶³ This doctrine of implied liability through a covenant to enter and repair seems even more applicable to the public housing situation where the tenant, with a standard of living only slightly above the subsistence level, must rely on the Authority's resources to repair and maintain his premises.

Even if the tenant successfully argues that the Authority breached an implied duty to maintain and repair, he would be faced with the traditional doctrine of landlord-tenant law holding that the covenant to pay rent in a lease is independent of the covenant to repair⁶⁴ and he could not withhold his rent. His measure of recovery in damages would be determined by what one commentator has aptly described as "the amount he could get for well-maintained premises from a mythical sublessee, . . . [a] standard bear[ing] . . . little relation to the wrong of which the tenant in fact complains"⁶⁵

Furthermore, the common law remedy of constructive eviction,⁶⁶

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 the era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. *Id.* at 595-96, 111 N.W.2d 412-13.

⁶² See note 320 *infra* and accompanying text.

⁶³ See W. PROSSER, *TORTS* § 63, at 421-23 (3d ed. 1964). In *De Clara v. Barber Steamship Lines* the New York Court of Appeals hinted at such liability: "A landlord who has the right to come and go upon the leased premises as he pleases . . . thereby reserve[s] a privilege of ownership, sufficient to give rise to liability in tort." 309 N.Y. 620, 630, 132 N.E.2d 871, 876 (1956).

⁶⁴ 6 S. WILLISTON, *CONTRACTS* § 890 (3d ed. 1962); see Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 518, 534-35 (1966).

⁶⁵ 68 COLUM. L. REV., *supra* note 4, at 563-64.

⁶⁶ Constructive eviction is the result of a breach of the covenant for quiet enjoyment

although it does not require an express covenant to repair, is hardly a propitious remedy for an indigent tenant living in an area whose shortage of decent housing was the *raison d'être* for the construction of public housing.⁶⁷ In order to avail himself of this doctrine the tenant would have to leave the premises,⁶⁸ whereas public housing tenants want to remain and are only desirous of more habitable conditions. Unless courts accept such a novel doctrine as partial constructive eviction⁶⁹ and treated necessary maintenance as a *quid pro quo* for rent collection, both federal enforcement of ACC violations and the contractual theory of third party beneficiaries would appear to be more useful to the public housing tenant. The fact that tenants may be "donee" rather than "creditor" beneficiaries is of little modern significance; the latest draft of the Restatement of Contracts virtually obliterates the

implied in all leases. It is established when one shows that the landlord has prevented the tenant's enjoyment of his interest in the property leased. Generally the acts must be of such serious and permanent character as to deny the tenant the enjoyment of his possessory rights. Schoshinski, *supra* note 64, at 528.

⁶⁷ No public housing units may be built without the "elimination . . . of unsafe or insanitary dwelling units situated in the locality or metropolitan area substantially equal in number to the number of newly constructed dwelling units." 42 U.S.C. § 1410(a) (Supp. 11, 1966).

⁶⁸ The requirement of abandonment within a reasonable time exists because traditionally a tenant's quiet enjoyment has not been considered impaired unless he is dispossessed. Thus, interference by the landlord must be of such magnitude that it will render the premises uninhabitable. Schoshinski, *supra* note 64, at 529; *see Westland Housing Corp. v. Scott*, 312 Mass. 375, 44 N.E.2d 959 (1942).

⁶⁹ It is a well-established principle that actual partial eviction on the part of the landlord operates as a suspension of the tenant's liability for the entire rent on the theory that the landlord may not apportion his own wrong. *E.g.*, *Pinching v. Wurdeman*, 12 F.2d 164 (D.C. Cir. 1926); *Tuchin v. Chambers*, 439 S.W.2d 849, 852 (Tex. Civ. App. 1969).

This theory of actual partial eviction is predicated on some positive act by the landlord causing partial ouster, which amounts to the wrong that the courts refuse to apportion. Is it not as serious a wrong, amounting to partial ouster, when the landlord violates his statutory duty to keep premises in a minimum state of repair and to provide essential services and thereby deprives a tenant of complete use of a room or a group of rooms within an apartment while leaving the remaining portion tenantable? There seems to be no logical reason to differentiate between a wrong committed by a landlord's positive act of interference and one which results from his failure to obey provisions of a statute or ordinance. Partial constructive eviction would result from an unrepaired roof leaking in one room of an apartment, or an inadequate heating system serving only a portion of the dwelling. The theory of partial constructive eviction has been recognized in similar circumstances although not to the extent of suspending rent *in toto*. *E.g.*, *Dolph v. Barry*, 165 Mo. App. 659, 148 S.W. 196 (1912). *See also Charles E. Burt, Inc. v. Seven Grand, Inc.*, 340 Mass. 124, 163 N.E.2d 4 (1959); Schoshinski, *supra* note 64, at 531-32.

distinction.⁷⁰ A third party "who is intended to benefit from a contract may [almost universally] sue to enforce it."⁷¹ Both the legislative history and the language of the United States Housing Act⁷² and its state counterparts require provision of decent housing. Although the ACC specifically exempts the HAA from suits by third parties,⁷³ no provision is made for exempting the Local Authority. Allowing tenants to sue as such third party beneficiaries would provide "the broadest possible remedy—one available in every state."⁷⁴

Recommendations

1. The need for modernization, rehabilitation, and superior maintenance should be more directly and emphatically brought to the attention of Local Authorities. The new HUD program deals with the use of operating funds—residual receipts and a portion of operating reserves—for modernization and rehabilitation in a negative fashion, requiring that these funds be used before application is made for development funds. The approach should be a positive one—affirmative direction to use residual receipts for these purposes rather than to reduce federal contributions to discharge existing indebtedness. If a project or authority is producing high residual receipts while tenants are complaining of long delays in repairs, appropriate budget modifications should be ordered to increase expenditures for maintenance items, personnel, and equipment. Possibly residual receipts should be retained entirely by Local Authorities to be plowed back immediately into maintenance and modernization.

Rather than allowing only limited amounts of operating reserves to be used for modernization, Local Authorities should be encouraged and directed if necessary to apply their entire reserves when there exists an immediate and imminent need for rehabilitation and modernization.

2. HUD's present inspection program does not seem to be based on any clearly defined standards of maintenance and repair;

⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Draft No. 3, 1967).

⁷¹ 68 COLUM. L. REV., *supra* note 4, at 577.

⁷² *Id.*; see 42 U.S.C. §§ 1401, 1402(1) & (2) (1964 & Supp. 11, 1966).

⁷³ PHA. ACC, *supra* note 15, § 510.

⁷⁴ 68 COLUM. L. REV., *supra* note 4, at 579.

regulations should be promulgated by HUD's regional offices to apply to all projects within the region or all projects within a Local Authority. The local government's housing code or regulations could be used as minimal criteria, setting guidelines for both local project management and federal inspectors. In those areas where the local governmental body does not apply or enforce its codes and regulations in public housing,⁷⁵ HUD and the Local Authorities should work out a program with the local government whereby public housing will be subject to strict enforcement of local standards.⁷⁶

3. The ACC provides the federal government with various remedies ranging from forced conveyance of title to "any and all actions at law or in equity."⁷⁷ Federal authorities must become much more demanding in requiring proper maintenance, and in following up on inspections and recommendations.

4. Project managers uniformly point to tenant misuse and abuse of project property as the primary cause of deterioration and lament the vandalism and excessive wear and tear by tenants untrained in apartment living. As these are certainly substantial causes of deterioration, a training program in apartment housekeeping should be developed.⁷⁸ Many authorities already issue training handbooks to tenants on the proper use and maintenance of apartments and appliances. The practice of tenant painting and redecoration with materials supplied by management, encouraged by local project authorities at HUD's suggestion, should be expanded to promote tenant self-help in performing other repairs

⁷⁵ See *id.* at 567-68.

⁷⁶ Some municipalities, such as New Orleans, do not enforce their housing code because they feel that the Local Authority adequately policies its own units. Letter from Christopher J. Bellone, Administrator, Dep't of Safety & Permits, Div. of Housing Improvement, City of New Orleans, to the author, Aug. 2, 1967. The District of Columbia does not enforce its code against the NCHA because it believes that it lacks the power to do so, presumably on the theory that since the NCHA is a federal agency it enjoys sovereign immunity from state and local law. The District of Columbia Department of Licenses and Inspections does inspect public housing, but it has never taken the Authority to court. Tenants from several NCHA projects have recently filed suit in the U.S. District Court for the District of Columbia to compel enforcement of the city's housing code to their homes. Washington Post, Nov. 10, 1968, at C1, col. 1.

⁷⁷ PHA. ACC. *supra* note 15, § 508(B); see notes 14-21 *supra* and accompanying text.

⁷⁸ One pilot project is in existence in Gulfport, Mississippi, Interview with Kenneth Cavanaugh, Deputy Director of Tenants' Services, Dep't. of Housing and Urban Development, in Washington, D.C., Oct. 29, 1968.

and maintenance, especially if it is impossible for management to perform such tasks immediately.

The federal government has recognized tenant unions and their concomitant formal grievance machinery;⁷⁹ these and similar tenant organizations could play a vital role in establishing programs to promote tenant cooperation and assistance in policing project property against vandalism and other forms of tenant misuse.⁸⁰ These programs would foster pride in "their own" projects among public housing tenants. HUD's modernization program recognizes the need for tenant involvement and the humanization of management attitudes toward its clientele by urging a commitment on the part of Local Authorities to develop programs in this area.⁸¹

5. The HAA should require that public housing leases explicitly impose the duty of repair and maintenance on project management. The public housing program contemplates this to be the responsibility of management and an express undertaking in the lease will facilitate judicial enforcement of this duty in private actions by public housing tenants.

Even in projects which are not dilapidated or deteriorated, a constant tenant complaint is the inordinate delay in making repairs.⁸² By allowing long delays public housing management is not fulfilling its obligation or carrying out the legislative mandate to provide decent, safe and sanitary housing. In projects showing residual receipts, more maintenance people should be hired; providing decent housing should take priority over operating at a profit. Furthermore, since unreasonable delay in maintenance is a breach of the ACC, the federal government should utilize its remedies to correct the situation.

6. Channels of communication must be developed between public tenants and the regional HAA offices so that, through tenant complaints, the federal authorities can better carry out their role of assuring that public housing is accomplishing its purposes.

⁷⁹ See 42 U.S.C. § 2785(d) (1964); see notes 262-63, 307 *infra* and accompanying texts.

⁸⁰ See generally: Davis & Schwartz, *Tenant Unions: An Experiment in Private Law-Making* in HOUSING FOR THE POOR: RIGHTS AND REMEDIES 100 (N.Y.U. School of Law Project on Social Welfare Law, Supp. 1, 1967). See Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368, 1369 (1968).

⁸¹ See Dep't of Housing and Urban Development, Circular (Mar. 22, 1968).

⁸² Tenants have cited instances of delays of six months in replacing broken windows, interview with Mrs. Lillian Wright, Vice-President, Barry Farms Tenant Union, in Washington, D.C., July 11, 1967; or fixing plumbing leaks, and delays of years in repairing holes in the living room walls, see Washington Post, Nov. 10, 1968, at C1, col. 4.

II. TENANT ELIGIBILITY

The rights of the indigent are undefined and largely ignored in Local Authority determinations of tenant eligibility. Many Local Authorities have established grounds for eviction and denial of admission which are without statutory bases, are inconsistent with the overall objectives of our public housing and anti-poverty programs and are often unconstitutional. The only federal legislative criterion is that tenants be low-income families.⁸³ Without legislative mandate, however, Authorities have declared tenants ineligible for public housing on the basis of vague desirability standards, on the equally vague basis of violations of lease provisions, for giving birth to and housing illegitimate children, in retaliation for constitutionally protected activities, or for no expressed reason at all.⁸⁴ Moreover, there is a decided lack of procedural safeguards to control Authorities in making their determination of substantive grounds for denial of the benefits of public housing.⁸⁵

Nothing in the legislative history of the Housing Act and its subsequent amendments indicates that Congress intended the setting of any standards for eligibility other than low income. Prior to 1959, the responsibility for setting eligibility standards rested solely with the federal government. Following the spirit of the Housing Act, the Public Housing Authority Act standards dealt exclusively with income, the sole federal legislative criterion, and granted priorities only on the basis of military service and certain disabilities. In 1959 amendments to the statute vested in the Local Housing Authority the primary responsibility for determining eligibility and discretion in making that determination. These amendments did not add any substantive eligibility requirements to

⁸³ 42 U.S.C. § 1401 (1964).

⁸⁴ See, e.g., *Lewis v. Housing Authority*, 397 F.2d 178 (5th Cir. 1968) (Talladega, Ala.); *Richardson v. Housing Authority*, Civ. Action No. 678 (E.D.N.C. May 13, 1968) (New Bern, N.C.); Rosen, *Tenants' Rights in Public Housing*, in HOUSING FOR THE POOR: RIGHTS AND REMEDIES 154, 162-64, 186-98 (N.Y.U. School of Law Project on Social Welfare Law, Supp. I, 1967); Boston Housing Authority, Resolution Establishing Policies and Standards Governing Occupancy of Federally-Aided Developments, at 9 (Oct. 28, 1965); Chicago Housing Authority, Resolution No. 62-CHA-192 § 1(F), at 3 (July 25, 1968); Letter from Bettie McJunkin, Law Reform Coordinator, Milwaukee Plan Legal Services, to the author, Aug. 23, 1968 (Milwaukee, Wis.).

⁸⁵ See section on Tenant Eligibility, *infra*.

existing federal policy but merely decentralized and transferred the power to set income limitations and establish priorities among eligible families to the Local Authorities.⁸⁶

State enabling statutes are likewise silent as to continued occupancy standards, except for the income limitation. They are concerned primarily with the maintenance of the low rent character of projects in tenant selectivity, continued occupancy, and rent determinations.⁸⁷ They do empower the Local Authority to establish rules and regulations to "effect the powers and purposes of the authority," but with the circumscription that such regulations not be "inconsistent with this Act."⁸⁸

The ACC echoes this legislative sentiment. Although it does not mention eviction per se, the ACC emphasizes the maintenance of the low rent character of each project,⁸⁹ moreover, scrutiny of the contract reveals that the exclusive concern of the federal government in the area of continued occupancy is that tenants continue to meet the income requirements.

Nonetheless, some HAA directives seem, by implication, to authorize Local Authorities to establish additional substantive requirements for eligibility. The Low-Rent Management Manual and the ACC allow the Local Authority to promulgate its own admission and eviction policies and place no express prohibition on the consideration of facts other than income. The only requirement is that admission regulations must be "reasonable."⁹⁰ However, the Local Housing Authority Management Handbook goes much further by expressly allowing the admission policies of Local Authorities to take into account factors not contained in the Act "provided they would not be contrary to the purposes of the low-rent program."⁹¹ In recent years many Authorities have relied upon

⁸⁶ Housing Act of 1959 § 501, 73 Stat. 654, 679-81.

⁸⁷ See, e.g., MISS. CODE ANN. § 7302 (1952); MO. REV. STAT. § 99.100 (1952); PA. STAT. ANN. tit. 35, § 1666 (1964).

⁸⁸ MISS. CODE ANN. § 7300(a) (1952); accord TEX. REV. CIV. STAT. ANN. art. 1269L (1963); WASH. REV. CODE ANN. § 35.82.070(1) (1965).

A model enabling act formulated by HAA is even more emphatic. It provides that "[a]n authority shall issue regulations establishing eligibility requirements, consistent with the purposes and objectives of this Act, for admission to and continued occupancy in its projects." HOUSING ASSISTANCE ADMINISTRATION, DRAFT ENABLING ACT § 10 (1965).

⁸⁹ PHA. ACC. *supra* note 15, §§ 201(1), 202, 204, 207 (May 1967).

⁹⁰ LOW-RENT MANAGEMENT MANUAL. *supra* note 22, § 3.5 (Oct. 1967).

⁹¹ PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK Pt. IV, § 1, ¶ 2 (f) (July, 1965).

this directive to validate their establishment of restrictive admission requirements.⁹²

It may be argued that since the ACC charges the Local Authority to operate each project "in such manner as to promote serviceability, efficiency, economy, and stability,"⁹³ it, implicitly authorizes eviction for tenant conduct which would immediately threaten these concepts. But it is not contended here that the Local Authority should be powerless to evict for such reasons; rather, it is submitted that the grounds presently established for eviction often do not accomplish, and, in fact, are not even calculated to meet this end.

Several HAA regulations and directives do touch upon the problem of continued eligibility. The Low-Rent Management Manual is concerned exclusively with income as a qualification for continued tenure,⁹⁴ while the Management Handbook grants wider latitude to Local Authorities, allowing them to evict for income misrepresentation and violations of lease terms.⁹⁵ In a section entitled "Tenant Leases and Leasing Policies," the Handbook recommends a monthly lease to "permit any necessary evictions to be accomplished with a minimum of delay and expense upon the giving of a statutory Notice To Quit."⁹⁶ This language may be interpreted to empower Local Authorities to give 30-days notice only when a tenant becomes ineligible because of over-income, the only ostensible statutory grounds for termination; unfortunately, it has, instead, been viewed as impliedly sanctioning evictions without cause.⁹⁷ Basically, the additional criteria adopted by Local Authorities for admission and continued occupancy fall into two categories: (1) residency requirements, and (2) standards evaluating the "desirability" of the tenant.

Residency Requirements

Many housing authorities impose a residency requirement in

⁹² HUD. ACC, *supra* note 14, § 206.

⁹³ *Id.* § 201(1).

⁹⁴ LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 3.6 (Oct. 1967).

⁹⁵ PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Pt. IV, § 1, ¶ 8 (g) (July 1965).

⁹⁶ *Id.* § 1, ¶ 6(d)(1).

⁹⁷ See, e.g., *Brand v. Chicago Housing Authority*, 120 F.2d 786 (7th Cir. 1941); *Housing Authority v. Turner*, 201 Pa. Super. 62, 191 A.2d 869 (1963); *Rosen*, *supra* note 84, at 185.

determining eligibility for public housing.⁹⁸ Such a test not only may arbitrarily deny decent housing but also, in a very real sense, may affect the constitutionally protected freedoms of association⁹⁹ and movement.¹⁰⁰ As in the case of the undesirability standards, there is nothing in the federal housing statutes or their legislative history to sanction a residency requirement; the only federal legislative criterion for eligibility is the income requirement. Although the Housing Act and the ACC allow great latitude and discretion in setting admissions policies, each omits any reference to residency in setting forth possible factors to be considered in eligibility and preference.¹⁰¹ Most state enabling statutes do not mention residency requirements, although a few, such as those of Minnesota and Massachusetts, do speak of giving preference or

⁹⁸ The NYCHA has a two-year residency requirement which may be waived for families who "by history and roots" are New York residents. NEW YORK CITY HOUSING AUTHORITY, MANAGEMENT MANUAL ch. 111, § 11(c)(5)(a) (Feb. 15, 1961). The Chicago Housing Authority has a one-year requirement which is waived for "interns and resident physicians stationed in Chicago Hospitals, American Indians relocated into the City of Chicago upon request by the Bureau of Indian Affairs, families of servicemen and student families." Chicago Housing Authority, Resolution No. 62-CHA-192 § I(D), at 2 (July 25, 1968). The Boston Housing Authority also has a one-year requirement with an exception for families who are displaced and without housing "through no fault of [their] own." Boston Housing Authority, Resolution Establishing Policies and Standards Governing Occupancy of Federally-Aided Developments, § IV(a)(5), at 11 (Oct. 28, 1965).

⁹⁹ See, e.g., NAACP v. Alabama, 377 U.S. 288 (1964); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). Many indigents move because of a desire to associate with their family or relatives. See Brief for Appellee Harrell at 37, Shapiro v. Thompson, 89 S.Ct. 1322 (1969).

¹⁰⁰ See Shapiro v. Thompson, 89 S.Ct. 1322, 1329 (1969); Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958); Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

The tragic effect of residency requirements on indigents was recently recognized in the Kerner Commission Report. The Commission's findings, while directed to the welfare residence requirement, apply equally to the effects of the residency requirement on public housing applicants:

[I]n most states, there is a residency requirement, generally averaging around a year, before a person is eligible to receive welfare. These state regulations were enacted to discourage persons from moving from one state to another to take advantage of higher welfare payments. In fact, they appear to have had little, if any, impact on migration and have frequently served to prevent those in greatest need—desperately poor families arriving in a strange city—from receiving the boost that might give them a fresh start. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT, 253 (1968).

¹⁰¹ See 42 U.S.C. § 1401 (1964); HUD, ACC, *supra* note 14, § 206.

priority to inhabitants of the municipality in which the project is located if the number of applicants should exceed the number of units available.¹⁰²

Although no legislative mandate exists to impose such a residency requirement, the HAA has lent some support to the validity of the requirement through its advisory directive, the Local Housing Authority Management Handbook. In authorizing Local Authorities to consider factors other than those listed in the Act in establishing admission policies, the Handbook cites as one example residency in the locality for a minimum period.¹⁰³ HAA authorities have indicated that a residency requirement was authorized because HAA has traditionally viewed the initiation, planning, and development of public housing of low income families as a local rather than a federal function. It has therefore felt that it was reasonable to allow municipalities to limit low-cost housing to its residents.¹⁰⁴

Seizing upon this HAA authorization, Local Authorities have imposed residency requirements.¹⁰⁵ As in the case of the period of residency required to qualify for welfare payments, the condition has been attached to public housing eligibility, theoretically at least, to prevent an influx of the poor into a particular locality solely to obtain public housing not available at their former residence.¹⁰⁶ Welfare authorities argue that without minimum residency the increase in welfare payments resulting from the influx of indigents will cause a serious drain on the state and local municipal

¹⁰² MASS. GEN. LAWS ANN., ch. 121, § 26FF (1968 Supp.); MINN. STAT. ANN. § 462.481 (1963).

¹⁰³ PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Pt. IV, § 1, ¶ 2(f) (July 1965).

¹⁰⁴ Interview with Clara Rawlings, Chief, Occupancy and Rental Section, Dep't of Housing and Urban Development, in Washington, D.C., Oct. 29, 1968. Even prior to 1959, when the responsibility for setting admission standards rested with the federal authorities, at least in theory, the PHA regulations sanctioned a residency requirement. PUBLIC HOUSING ADMINISTRATION, LOW RENT HOUSING MANUAL § 403.1 (Feb. 1957) (superseded).

¹⁰⁵ See note 98 *supra*.

¹⁰⁶ Typically, durational residence laws for welfare benefits do not give the rationale for their classification; nor is any legislative history available to suggest a purpose. See Brief for Appellee Harrell at 43-44, *Shapiro v. Thompson*, 89 S.Ct. 1322 (1969). However, they have their roots in the settlement system of the Elizabethan poor laws which sought to return paupers to the jurisdiction which had the responsibility for supporting them. See Mandelker, *The Settlement Requirement in General Assistance I*, 1955 WASH. U.L.Q. 355; Mandelker, *The Settlement Requirement in General Assistance II*, 1956 WASH. U.L.Q. 21; Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57.

treasuries.¹⁰⁷ Yet an influx of indigents seeking to obtain public housing benefits hardly seems to pose a serious threat to local treasuries. The underlying financial concept of public housing is the economic independence of each project. The original financing is secured through public bond issues whose amortization, guaranteed by the federal government, is in fact effectuated entirely through federal contributions and profits from project operation.¹⁰⁸ Thus, increased project construction and operation resulting from an influx of the poor due to the elimination of a residency requirement would not require the direct commitment of any local or state funds.¹⁰⁹ Relaxing the residency requirement, it has further been argued, would indirectly affect local finances because indigents supposedly flocking to a locality to obtain public housing would in many instances also be in need of public welfare assistance, public health benefits, and other public social services, including public education. Therefore, the cost of attending to these needs would result in increased expenditures by the local government without the normally concomitant tax contribution to the public treasury.¹¹⁰

Moreover, serious doubt exists as to the constitutionality of the residency requirement. Such tests in welfare assistance programs have been held unconstitutional by several federal district courts¹¹¹

¹⁰⁷ See Brief for Appellant Washington, at 9, *Shapiro v. Thompson*, 89 S. Ct. 1322 (1969); Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CALIF. L. REV. 567, 585-86 (1966).

¹⁰⁸ See generally Ledbetter, *supra* note 8, at 493-95.

¹⁰⁹ It may be argued that public housing projects do not pay local property taxes and thus an increase in public housing units decreases revenue from property taxes, however, the federal government does make payments in lieu of taxes which would seem to more than compensate for the loss of property taxes. See Friedman, *supra* note 4, at 648 n.35.

¹¹⁰ See Harvith, *supra* note 107. Another justification presented for the presence of a minimum residency requirement is that a locality in the throes of an across-the-board housing shortage, both private and public, has a primary responsibility to its long time residents, rather than recent arrivals. Cf. *People ex rel. Heydenreich v. Lyons*, 374 Ill. 557, 566, 30 N.E.2d 46, 51 (1940).

It could be argued that the residency test is a natural by-product of the equivalent elimination program whereby the construction of new public housing units is limited to the number of slum dwelling units destroyed. Wagner-Steagall Act, 50 Stat. 891 (1937), *as amended*, 42 U.S.C. § 1410(a) (Supp. I, 1965). See generally Robinson & Altman, *Equivalent Elimination Agreements in Public Housing Projects*, 22 B.U.L. REV. 375 (1942). Therefore, to allow newly arrived families to move into these units along with displaced families would be inconsistent with the objectives of the equivalent elimination program.

¹¹¹ *Johnson v. Robinson*, 296 F. Supp. 1165 (N.D. Ill. 1968); *Greene v. Dep't of Pub. Welfare*, 270 F. Supp. 173 (D. Del. 1967). Preliminary injunctions enjoining statewide

and recently by the Supreme Court,¹¹² on the grounds that they infringe upon the constitutionally protected freedom of movement and that such a test violates the fourteenth amendment's equal protection clause. Similar attacks can be made on the minimum residency requirements for public housing eligibility.¹¹³

Since public housing is state action¹¹⁴ it may be argued, on the basis of the Supreme Court's *Shapiro v. Thompson* decision,¹¹⁵ that the imposition of a period of residency requirement impedes freedom of interstate movement. *Shapiro* involved the constitutionality of state statutes which denied welfare assistance to indigents who had not resided in that state or locality for a minimum period of time. The state admittedly enacted the statute to protect its treasury from the drain which would result from the heavy influx of indigents.¹¹⁶ The Court held, however, that the purpose of inhibiting indigents from entering the state was an unconstitutional deprivation of the right to travel.¹¹⁷

The residency requirement in public housing is probably equally as direct a burden on state to state freedom of movement as the statutes in *Shapiro*. An indigent will be much less likely to move to another jurisdiction where he might have greater job opportunities, when he realizes that he will be unable for a certain period of time to obtain decent housing which he can afford.¹¹⁸

It might be contended that Congress, in empowering the HAA to administer the public housing program and set implementary regulations, has acquiesced in the LHA Management Handbook,¹¹⁹ thus allowing Local Authorities to impose a residency requirement, and that by such approval Congress itself is the actual regulator of

enforcement of durational residence laws have been granted in several other jurisdictions. *Alvarado v. Dunn*, Civil No. 12,399 (D. Conn. 1968); *Montell v. Dandridge*, Civil Action No. 18,792 (D. Md. 1967); *Ramos v. Health & Social Serv. Bd.*, 276 F. Supp. 474 (E.D. Wis. 1967).

¹¹² *Shapiro v. Thompson*, 89 S. Ct. 1322 (1969).

¹¹³ See generally Harvith, *supra* note 107.

¹¹⁴ In order to receive financial and advisory aid from the federal government, the local governing body must adopt an ordinance creating a local housing authority, pursuant to state enabling legislation. Public Housing Administration, Dep't of Housing & Urban Development, Public Housing Fact Sheet 2 (undated).

¹¹⁵ 89 S. Ct. 1322 (1969).

¹¹⁶ *Id.* at 1325, 1328.

¹¹⁷ *Id.* at 1329.

¹¹⁸ See Harvith, *supra* note 107, at 618.

¹¹⁹ See note 103 *supra* and accompanying text.

interstate commerce. However, in an area of interstate commerce having such a direct and vital impact on human rights and liberties, Congress should be required to be explicit in its regulation.¹²⁰

Assuming *arguendo* that the state purposes allegedly underlying the residency requirement¹²¹ are valid, other less discriminatory means are available to accomplish these ends. A residency or state citizenship requirement could easily be imposed without setting a minimum period. Further, whether an applicant was a bona fide resident or whether he had entered the area solely to obtain public housing could be determined through investigation, just as other determinations of qualification are presently made.¹²² The burden of proof should rest with the Local Authorities and procedures for determination should be established to satisfy procedural due process requirements. It would seem, therefore, that since less restrictive means can be employed to accomplish the state purpose, the minimum period of residency requirement is an unreasonable classification in violation of the equal protection clause of the fourteenth amendment.¹²³

The effect of the various fixed period residency requirements is to relegate needy families to slum housing for the particular time period established, even though they otherwise qualify under the Housing Act. To deny public housing to those families, if units are available, is unconscionable and certainly contrary to all enunciated national housing and anti-poverty goals. The otherwise harsh effect of the residency requirement would be ameliorated in areas where because of a shortage, public housing would not be available to a new resident for a substantial period of time in any event. In this

¹²⁰ See Harvith, *supra* note 107, at 592.

¹²¹ See notes 106-07 *supra* and accompanying text.

¹²² *Cf. Carrington v. Rash*, 380 U.S. 89, 95-96 (1965).

¹²³ It is extremely doubtful that the local government's purpose of denying public housing to those who would enter the locale for the sole purpose of obtaining it, is reasonable and valid. In *Shapiro*, the Court stated that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." 89 S. Ct. at 1330; and held that attempts to do so was an unconstitutional deprivation of equal protection. *Id.* A state does not, and constitutionally could not, deny benefits of its superior state universities, other public school systems, and other public services and programs to a citizen of the state because he entered the state for the very purpose of receiving these services. *Cf. Griffin v. County School Bd.*, 377 U.S. 218, 231 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). So also a state or local government should not be allowed to deny decent housing to an individual because he entered the locale for the very purpose of procuring it. See *Shapiro v. Thompson*, 89 S. Ct. 1322 (1969).

situation, however, a minimum period of residency is not required; the shortage serves to accomplish whatever purpose the residency requirement is intended to serve. But even within an area experiencing a shortage of public housing units, the residency requirement can still produce harsh results.

Admission. The former eligibility requirements of the New York City Housing Authority (NYCHA) are probably the most refined aggrandizement of a desirability standard.¹²⁴ The NYCHA Resolution stated that a ground for admissibility was whether the applicant would be a "desirable tenant." The standard that was used to determine desirability set out five prohibitions:

[T]he family will not or does not constitute (1) a detriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence upon sound family and community life, (3) a source of danger to the peaceful occupation of the other tenants, (4) a source of danger or cause of damage to the premises or property of the Authority, or (5) a nuisance.¹²⁵

The Resolution then stated:

In making such determination consideration shall be given to the family, parental control over children, family stability, medical and other past history, reputation, conduct and behavior, *criminal record* if any, *occupation of wage earners*, and any other data or information with respect to the family that has a bearing upon its desirability . . .¹²⁶

Recently the NYCHA promulgated new standards for admission.¹²⁷ The most essential change is in the new standards from which "[t]he exercise of moral judgment is precluded."¹²⁸ But this is no more than an enlightened first step; many other Authorities throughout the country still retain standards of eligibility other than low income.¹²⁹

¹²⁴ See New York City Housing Authority, Resolution Relating to Desirability as a Ground for Eligibility, No. 62-9-683 (Sept. 12, 1962); New York City Housing Authority, Desirability Standards for Admission of Tenants, GM-1287 (Nov. 29, 1961), *revised*, GM-1632 (May 9, 1968).

¹²⁵ New York City Housing Authority, Resolution Relating to Desirability as a Ground for Eligibility, No. 62-9-683 (Sept. 12, 1962).

¹²⁶ *Id.* (emphasis added).

¹²⁷ New York City Housing Authority, Revised Standards for Admission of Tenants, GM-1632 (May 9, 1968), *revising* GM-1287 (Nov. 29, 1961).

¹²⁸ *Id.*

¹²⁹ See note 84 *supra*.

Illegitimacy is the most prominent obstacle barring admission to public housing projects under the guise of the desirability standard.¹³⁰ The recent case of *Thomas v. Housing Authority*¹³¹ exposed a directive of the Little Rock, Arkansas Local Authority providing that a person “. . . having children born out of wedlock shall not be eligible for admission or continued occupancy.”¹³²

The Los Angeles Housing Authority considers common-law marriage as a basis for the denial of admission, even while recognizing that common-law marriage, per se, is not conclusive proof of an unstable family.¹³³ This policy is premised upon two considerations. The ACC requires a “family unit,” supposedly excluding living groups of unrelated persons, and California law does not recognize common-law marriages.¹³⁴ A provision of this nature not only seems irrelevant to the goals of the Public Housing Act; it ignores the findings of modern sociology¹³⁵ that this type of institutional arrangement is often the rule in low-income Negro neighborhoods.

Several arguments have been raised attempting to support the desirability standard as a determinant of public housing eligibility. The NYCHA, justifying its former imposition of a desirability standard, stated that its purpose was “to create for . . . tenants an

¹³⁰ See *Lewis v. Housing Authority*, 397 F.2d 178, 180-81 n.2 (5th Cir. 1968); notes 190-93 *infra* and accompanying text. In *Lewis*, Negro tenants of the Talladega Housing Authority were given a notice to vacate without an explanation or reason; however, plaintiffs either had or were expecting illegitimate children and an Authority rule made illegitimacy a ground for eviction. After a district court granted a temporary restraining order, the Authority rescinded the notices to vacate and notified the court that they had implemented procedures pursuant to the HUD circular of February 7, 1967. Dep't of Housing and Urban Development, Circular (Feb. 7, 1967). The district court dismissed the case as moot and plaintiffs appealed. After oral argument, the Authority notified the Fifth Circuit that it had repealed its illegitimacy rule and replaced it with a regulation (identical to the New York resolution) conditioning eligibility and continued occupancy on “desirability.” Plaintiffs objected to the new regulation on grounds of vagueness and overbreadth. The Fifth Circuit then reversed and remanded to allow plaintiffs to adapt their pleadings to the new circumstances and to allow the district court to consider the newly raised constitutional claims. 397 F.2d at 180-81 n.2.

¹³¹ 282 F. Supp. 575 (E.D. Ark. 1967).

¹³² *Id.* at 578.

¹³³ Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122, 1132 (1968).

¹³⁴ *Id.* at 1132-33.

¹³⁵ See generally L. RAINWATER & W. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 5 (1967).

environment conducive to healthful living, family stability, sound family and community relations and proper upbringing of children" and noted that "occupancy by families whose conduct and behavior, family life, lack of parental control over children, and ways of living create influences and effects that are adverse and detrimental to other families in the project or the entire community, seriously interferes with the objectives of the Authority for wholesome family and community life, frequently constitutes a danger to the health, safety, or morals of their neighbors, may be a cause of damage to the property of the Authority, and interferes with the proper administration by the Authority of its projects."¹³⁶

Proponents of a desirability standard also make the economic argument that such a standard is required to weed out the "problem family," the products of broken homes, or the chronic unemployed, because such tenants would irrevocably impair their federally imposed quest for fiscal solvency by destroying property and being chronically delinquent in rent payments.¹³⁷

However, there are strong statutory policies and constitutional arguments against the desirability standard as a determinant of tenant eligibility. The desirability standard and its supporting concepts are compatible with neither the policy of providing "a decent home and a suitable living environment for every American family,"¹³⁸ nor with the policy and objectives of the war on poverty to open to everyone "the opportunity to live in decency and dignity."¹³⁹ There is evidence that the pendulum of public housing objectives has swung from providing shelter for the respectable and temporary poor to playing a major role in the rehabilitation of the permanently poor.¹⁴⁰ The desirability standard bars achievement of this goal by denying an opportunity for rehabilitation to those families and persons whose need is most acute and by providing aid only to those who are most likely to achieve economic self-sufficiency.

The standards of undesirability, whether formally enunciated or informally applied, are the "very badges of the poor" for whom

¹³⁶ New York City Housing Authority, Resolution Relating to Desirability as a Ground for Eligibility, No. 62-9-683 (Sept. 12, 1962).

¹³⁷ See Chicago Housing Authority, Resolution No. 62-CHA-192 § 1(F) (July 25, 1968).

¹³⁸ 42 U.S.C. § 1441 (1964).

¹³⁹ 42 U.S.C. § 2701 (1964).

¹⁴⁰ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 10-11.

public housing is designed. The application of these standards operates in many cases to deny decent housing to those most in need. One can choose any of the grounds which may disqualify an applicant and demonstrate that such conditions are more prevalent among the poor. Such factors as a record of poor rent payment or eviction from private housing for nonpayment of rent, illegitimate children, a history of irregular employment, the separation of husband and wife twice in the previous five years, lack of parental control over children, and placement of children with relatives or agencies have disqualified potential applicants.¹⁴¹ The incongruous situation is created whereby these conditions, normally associated with so-called "problem families," the alleviation of which is a basic rationale for the existence of public housing, are the very grounds for denying them housing. The basic goal of public housing cannot be achieved by requiring those whose morals may have been affected or molded by their slum environment to remain in that environment. Furthermore, the entire history of low-cost housing legislation is bereft of any requirement that an applicant prove his moral worthiness to obtain the benefits of the housing programs. The sole question should be: Is this family in need of low cost housing? Any program which makes need secondary to a determination of desirability is inconsistent with the statutory purpose of public housing laws.¹⁴²

¹⁴¹ See Rosen, *supra* note 84, at 224; Community Service Society, *Not Without Hope* 65-72 (Community Serv. Soc'y of N.Y., 1958). The denial of admissions on these grounds in New York should be eliminated by the NYCHA's recently promulgated guidelines. See New York City Housing Authority, *Revised Standards for Admission of Tenants*, GM-1632 (May 9, 1968), *revising* GM-1287 (Nov. 29, 1961). This does not mean, however, that other authorities are not now, or may not in the future, deny admissions on these grounds either through established regulations or on an ad hoc basis. See *Lewis v. Housing Authority*, 397 F.2d 178, 180-81 n.2 (5th Cir. 1968) (Talladega, Alabama Authority apparently adopted New York's former resolution on eligibility for admission); Letter from Bettie McJunkin, Law Reform Coordinator, Milwaukee Plan Legal Services, to the author, Aug. 23, 1968 (applicants in Milwaukee, Wisconsin, denied admission on basis of "poor housekeeping" without published standards).

¹⁴² A recent article has excellently demonstrated the unconstitutionality of automatically rejecting unwed mothers from public housing. Rosen, *supra* note 84, at 227-42. Beginning with the proposition that although public housing might be considered a privilege rather than a right, the government, acting in the capacity of a landlord, still cannot withhold the benefit of public housing upon an arbitrary or unreasonable condition; the reasonableness of the condition must be examined in light of the interests of the applicants so excluded and the purposes of the program. *Id.* at 233-42. Analogous to this position are the cases declaring unconstitutional the rejection, under the auspices of the Gwinn Amendment, of individuals

The principle that restrictive admission policies are contrary to the purposes of the low-rent program has been afforded some judicial recognition. *Thomas v. Housing Authority*¹⁴³ held that application of the so-called "illegitimacy regulations" was violative of the fourteenth amendment.

[A]n indiscriminate denial of access to public housing to families unfortunate enough to have or acquire one or more illegitimate children would . . . 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. An administrative policy which involves such a denial does not square with the humane purpose of the low rent housing program.¹⁴⁴

Thomas was a class action brought to test the validity of the Local Authority's regulation which rejected applicants or evicted tenants if *any* member of their family had an illegitimate child. The individual plaintiffs were two women whose applications for admission were denied because they were the mothers of illegitimate children. The court held that illegitimacy by itself is too narrow a basis for eviction or rejection and that the automatic denial of housing to unwed mothers violated both the due process and equal protection clauses of the fourteenth amendment, a holding which HUD has followed in requiring that Local Authorities not auto-

who were members of subversive organizations or refused to sign loyalty oaths. *E.g.*, *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). The author concludes that even if an unwed mother is in fact morally unfit, moral unfitness is an unreasonable basis for her exclusion from public housing; such a rule is overly broad in its sweep. Rosen, *supra* note 84, at 239. See generally *McLaughlin v. Florida*, 379 U.S. 184 (1964); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960). He also argues that such a policy is inconsistent with the original purpose of the public housing program and is thus an unreasonable classification in violation of the equal protection clause of the fourteenth amendment. Rosen, *supra* note 84, at 239-42.

The author did not extend his condemnation to the type of broad desirability standard formerly used in New York and presently the practice in many areas, but it would seem that cogent arguments can be made that a general undesirability standard is unconstitutional, or at least that many of the conditions which are used to determine desirability are unconstitutional. Central to this argument is the fact that the existence of one or more of these conditions disqualifies a potential applicant, rather than a finding of undesirability based on all factors. See generally P. Spriggs, *Eviction from Public Housing in New York City on the Basis of "Non-Desirability,"* (1965) (unpublished paper on file at Project on Social Welfare Law, N.Y.U. School of Law).

¹⁴³ 282 F. Supp. 575 (E.D. Ark. 1967). See generally 56 GEO. L.J. 1215 (1968).

¹⁴⁴ 282 F. Supp. at 580-81.

matically deny admission or continued occupancy to particular classes of tenants, such as unwed mothers.¹⁴⁵ It added, however, that illegitimacy coupled with additional behavioral criteria may support a valid finding of ineligibility.¹⁴⁶

¹⁴⁵ 282 F. Supp. at 580; Dep't of Housing and Urban Development, Circular (Dec. 17 1968).

¹⁴⁶ See 282 F. Supp. at 581. The prohibition of most present policies is absolute. They make no distinction between the unwed mother with one illegitimate child and the unwed mother with ten of such children; they do not take into account the circumstances of the illegitimate birth or births, the age, knowledge, training or experience of the mother, or the possibility or likelihood of future illegitimate births. In *Richardson v. Housing Authority*, Civil No. 678 (E.D.N.C. May 13, 1968) tenants were required to covenant in their lease that "[i]f additional illegitimate children are born to me or any member of my immediate family during my tenancy in properties of the Landlord . . . I will within thirty (30) days after birth of such child, vacate and remove myself and family from any property or housing accommodations either owned, operated, or managed by the Landlord" *Id.*, Plaintiff's Complaint at 6. The lease gave the Authority alternative remedies—either eviction or a \$50 fine. *Id.* at 6-7; *Rosen, supra* note 84, at 230; 4 WELFARE L. BULL. 6-7 (1966).

Furthermore, in another case, *Strawder v. New York City Housing Authority*, Index No. 02212-67 (Sup. Ct. N.Y. County, Feb. 7, 1967), noted in 8 WELFARE L. BULL. 3-4 (1967), an applicant was denied admission under New York's former "clear and present danger" criterion because one of her children was having adjustment difficulties in the first grade. See *New York City Housing Authority, Desirability Standards for Admission of Tenants, GM-1287* (Nov. 29, 1961), revised, GM-1632 (May 9, 1968); note 162 *infra* and accompanying text. Later investigation revealed the charge was unfounded, and suggested the possibility that the real ground for denial of admission was the fact that she had several children born out of wedlock who had been legitimized by her subsequent marriage to their father. Even if the child was having such difficulties, however, it does not seem to be a reasonable basis for denial of public housing. Is a family with such a child necessarily a "clear and present danger to public housing tenants or property"?

Manigo v. New York City Housing Authority illustrates the danger that a juvenile record or records of arrests, albeit without any convictions, may be the basis for denying admission to public housing. 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 803, 279 N.Y.S.2d 1014 (1967), *cert. denied*, 389 U.S. 1008 (1967). This applicant was declared ineligible because of her husband's prior record. The "record" consisted of four adjudications as a juvenile delinquent, several arrests without conviction, and one conviction on a minor offense. Except for one arrst which resulted in dismissal, these all occurred when the husband was a minor and before he was married and became a father. The New York court upheld the denial of admission, conceding that a juvenile record "standing by itself, cannot be utilized to operate as a forfeiture of any right or privilege," but added that "this does not mean that an applicant's entire behavior pattern over a period of years may not be a proper subject of scrutiny by an administrative agency before granting a right or privilege such as eligibility to public housing." *Id.* at 832, 273 N.Y.S.2d at 1005. As the plaintiff's argument on appeal pointed out, this holding seems to conflict "with the constitutional presumption of innocence and the constitutional guarantee of due process of law in the ascertaining of guilt." Petitioner's Brief in Support of Motion for Leave to Appeal to the Court of Appeals at 23, *Manigo v. New York City Housing Authority, supra*. See also *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 241 (1957).

A broader test has been suggested for determining the constitutionality of conditions attached to any welfare benefits.¹⁴⁷ The first question to be asked is: How relevant is the condition to the benefit? Courts have invalidated conditions not rationally related to the asserted purpose of welfare programs. It is seriously doubtful that the following conditions originally established by the NYCHA as grounds for determining undesirability are rationally related to the asserted purposes of public housing: apparent mental retardation of any member of the family; discharge from service with other than an honorable discharge; obnoxious conduct during processing of application; unusually frequent changes in place of residence; family with minor children which does not include both parents; illegitimate children; placement of children with relatives or agencies; husband or wife under 18 years of age; frequent separation of husband and wife; and a highly irregular work history. Moreover, the possibility that there exists a "less onerous alternative" than imposing a condition which may infringe on constitutional rights, may lead to a determination of unconstitutionality.¹⁴⁸ Rather than imposing an undesirability standard or establishing various conditions indicating undesirability, public housing authorities should take on the responsibility of housing and rehabilitating the permanent poor by providing a new environment and establishing a larger and more meaningful social services program.¹⁴⁹

Denial of public housing based on undesirability would seem to definitely fail two other parts of the suggested constitutionality test. (1) What is the importance of the benefit to the individual recipient being disqualified? (2) Does the private sector offer equivalent benefits? The answer to the first question is obvious; numerous reports and studies have underlined the importance of public housing to this very group labelled "undesirable."¹⁵⁰ Furthermore,

¹⁴⁷ O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

¹⁴⁸ *Id.* at 466-70. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354-56 (1951); *Schneider v. State*, 308 U.S. 147, 164 (1939). See also *Wormuth & Mirkin, The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

¹⁴⁹ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 10-11.

¹⁵⁰ O'Neil, *supra* note 147, at 470; see, e.g., *Harvith, Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210, 240 (1967); 53 CORNELL L. REV., *supra* note 133, at 1135.

several congressional declarations concerning public housing point to the glaring lack of suitable private housing. Section 1401 of the Housing Act sets forth the most fundamental goal of public housing: "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . that are injurious to the health, safety, and morals of the citizens of the Nation."¹⁵¹

The last two parts of the test go to the form and clarity of the condition and the procedure by which a possible recipient is denied the benefit.¹⁵² Many authorities do not publish their regulations as required by the ACC and the HAA Low Rent Management Manual;¹⁵³ thus an applicant is not apprised of the criteria he must meet to become eligible. Further, when an applicant is rejected, he is often not informed of the reasons or grounds.¹⁵⁴ Observers of the NYCHA and other Authorities' procedures have related vivid examples of the inadequate investigation upon which decisions are based. In many cases, the decision to deny admission is made by one person. Furthermore, in determining ineligibility, the Authority commonly is not held to any burden of proof or evidentiary standard. Applicants are frequently not afforded a hearing, the right to confront their accusers, or the right to appeal within the Authority.¹⁵⁵ This lack of procedural due process will be discussed in detail later; its significance here is the fact that, placed within this procedural context, the undesirability standard again seems to fail the test of constitutionality.¹⁵⁶ Existing standards are often vague, with "little in the way of procedure to make certain that the authorities' information is true."¹⁵⁷ The argument in support of the reasonableness of a general anti-social behavior standard is that

¹⁵¹ 42 U.S.C. § 1401 (1964).

¹⁵² O'Neil, *supra* note 147, at 473-77.

¹⁵³ "The Local Authority shall duly adopt and promulgate, by publication or posting in a conspicuous place for examination by prospective tenants, regulations establishing its admission policies." PHA, ACC, *supra* note 15, Pt. 1, § 206 (April 1966); *accord*, Low-RENT MANAGEMENT MANUAL, *supra* note 22, § 3.5 (Oct. 1967); *see* 42 U.S.C. § 1410(g)(2) (1964); Rosen, *supra* note 84, at 164-67.

¹⁵⁴ *See, e.g.*, Thorpe v. Housing Authority, 386 U.S. 670, 671, 675-76 (1967). *See also* Thorpe v. Housing Authority, 393 U.S. 268 (1969).

¹⁵⁵ *See* 386 U.S. 670, 675-76.

¹⁵⁶ *See* notes 212-63 *infra* and accompanying text.

¹⁵⁷ Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1250 (1965).

such screening is required to protect the morals, health, and welfare of residents in the project. But what of tenants in private housing? Is it not also the responsibility of government to protect the safety, morals, health, and welfare of those citizens? Would it be reasonable under this guise to deny private housing to this category of undesirables? It seems far more reasonable, and, in the interests of "protecting" the general public, to afford this "undesirable" segment of our society an opportunity for rehabilitation through a more wholesome public housing environment.

Furthermore, denying public housing to persons because of a history of anti-social behavior is in effect a punishment for conduct which is not necessarily criminal or, in cases where the conduct did constitute a crime, a further penalty where society has already exacted its punishment. Nor will this constitutional infirmity be countered by merely alleging that public housing is a privilege and not a right. "Increasingly," as one commentator has pointed out:

[W]hen the petitioner's primary interest in the public sector could not be characterized as a "right" entitled to [substantive due process protection] . . . courts have nonetheless found some other implicated right to sustain the claim. Alternatively, they have granted relief through recourse to constitutional provisions which operate irrespective of whether what is involved is deemed a privilege, rather than a right.¹⁵⁸

This examination of admission policies has attempted to show that existing standards of admissibility, especially those relating to desirability, are open to both constitutional and statutory purpose attacks. The admission policies of the most Local Authorities are totally discordant with the purpose of the national public housing program. "It makes little sense to deprive a poor family of perhaps its only comfort—decent housing—because the extra mouth to feed belongs to a bastard rather than a legitimate child,"¹⁵⁹ or because one member of the family many years before had committed an "undesirable act."

The divergence of opinions on whether there should be a desirability standard serves to underscore the widespread debate as to the purpose of public housing—is it merely a stepping stone to

¹⁵⁸ Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968).

¹⁵⁹ 53 CORNELL L. REV., *supra* note 133, at 1132.

middle income housing, providing low-cost, decent housing to serve the temporary poor, or is it a rehabilitative institution, serving as a constructive force in the attempt to break the poverty cycle. Anti-poverty programmers would seem to view its function as rehabilitative.¹⁶⁰ If so, and it is submitted that this is an accurate appraisal, Local Authorities, their officials and managers, and even public housing tenants must be educated as to the role of public housing.

Alternatively, if it is felt that at the federal level, conceding public housing's role in the anti-poverty program, a means of screening and rejection is nevertheless required to weed out those who would be a definite and immediate danger to other tenants, the desirability standard must be reexamined. A vague undesirability provision which leaves implementation completely to the discretion of Authority officials should be abolished. If public housing is to be denied because of extreme anti-social conduct, HAA should dictate what specific factors are to be considered and a finding should be required that such behavior is present and continuing, not merely that a past indiscretion existed.

If it is felt that the health, safety, and moral well being of tenants cannot be protected without this type of requirement, only extreme social disorders, established by HAA guidelines as clearly potentially harmful to the public housing community, should be considered. If such a standard remains, clearly defined procedures, including a right to a hearing, must be promulgated by the HAA and uniformly adopted by all authorities to insure substantive and procedural due process in each case. Local Authorities must heed the admonition of HUD's circular, founded on the *Thomas* holding, to establish regulations for admission and continued occupancy which do not deny admission to certain classes and do not allow eviction because of marital status or legitimacy.¹⁶¹ Unless eligibility standards which do not discriminate against the "problem

¹⁶⁰ See Remarks of Abner D. Silverman at Management Portion of the Rent Supplement Program, FHA Director's Meeting, Washington, D.C., May 10, 1966, reported in PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 11; Weinandy, Working With the Poor, The Report of a Three-Year Family Consultation Service in Public Housing, at 4-5 (Syracuse Univ. Youth Development Center, 1965).

¹⁶¹ Dep't of Housing and Urban Development, Circular (Dec. 17, 1968). See notes 259-63 *infra* and accompanying text for procedural recommendations.

family" are instituted, the goals of public housing may very well become illusory—long in rhetoric, but short in fulfillment.

Eviction. Unlike the nondesirability requirement applied in admission cases, wherein it can be argued that past behavior should not be used to deny a person the opportunity of receiving the rehabilitative benefits of standard housing, there does exist an area in which a local authority must be able to rid itself of a person presently exhibiting disruptive characteristics in order to protect the physical well-being and peaceful occupancy of its tenants.

The question then is whether or not the factors which give rise to a determination of nondesirability are consonant with this legitimate purpose. New York City's Tenant Review Board Handbook authorizes eviction for the following offenses or conditions which are characterized as creating a "*clear and present danger to other tenants:*" the sale of narcotics; heroin addiction; use of marijuana; membership in an anti-social violent gang (not based on arrest); forcible or statutory rape; sexual deviation; and miscellaneous clear and present danger situations such as tampering with elevator controls, riding on top of elevators, tampering with mailboxes, stealing mail, endangering passersby by throwing objects from windows or roofs, armed robbery, mugging, and assault with a dangerous weapon.¹⁶²

Undoubtedly, many of these acts could seriously affect the physical and moral well-being of tenants and thus would be legitimate grounds for eviction, but it is also arguable that in many instances isolated acts of this nature do not necessarily result in a clear and present danger. The serious defect in this standard is that the Tenant Review Board is not required to establish an actual causal connection between the act and the danger to tenant well-being. The regulations thus have the effect of establishing a conclusive presumption that certain acts constitute a clear and present danger.¹⁶³ Although the Board is admonished in certain situations to consider mitigating factors such as a first offense and the youth of the offender,¹⁶⁴ this is not an adequate substitute for a

¹⁶² NEW YORK CITY HOUSING AUTHORITY, MANAGEMENT MANUAL ch. VII; Tenant Review Board Handbook, appendix B, at 7-10 (April 15, 1964).

¹⁶³ See P. Spriggs, *supra* note 142, at 8.

¹⁶⁴ See NEW YORK CITY HOUSING AUTHORITY, MANAGEMENT MANUAL, ch. VII; Tenant Review Board Handbook, appendix B, at 8 (April 15, 1964).

clear establishment in each and every case that a particular action actually constitutes a danger to tenants. Furthermore, except for these situations, the clear and present danger guidelines do not suggest or even allow for continued occupancy of the offender with attempts at rehabilitation.

Under the established guidelines, one offense is sufficient to constitute a clear and present danger. An "offense" is usually established by an arrest; however, the Tenant Review Board in deciding to evict is not required to await court disposition nor is it bound by a court finding of acquittal.

A criterion for eviction which permits arrest alone to form a basis for undesirability and which allows the Authority to disregard an acquittal raises serious constitutional questions. That a private landlord can pursue proper legal methods to terminate his relationship with a tenant who has an arrest record is basic, but when the Government as a landlord pursues such action, it is denying the individual, without due process of law, rights and privileges which that Government has established.¹⁶⁵

Regulations which permit an eviction based solely on proof of behavior without a showing that such behavior is a source of danger to the project or its tenants are inconsistent with the objectives of public housing. In *Sanders v. Cruise*,¹⁶⁶ a New York court held that although NYCHA's nondesirability regulations were reasonable, the Authority's application of the regulations to evict a tenant on the ground that his adult son was a narcotics user was unreasonable since the Attorney had failed to show that the son's drug addiction was a source of danger to other tenants.¹⁶⁷ If an Authority's action is unreasonable when it fails to prove the causal nexus, then, a fortiori, a regulation which allows it to evict without such proof is equally unreasonable and must fall.¹⁶⁸

One category of nondesirability, the family which repeatedly engages in disruptive behavior,¹⁶⁹ except for establishing illegitimate

¹⁶⁵ See notes 212-25 *infra* and accompanying text.

¹⁶⁶ 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

¹⁶⁷ *Id.* at 537, 173 N.Y.S.2d at 875.

¹⁶⁸ See *New York City Housing Authority v. Watson*, 27 Misc. 2d 618, 619-25, 207 N.Y.S.2d 920, 922-27 (Sup. Ct. 1960) (Hofstadter, J., dissenting).

¹⁶⁹ "Disruptive behavior" is subdivided by the Authority into the following classifications: alcohol, boisterous conduct, friction or interference with employees, friction or interference with neighbors, lack of parental control, neglect of children, out-of-wedlock children.

children as a basis for eviction, seems substantively reasonable. It requires a nexus between the behavior and interference with other tenants or the project, provides for an examination and review of the total record, does not allow eviction based on isolated acts or arrests, and makes relevant the locale of the alleged actions.¹⁷⁰

The third category of nondesirability established by NYCHA is the use of an apartment for illegal or immoral purposes, specifically, abortion, prostitution, illegal manufacture or sale of articles, and professional gambling. As a substantive matter, these grounds seem legitimate and fair. Again, however, the danger lurks that the application of this standard in individual cases is devoid of procedural safeguards.

Another factor indicating undesirability, according to the NYCHA, is the birth of out-of-wedlock children.¹⁷¹ Although the regulations seem to require that the occurrence of such births be coupled with other evidence of disruptive behavior in order to constitute nondesirability, other Authorities, through either published or unpublished policies, have evicted tenants solely on the ground of illegitimate births.¹⁷² The denunciation in *Thomas*¹⁷³ of the indiscriminate denial of *admission* to public housing, as

loitering, unacceptable housekeeping, vandalism, arrests (misdemeanors), marital disputes, minor mental instability, senility, and unauthorized occupancy. Report of New York City Housing Authority Tenant Review Board for 1964 § 1V(B) (Apr. 15, 1964) (mimeographed) [hereinafter cited as Tenant Review Board Report].

¹⁷⁰ See P. Spriggs, *supra* note 142.

¹⁷¹ The birth of out-of-wedlock children is considered a form of "disruptive behavior." Tenant Review Board Report, *supra* note 169, § 1V(B)(8).

¹⁷² For example, the regulations originally promulgated by the Public Housing Authority of Talladega, Alabama, which prompted the litigation in *Lewis* provided that "any illegitimate child born to any member of a tenant family will automatically bring about the eviction of that family. . . . [I]f it becomes apparent that a person is expecting an illegitimate child, the family will be evicted immediately. . . . No exceptions will be made." See *Lewis v. Housing Authority*, 397 F.2d 178, 179 n.1 (5th Cir. 1968). The stated policy of the Little Rock, Arkansas Housing Authority is that "[a] family shall not be eligible for admission or continued occupancy if any family member residing regularly with the family has a child or children born out of wedlock." *Thomas v. Housing Authority*, 282 F. Supp. 575, 578 (1967). This practice is often incorporated as a term of the lease. See *Richardson v. Housing Authority*, Civil No. 678 (E.D.N.C. May 13, 1968); note 146 *supra*; *Rosen*, *supra* note 84, at 230. Another example is found in the lease of the Housing Commission of Ypsilanti, Michigan, which incorporates a provision of the Tenant's Handbook stating that "[f]emale heads of the family will not be permitted to increase their family while a resident of the project. Increase in the family will be cause of eviction." See *Williams v. Housing Comm'n*, Civil No. 28936 (E.D. Mich. Sept. 4, 1966), noted in 7 WELFARE L. BULL. 5 (1967).

¹⁷³ 282 F. Supp. 575 (E.D. Ark. 1967).

violative of equal protection and due process guarantees, would seem to proscribe by analogy the automatic *eviction* of tenants who give birth to illegitimate children.¹⁷⁴ Furthermore, the wholesale eviction or denial of admission because of illegitimate births not only discriminates against the indigent mothers but also discriminates against their children. Such discrimination without fault is indisputably contrary to public housing goals. Congress could not have intended to exclude so large a portion of the poor from public housing merely because they were born out of wedlock.¹⁷⁵

Indeed, the Supreme Court's recent decision in *Levy v. Louisiana*¹⁷⁶ indicates this discrimination is an unconstitutional denial of equal protection. As in *Levy*, which involved a statute denying illegitimate children the right to bring a wrongful death action for the death of their mother, the fact of illegitimacy has no connection with the claimed right or benefit.¹⁷⁷

Perhaps the clearest example of the Local Authority's arbitrary and unrestrained power are the vague provisions found in leases and Authority regulations which permit eviction for the violation of

¹⁷⁴ Nevertheless, the courts continue to permit an Authority to give some evidentiary or presumptive effect to the presence of illegitimate children in determining initial and continued eligibility for public housing. Such a policy was sanctioned in *Thomas* and seems to be the present practice of the NYCHA. See 282 F. Supp. at 581; NEW YORK HOUSING AUTHORITY MANAGEMENT MANUAL ch. VII, Tenant Review Board Handbook, Appendix B, at 11 (April 15, 1964).

¹⁷⁵ The unfairness of illegitimacy as a classification is illustrated by the following figures. Estimated Ratio of Illegitimate Live Births to all Live Births Among Nonwhites for the Year 1962. (Figures are totals per 1,000 live births.)

Totals in the United States	249.8 per thousand
Some states	
Illinois	279.9 per thousand
Louisiana	219.1 per thousand
Missouri	291.2 per thousand
Ohio	224.7 per thousand
Pennsylvania	232.7 per thousand
Texas	222.7 per thousand
Washington, D.C.	278.4 per thousand

DEP'T OF HEALTH, EDUCATION AND WELFARE, 1 VITAL STATISTICS OF THE U.S.: 1962, at Table 1-24, p.1-19. The rate of illegitimacy among poor non-whites is even higher. Among families in Washington, D.C., with an income of less than \$4,000, 38.2% of all live births are illegitimate. U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, INCOME, EDUCATION, AND UNEMPLOYMENT IN NEIGHBORHOODS, WASHINGTON, D.C. (1964).

¹⁷⁶ 391 U.S. 68 (1968); see *Glonn v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). See also *King v. Smith*, 392 U.S. 309 (1968).

¹⁷⁷ See 391 U.S. at 72.

any condition or clause of the lease,¹⁷⁸ "any applicable rule, regulation or resolution of the authority," "the requirements or directives of the Authority," "the requirements or directives of the Authority," or for "noncooperation" with management.¹⁷⁹ The references in these provisions are to a myriad of conditions of varying importance, from playing baseball on project property to subletting, but the violation of any one of them subjects the tenant to eviction. Such provisions allow for purely arbitrary evictions. A breach of a rule or regulation of the authority, or the condition or rule itself, might be quite minor or technical; it may be nonrecurring, but still it affords the Authority a "legal" basis for eviction. Such a lease amounts to a tenancy terminable at the will of the Authority, without notice in many cases, because it could always find a technical or nominal "breach" or violation of one of its innumerable lease conditions or rules and regulations.

The lack of reasonable guidelines or standards limiting eviction to breaches or violations meeting a certain degree of severity would seem to render such provisions too indefinite to be enforceable.¹⁸⁰ Furthermore, eviction pursuant to a nominal or insignificant breach or violation is open to attack as both an arbitrary and capricious decision, denying due process of law, and violating the equal protection requirements of the Constitution. This principle was recognized in *Holt v. Richmond Redevelopment and Housing Authority*.¹⁸¹ There it was indicated that a slight breach of a lease through a failure to report \$99 in income would not support an eviction when no other tenants were evicted in the past for minor breaches of the same nature. Indeed, the real reason for the eviction notice was found to be the plaintiff's activities in organizing fellow tenants. The court concluded that the exercise of the first amendment rights of freedom of speech and assembly "are too valuable to be frittered away under the guise of breach of contract based upon an ex parte computation of income"¹⁸²

¹⁷⁸ See, e.g., Housing Authority of New Orleans, Dwelling Lease, Form D-104, ¶ 3 (May 1, 1960); National Capital Housing Authority, Dwelling Lease, NCHA 583, ¶ 5 (Aug. 1961).

¹⁷⁹ New York City Housing Authority, Resolution Relating to Termination of Tenancy, 60-8-684, § 2.02(e) (Aug. 3, 1960).

¹⁸⁰ See Schoshinski, *supra* note 64, at 557. See generally 1 A. CORBIN, CONTRACTS §§ 95-108 (1963); 1 S. WILLISTON, CONTRACTS §§ 37-49 (3d ed. 1957).

¹⁸¹ 266 F. Supp. 397 (E.D. Va. 1966).

¹⁸² *Id.* at 401. Cf. *Hosey v. Club Van Cortlandt*, 68-Civ. 4498 (E.D.N.Y., Mar. 25, 1969), noted in 4 LEGAL AID DIGEST 18 (1969).

The greatest boon to retaliatory eviction is the present practice of most Authorities, sanctioned until recently by HAA, of terminating the normal month-to-month tenancy without ascribing a reason for the termination. This mode of termination is often used to expedite eviction and circumvent procedural and evidentiary problems in undesirability, anti-social, or disruptive behavior cases.¹⁸³ The only limitation imposed by the courts on the power to evict was that a Local Authority could not use a legally or constitutionally invalid reason for eviction, if it stated one.¹⁸⁴

To ameliorate the harshness of this federal sanction, the HAA issued two circulars, the first strongly urged Local Authorities to inform tenants of the reasons for the notice to quit¹⁸⁵ and the second, a superseding circular, stated the "belief" of HAA that it was essential to inform tenants of the reasons for their eviction.¹⁸⁶ It was this later circular which permitted the Supreme Court in *Thorpe v. Housing Authority*¹⁸⁷ to sidestep the issue of whether a Local Authority must give reasons for eviction. Instead, it interpreted this circular, which was in fact issued by the HAA during the *Thorpe* litigation, "to require local authorities to keep future records of eviction, [and] the reasons therefore" and indicated that a finding of compliance or noncompliance with the procedures established by the circular would be dispositive of all

¹⁸³ See Friedman, *supra* note 4, at 661:

¹⁸⁴ See, e.g., *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1964); *Peters v. New York City Housing Authority*, 9 Misc. 2d 942, 128 N.Y.S.2d 224 (Sup. Ct. 1953), *modified*, 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dept. 1954), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954), *appeal dismissed on remand*, 1 App. Div. 2d 694, 147 N.Y.S.2d 859 (2d Dept. 1955); *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). See also *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 305 U.S. 969 (1956); *Kutcher v. Housing Authority*, 20 N.J. 181, 119 A.2d 1 (1955). See generally Rosen, *supra* note 84, at 182-223.

¹⁸⁵ Public Housing Administration, Circular (May 31, 1966). "There is as you may be aware growing opposition and challenge from individuals and organizations to the practice of simply giving the statutory notice without stating the reason or reasons therefor. In connection with the above practice, we strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given such notices of the reasons for this action." *Id.*

¹⁸⁶ Dep't of Housing and Urban Development, Circular (Feb. 7, 1967). See also *Thorpe v. Housing Authority*, 393 U.S. 268 (1969).

¹⁸⁷ 386 U.S. 670 (1967) (per curiam).

eviction proceedings which had not yet become final.¹⁸⁸ For a time a question persisted as to the binding effect of this circular, as well as other federal directives in the public housing field, but the second *Thorpe* decision held the circular to be a mandatory directive.¹⁸⁹

In *Lewis v. Housing Authority*,¹⁹⁰ the Fifth Circuit may have lent some support to the proposition that the mere issuance of modifying regulations will not preclude a court from examining the validity of a policy of evictions without notice. The plaintiffs, Negro residents of a Talladega, Alabama public housing project, sought to enjoin the Authority from continuing to enforce its policy of automatically evicting any family having, or expecting, an illegitimate child, and continuing to evict or threaten to evict tenants without reason and a fair hearing and from pursuing several discriminatory practices.¹⁹¹ Although the Authority had revoked the eviction of the plaintiffs who brought the suit, the court found that:

the issues raised . . . must be passed on initially by the Trial Court. Though the present threat of eviction to appellants has been lifted, . . . [the] [a]ppellants' charge of unconstitutionality of the new eligibility rule must also be passed on.¹⁹²

In conclusion, the *Lewis* court stated that "[t]he case is not moot because there remains subject matter on which the judgment of the court can and must operate."¹⁹³ Analogizing to that opinion it might well be argued that where the only prophylactic interposed to prevent eviction without notice and possible infringement of first amendment rights is an HAA "suggested" circular, the case should

¹⁸⁸ *Id.* at 672-73. On remand, the Supreme Court of North Carolina held that the HUD directive has no retroactive force and that the Local Authority therefore had no duty to afford the defendant-tenant notice of the reasons for her eviction and a hearing on those reasons. *Housing Authority v. Thorpe*, 271 N.C. 468, 157 S.E.2d 147 (1967).

¹⁸⁹ *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). The Court originally deferred decision on this issue, and opinions varied as to the legal efficacy and enforceability of such directives. 386 U.S. at 677-81 (Douglas, J., concurring); Rosen, *supra* note 84, at 207-10. The Housing Law Center, Earl Warren Legal Institute of Berkeley, California is currently researching whether HUD can impose procedural reforms on local housing authorities. Letter from Myron Moskowitz, Chief Attorney, Housing Law Center, Earl Warren Legal Institute, Berkeley, California, to all legal services project directors, Aug. 21, 1968.

¹⁹⁰ 397 F.2d 178 (5th Cir. 1968).

¹⁹¹ *Id.* at 178-79.

¹⁹² *Id.* at 181.

¹⁹³ *Id.*

not be declared moot without at least testing the effect of the circular.

A recent New York State Supreme Court opinion represents an even further break from the courts' traditional sanctioning of public housing evictions without cause or prior notice. *Vinson v. Greenburgh Housing Authority*¹⁹⁴ re-examined the whole nature of the relationship between Public Housing Authorities and their tenant clientele. Relying on the state constitution's recognition of low-rent housing as a proper governmental function and implementation by the legislature's enactment of public housing programs, the court held that even though the traditional notions of private property might otherwise be applied, low-rent housing "imports a status of a continuous character" and "[w]hat may be complete freedom of action under private contractual arrangements falls to restricted action under public housing leases."¹⁹⁵ Thus, housing authorities cannot oust a tenant merely by arbitrarily enforcing the termination provision in the lease.¹⁹⁶ In reaching this conclusion, the court quoted at length Mr. Justice Douglas' concurring opinion in *Thorpe I*; especially relevant was the following section:

It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government . . . and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."¹⁹⁷

Unfortunately, such reasoning is certainly far from accepted. Faced with a generally non-directional legislative and regulatory background, the Local Authorities have seized the initiative and adopted various eviction practices, some clearly enunciated and others resulting from unpublished policies. Because of the absence of clear federal guidelines setting out permissible grounds for, and procedures to be followed in, eviction, the danger of arbitrary, ad hoc disqualifications made by single individuals or small groups of

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

¹⁹⁵ *Id.* at 341, 288 N.Y.S.2d at 163.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 344, 288 N.Y.S.2d at 166.

management officials is ever-present.¹⁹⁸ A number of Authorities have no published eviction policy and procedure, and arbitrary practices do not come to light unless they are questioned by aggrieved tenants. Often the low income tenant is reluctant or ill equipped, even in this age of increased legal aid to the indigent, to defend against such an eviction.¹⁹⁹ But at present this remedy seems to be the only one open to him. When *Thorpe* came before the Supreme Court again, it was held that the HUD circular²⁰⁰ was mandatory in requiring that the Local Authority give the tenant the reason for his eviction,²⁰¹ but the constitutionality of the reason had to be challenged in ensuing eviction proceedings.²⁰²

Even after *Thorpe II*, however, significant questions arising from the circular²⁰³ are left unanswered. As noted by Mr. Justice Douglas in *Thorpe I*, the circular is silent as to what reasons will support an eviction.²⁰⁴ Furthermore, tenants may be unable to interpose constitutional defenses at eviction proceedings under rules of local practice.²⁰⁵ Finally, the marked reluctance shown by the HAA before *Thorpe II* to enforce the circular's avowed policy²⁰⁶ may continue.

¹⁹⁸ See Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988, 994 (1968).

¹⁹⁹ *Id.* at 993.

²⁰⁰ Dep't of Housing and Urban Development, Circular (Feb. 7, 1967); 393 U.S. at 272-73 n.8.

²⁰¹ 393 U.S. at 283-84.

²⁰² *Id.*

²⁰³ Dep't of Housing and Urban Development, Circular (Feb. 7, 1967); 393 U.S. at 272-73 n.8.

²⁰⁴ See 386 U.S. at 677-78.

²⁰⁵ See Rosen, *supra* note 84, at 198-203. In New York, for example, the courts have refused to look beyond the 30 day notice to terminate, holding that the tenancy is governed by the lease and the lease provides for termination in this manner. *E.g.*, *New York City Housing Authority v. Russ*, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954). But a New York statute provides that a landlord in a city with a population over one million who attempts to evict a tenant in a summary proceeding pursuant to a lease provision permitting termination for objectionable conduct may do so only if he can prove objectionableness by competent evidence presented in court. N.Y. REAL PROP. ACTIONS LAW § 711 (McKinney 1963). If the HUD circular, Dep't of Housing and Urban Development, Circular (Feb. 7, 1967), is followed and the Authority gives a reason for termination with the 30 day notice, the question then will be whether the landlord-tenant court may inquire as to the reasonableness and propriety of the decision.

²⁰⁶ Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968), reports that communication with HAA officials indicated that HAA was unwilling to define the legal status of the circular or to state whether it had the power to make it legally binding;

Traditionally courts have sanctioned eviction without a legal reason. The only established judicial inroads in combatting this practice have been in cases where the underlying reason prompting eviction has been adjudged to be unconstitutional or contrary to public policy.²⁰⁷ Thus, an indigent tenant evicted without cause must discover a retaliatory motive on the part of the Authority and then persuade a court that this motive violates his constitutional rights—an onerous burden indeed. It is submitted that eviction without cause should be treated as a *per se* violation of due process and that the burden of showing cause should be placed on the shoulders of the Authority.²⁰⁸

Recommendations

Standardized and uniform rules. As a first step in imposing definite eviction rules upon Local Authorities, HUD should implement its circular of February 7, 1967 which provided that a public housing lease can be terminated by the Local Authority only for cause. Such a provision should be included in the lease thus making the tenancy one for an indefinite or indeterminate term with the tenant permitted to terminate upon giving reasonable notice.

Substantive grounds for lease termination. It has been suggested that the reasons for eviction should be limited to those commonly

refused to publish the circular in the Federal Register under the Freedom of Information Act; was unwilling to make an investigation to determine whether the circular was being followed; and declined to clarify the grounds upon which tenants may be evicted. *Id.* at 964-65. Thus, the article concludes, this refusal to act may result in evictions "which directly subvert other HAA policies." *Id.*

²⁰⁷ See note 184 *supra* and accompanying text. The most recent pronouncement of this principle is in the District of Columbia Circuit Court of Appeals' landmark decision of *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968). "[W]hile the landlord may evict for any legal reason or for no reason at all, he is not . . . free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted." *Id.* at 699.

²⁰⁸ To date, only one court has embraced this rationale. In *Vinson v. Greenburgh Housing Authority*, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968), the court held that traditional notions of private property cannot be applied to low-rent housing; rather, public tenancy imports a status of continuous character based on the needs of tenants for decent housing at a cost proportionate to their income and subject to compliance by the tenants with reasonable regulations. The declared purpose of the low-rent housing statute, said the court, makes it clear that so long as tenants remain qualified and do not violate reasonable regulations of the state agency, they may not be evicted for grounds "extrinsic to these requirements." *Id.* at 342, 288 N.Y.S.2d at 164.

accepted in the private housing sector²⁰⁹—those recognized at common law and under statutory summary proceedings for the premature termination of a fixed period tenancy. Absent a lease clause on the subject the common law recognized the lessor's power to terminate an estate for years upon the lessee's use of the premises in an illegal manner, for an illegal purpose, or in a manner constituting a nuisance.²¹⁰ "Common-law" legislation²¹¹ and more recent statutes also provide for forfeiture of an estate for waste either permitted or committed by a tenant for years.

The usual ground for terminating a tenancy in summary proceedings is non-payment of rent. This legal cause should be ameliorated in public housing tenancies. The legislature should recognize the often recurring financial straits of low-income public housing tenants and institute a partial payment or late payment plan to accommodate tenants who are experiencing financial difficulties arising from causes other than their own personal neglect, frivolity, or mismanagement. This ground for termination should be limited to chronic non-payment of rent resulting from gross tenant irresponsibility.

These substantive standards would preclude the Authority management from judging the moral worthiness or fitness of its tenants, a practice entirely alien to the objective of providing safe, decent, sanitary housing for all. The argument has been made, however, that this restriction on management's power would seriously threaten the efficient operation and economic viability of the project. If this is true, the answer is two-fold; first, a successful public housing program requires substantial infusion of rehabilitative social services—just providing adequate physical facilities will not rehabilitate our poor—and, second, the economic viability and financial independence of local housing projects may not be consonant with the overall objectives of the housing and anti-poverty programs.

²⁰⁹ See Rosen, *supra* note 84, at 215-16; Bill of Rights for Public Housing Tenants § 11(3) (July 5, 1967) (prepared by an *ad hoc* committee of Legal Services attorneys at the request of the OEO Legal Services Division).

²¹⁰ See 2 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 247[1], at 372 (1967).

²¹¹ Statute of Gloucester, 6 Edw. 1, c. 5 (1278). *Contra* Worthington Motors v. Crouse, 80 Nev. 160, 390 P.2d 229 (1964).

III. PROCEDURAL DUE PROCESS

Any proposed resolution of the substantive problems in public housing will be futile if it does not provide for due process safeguards. Making management the sole judge of nuisance, waste, and substantial interference with fellow tenants would merely be giving it another license for arbitrary action. The right of the tenant to notice of the evidence against him, as well as the right to a reasonable opportunity to rebut that evidence are fundamental safeguards, necessarily available to those who deal with government, against the impersonality inherent in any large public or private organization.²¹²

For example, if HUD were to declare that income was to be the sole criterion for determining eligibility for admission and continued tenancy, tenants were not apprised of this declaration, and the Local Authority continued to be the sole judge of eligibility without adequate provisions for an independent review of its determination or notice of pending action, such a declaration would clearly be of little value to public housing dwellers. Presently, however, admissions, evictions, and other determinations potentially adverse to the tenants' interests are usually decided without the benefit of published guidelines, adequate notice of the charges against the tenant, an established evidentiary standard of burden of proof, a review by an impartial tribunal, and often without an opportunity to appear before, and be heard by, the officials who make these decisions.

This study has catalogued the areas in which tenants' rights and liabilities are decided on a purely discretionary *ex parte* basis. These arbitrary practices, in large measure, are the result of the federal policy of vesting complete, and nearly unreviewable, discretion in the Local Authorities. The substantive illegality of these policies has been dealt with above; this section will discuss the application of procedural due process to Local Authority determinations.

The Constitutional Basis

Since public housing authorities are government agencies, their activities must conform with due process of law. Both state and

²¹² Reich, *supra* note 157, at 1253.

federal courts have recognized that federally-funded,²¹³ state-created housing authorities are subject to the due process clause of the fourteenth amendment. The principle was well-stated by the District of Columbia Circuit Court of Appeals in *Rudder v. United States*.²¹⁴ In rejecting the claim that a housing authority has the same freedom to evict tenants as a private landlord, the court said:

The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.²¹⁵

Similarly, in *Vinson v. Greenburgh Housing Authority*,²¹⁶ a New York court held that state action in the housing sphere was necessarily subject to the same constitutional commands applicable to any governmental function.

Due process applies to the granting of a privilege as well as to the withdrawal of a right.²¹⁷ Thus, in *Holmes v. New York City Housing Authority*²¹⁸ where several public housing applicants challenged the admission procedures of the NYCHA, the Second Circuit held that the plaintiffs set out a sufficient claim for relief under the due process clause of the fourteenth amendment, stating that due process required selection to be made in accordance with "ascertainable standards" since "uncontrolled discretion" would be an "intolerable invitation to abuse."²¹⁹

Similarly, the developing case law clearly indicates that ex parte determinations of ineligibility for government benefits are unconstitutional. The interested party must be given the basis for

²¹³ But see *Vinson v. Greenburgh Housing Authority*, 29 App. Div. 2d 338, 345, 288 N.Y.S.2d 159, 167 (1968) (due process requirements apply even if not federally funded).

²¹⁴ 226 F.2d 51 (D.C. Cir. 1955).

²¹⁵ *Id.* at 53.

²¹⁶ "Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceedings be judicial, administrative, or executive in its nature. [Citation omitted.] Once the State embarks into the area of housing as a function of government, necessarily that function, like other governmental functions, is subject to the constitutional commands." 29 App. Div. 2d at 340-41, 288 N.Y.S.2d at 163.

²¹⁷ See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956); *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

²¹⁸ 398 F.2d 262 (2d Cir. 1968).

²¹⁹ *Id.* at 265.

the decision, adequate notice, and an opportunity to rebut unfavorable information.²²⁰

Due process traditionally encompasses at least the following requirements: adequate notice of specific charges,²²¹ a hearing by impartial officials,²²² an opportunity to present evidence,²²³ a right to confront and cross-examine adverse witnesses,²²⁴ and a decision based upon evidence presented and tested at the hearing.²²⁵ Current public housing practices when measured against these standards are found to be wanting in almost every respect.

Present Practices

Eviction. Many Authorities have no guidelines for eviction procedures.²²⁶ Thus, public housing tenants faced with possible eviction for nondesirability are seldom fully apprised of the nature of the charges against them or given an opportunity to defend against the charges. Those Authorities that have established eviction procedures often fail to provide a fair hearing. For example, the NYCHA administers nondesirability evictions through an eight-member Tenant Review Board.²²⁷ A project manager initiates the procedures, informing the tenant by letter that his misconduct seriously jeopardizes continued occupancy and requesting the tenant to appear for an interview. If he feels eviction is warranted, the project manager may formally recommend

²²⁰ See *Dixon v. Alabama State Board of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962); note 212 *supra* and accompanying text.

²²¹ *In re Gault*, 387 U.S. 1, 31-34 (1967); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Dixon v. Alabama State Board of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962).

²²² *In re Murchison*, 349 U.S. 133, 136-37 (1955); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Amos Treat v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962).

²²³ *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964).

²²⁴ *Wilner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-04 (1963); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); *Reilly v. Pinkus*, 338 U.S. 269, 275 (1949).

²²⁵ *Burlington Truck Lines v. United States*, 371 U.S. 156, 169-70 (1962); *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964); *In re United Corp.*, 249 F.2d 168, 179-80 (3d Cir. 1957).

²²⁶ See notes 153, 199 *supra* and accompany text. See generally Comment, *Eviction Procedures in Public Housing*, 73 DICK. L. REV. 307 (1969).

²²⁷ The description herein of the NYCHA procedure for nondesirability evictions is taken from an excellent paper prepared by P. Kent Spriggs for Prof. Charles Ares' Seminar on the Indigent and the Law, New York University School of Law. See P. Spriggs, *supra* note 142.

termination of occupancy to the Tenant Review Board, notifying the tenant of his recommendation.²²⁸ The Board then summarily considers the recommendation and record.²²⁹ Although the tenant is not present, if the initial hearing results in eviction, the tenant is afforded the opportunity of review before a three-member panel of the Board with its decision being final.²³⁰

Panel hearings are informal. Although the tenant may be represented by a lawyer or social worker, rules of evidence do not apply. The evidence against the defendant, secured from the dossier forwarded by the project manager, is essentially hearsay, with most of the entries being complaints of tenants, or Authority officials. Since Authority policy prohibits the accused from learning the identity of complainants, little practical opportunity is afforded the tenant to attack the substance or source of the charges. Although the Tenant Review Board Handbook instructs project managers to corroborate complaints, and gives tenants the opportunity of defense before record entry is made, project managers have admittedly fallen short of this goal.²³¹ In addition, tenants are frequently saddled with the task of rebutting an apparent presumption among Board members that low income tenants cannot be believed.²³²

If the panel determines the case is ineligible for remand to the full board, and the Board Chairman approves the finding, the tenant is then served with notice to vacate in one month. Failure to so vacate will result in summary eviction proceedings, with the court usually giving the tenant from three to six months to vacate.

During this grace period the manager can observe the family's behavior and choose either to enforce the court order or allow the family to remain for up to one year. At that time he may either enforce the eviction order or refer the case back to the Board with a recommendation that the family be allowed to remain in the project. However, this grace period and opportunity for reconsideration is of doubtful benefit to the tenant, since most

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 23.

²³⁰ *Id.* at 24.

²³¹ *Id.* at 24-25.

²³² *Id.* at 26.

²³³ *Id.* at 26-27.

tenants will leave the premises before summary proceedings are commenced rather than remain as "tenants at will."²³³

The NYCHA eviction procedure was chosen for discussion herein because it is generally considered one of the most detailed and "liberal."²³⁴ As the above description illustrates, however, it fails to meet the requirements of procedural due process. An administrative proceeding need not be surrounded by all the safeguards of a trial, but certain minimal requirements must be met. First, the affected party must be given notice that sufficiently explains the charge so as to enable him to prepare a defense. In the NYCHA Board hearing "notice" is merely a theoretical requirement, a vague explanation of the grounds of undesirability and a brief statement of the case. In one proceeding the statement of the case was the "[a]ctivities of your children"²³⁵—hardly an adequate explanation of the Board's policy. When the Board reviews any determination, it has before it a written summary of the tenant's misbehavior. The tenant could conceivably be sent such a summary, although at present neither the tenant nor his counsel, if he has one, is given a copy.

A second basic element of a fair hearing is the right to cross-examine and confront adverse witnesses, traditionally the most effective judicial tool for discovering truth and exposing falsehoods. The Supreme Court has indicated that due process of law requires proper safeguards in any administrative proceeding in which "governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals."²³⁶

The Local Authorities, however, argue that confrontation must be displaced for two higher values—the necessity of protecting informers from possible reprisals and the desire to avoid placing an overwhelming administrative burden on the Board.²³⁷ The tenant's interest in a reasonable opportunity to rebut the charges against him should be balanced against these values. One possible

²³³ For a comparison to the NYCHA procedures, see *Thorpe v. Housing Authority*, 386 U.S. 670 (1967) (North Carolina).

²³⁴ See *P. Spriggs*, *supra* note 142, at 33.

²³⁵ *Hannah v. Larche*, 363 U.S. 420, 422 (1960); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959).

²³⁷ See *P. Spriggs*, *supra* note 142, at 26, 37.

compromise would be to require the presence of the project manager at Board hearings. Since the manager has some first-hand knowledge of the issues, subjecting him to cross-examination would likely aid in reaching a fair factual determination. Although the NYCHA has rejected this suggestion on the ground that the burden on the managers would be unreasonable, there is substantial evidence to the contrary.²³⁸

Admission. Like the eviction process, the procedures for determining eligibility for admission to public housing are nearly devoid of due process. Although the ACC requires that "[t]he local Authority shall duly adopt and promulgate, by publication or posting in a conspicuous place for examination by prospective tenants regulations establishing its admission policies,"²³⁹ applicants for public housing frequently are unable to discover the Local Authority's admission criteria. In addition, the determination of eligibility for admission is made on an ex parte basis, leaving little room for challenge or review. While a hearing may be available for tenants threatened with eviction on grounds of undesirability, most Authorities provide no similar review procedure to applicants denied housing on similar grounds.²⁴⁰

Recent judicial challenges to arbitrary admission procedures in New York²⁴¹ prompted the NYCHA to revise its regulations for admission.²⁴² Under the new procedures the applicant must be given a notice containing the reasons for denial or deferral of his request for admission to public housing and informing the applicant that he may request a personal interview for explanation of the reasons for the admission determination. The new procedure also provides that each applicant who appears for an explanation must be informed that he may submit additional information and may request reconsideration of the admission decision.²⁴³ If the applicant requests reconsideration his case is reviewed by the NYCHA Chief of Tenant Selection and Chief of Social Service Division who, in

²³⁸ *Id.* at 37.

²³⁹ See Rosen, *supra* note 84, at 165.

²⁴⁰ *Id.* at 169-70.

²⁴¹ See, e.g., *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968).

²⁴² New York City Housing Authority, Revised Standards for Admission of Tenants, GM-1632 (May 9, 1968), revising GM-1287 (Nov. 29, 1961).

²⁴³ *Id.* at 4. Note that if a tenant does not request an interview for a fuller explanation of his ineligibility he will be unaware that he is entitled to reconsideration.

turn, may declare the family eligible, continue the finding of ineligibility, continue or initiate deferral, or reopen the case for further evaluation. If they disagree, the case is referred to the Tenant Review Board for final determination.²⁴⁴

Redress of Grievances

Procedural due process is nonexistent in the redress of public housing tenants' grievances. This is illustrated by the unavailability of administrative machinery through which a tenant might seek to have substandard housing conditions rectified or arbitrary management practices reviewed.²⁴⁵ Whether it is a problem of project disrepair, or a problem of an ex parte imposition of fines for violation of project regulations, the tenant uniformly finds a lack of impartial consideration and review. Although theoretically the tenant can petition the HAA for redress of a grievance, or seek review of HAA inaction under the Administrative Procedure Act,²⁴⁶ it is fairly clear that as a practical matter these remedies are inadequate.²⁴⁷

Since judicial involvement is not economically feasible, a possible solution would be to encourage Local Authorities to seek improvement of the lines of communication between tenant and management²⁴⁸ as well as to recognize tenant organizations or unions.²⁴⁹ Congress indicated a desire for tenant involvement in this type of governmental program²⁵⁰ by specifying in the Economic Opportunity Act of 1964²⁵¹ "that community action programs generally should be conducted 'with the maximum feasible participation of the residents of the areas.'"²⁵² Preference for grants was given to "programs which give promise of effecting a permanent increase in the capacity of individuals, groups, and

²⁴⁴ *Id.*

²⁴⁵ See note 45 *supra* and accompanying text.

²⁴⁶ 5 U.S.C. §§ 1001-11 (1964).

²⁴⁷ See notes 44-74 *supra* and accompanying text (Private remedies for sub-standard Public Housing section).

²⁴⁸ The extent of this power is another issue. See Dep't of Housing and Urban Development, Circular (Mar. 22, 1968).

²⁴⁹ See 77 YALE L.J., *supra* note 80, at 1399-1400.

²⁵⁰ See *id.* at 1392-93.

²⁵¹ 42 U.S.C. §§ 2701-2981 (1964).

²⁵² 77 YALE L.J., *supra* note 80, at 1392.

communities to deal with their problems without further assistance."²⁵³ Tenant involvement would seem to advance this congressional purpose²⁵⁴ and, in providing an effective mode of communication of tenant grievances to project management and administration,²⁵⁵ permit an economical and fair mode of grievance settlement, thereby correcting the want of due process inherent in ex parte determinations of project tenant grievances.²⁵⁶

Conclusion

Both state and federal courts are beginning to acknowledge the constitutional deficiencies in ex parte decisions that may adversely affect the beneficiaries of government programs.²⁵⁷ In *Thorpe II*, the Court required that adequate notice of and the reason for eviction be given the tenant, but did not provide the tenant a meaningful opportunity to contest the reason for arbitrary evictions.²⁵⁸ The HUD circular is a first step in the right direction; however, agency regulations or new legislation should clarify this procedure and make it enforceable. The Local Authorities should be compelled to adopt formalized standards for admission and eviction pursuant to established guidelines and subject to federal approval.

Recommendations

1. One solution would be the mandatory use by public housing authorities of hearings which embody due process guarantees. Such hearings would be held before an impartial board having jurisdiction over all issues involving tenant-management relations. Adequate notice and preparatory devices should be guaranteed the

²⁵³ 42 U.S.C. § 2785(d) (1964). See 77 YALE L.J., *supra* note 80, at 1392.

²⁵⁴ See 77 YALE L.J., *supra* note 80, at 1369 n.9. The Federal Savings and Loan Insurance Corporation, as lessor of foreclosed properties, signed a three-year contract with a tenant union in Illinois. Also, HUD approved a public housing lease which recognizes a tenant union and establishes formal grievance machinery for a project in Michigan. *Id.*

²⁵⁵ *Id.* at 1369, 1374-76. But see Strauss, *Tenant Unions: Special Privilege Outside the Law*, 32 J. PROP. MANAGEMENT 129 (1967).

²⁵⁶ Angevine, *The Poor and Public Housing* (Law & Poverty Project, Boston Univ. School of Law, Jan. 6, 1967), in OEO LEGAL SERVICES NOTEBOOK 4.21-37 (Jan. 1968). JOINT COMM. ON PUBLIC HOUSING, PUBLIC HOUSING FOR CLEVELAND CITIZENS 21 (undated) (report on the Cleveland Metropolitan Housing Authority).

²⁵⁷ See, e.g., *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968); *Vinson v. Greenburgh Housing Authority*, 29 App. Div. 2d 338 (1968).

²⁵⁸ *Cf.* notes 241-42 *supra* and accompanying text.

tenant, and the hearing should be conducted in a formal manner using established rules of evidence, with an adequate record being kept of the proceedings. The availability of judicial review is also necessary.²⁵⁹

2. Judicial review of the day-to-day determinations of Local Authority officials would be cumbersome, expensive, and time-consuming. Arbitration, on the other hand, is cheaper, faster, and requires less legal expertise to function properly. The arbitrators either could be professionals or representation on the arbitration board could be divided between management and tenants. The former approach is espoused by a model lease developed by The Joint Committee on Public Housing (in Cleveland),²⁶⁰ which provides for compulsory binding arbitration of all controversies relating to the lease except those arising from non-payment of rent. Determination and award by the arbitrator is a condition precedent to judicial action.²⁶¹

3. Still another possible solution is the establishment of tenant unions in the project housing area and the use of a grievance panel or committee composed of union and project management officials.²⁶² Experiments in the private housing sector have proved

²⁵⁹ See notes 245-47 *supra* and accompanying text.

²⁶⁰ JOINT COMM. ON PUBLIC HOUSING, *supra* note 256. In the case of nonpayment of rent, the tenant may request arbitration. *Id.* The following is a model administrative hearing that satisfies all requirements of procedural due process. The Massachusetts legislature recently passed two bills which grant at least minimal due process rights to public housing tenants. The first prohibits the termination of tenancies of public housing tenants unless cause is shown and unless the tenant has been granted a hearing. The bill provides that:

The tenancy of a tenant of a housing authority shall not be terminated without cause and without reasons therefore given to said tenant in writing. A tenant at his request shall, except in the case of nonpayment of rent, be granted a hearing by the housing authority at least 15 days prior to any such determination. The housing authority's determination of cause shall be reviewable in the district court whenever an action for summary process is brought for possession of the premises. MASS. GEN. LAWS ANN. ch. 121, § 43 (Supp. 1968).

For the second bill, see note 262 *infra*.

²⁶¹ JOINT COMM. ON PUBLIC HOUSING, *supra* note 256, at 32-33.

²⁶² For a substantially similar approach see MASS. GEN. LAWS ANN. ch. 121, § 44 (Supp. 1968). The Massachusetts legislature gave the following recognition and protection to tenants' organizations:

A housing authority or its designee shall meet at reasonable times with tenant organizations to confer about complaints and grievances; provided, that if there is more than one tenant organization in any housing project, said authority or its designee shall not be obliged to meet with more than two organizations in each project which

successful where landlord and tenant have agreed on the scope of such a procedure.²⁶³

IV. UNFAIR MANAGEMENT PRACTICES

Great injustices exist in the day-to-day management of public housing projects due to the almost unlimited discretion of the Local Authority in this area. Tenants' complaints of arbitrary practices include: fees and charges imposed on tenants for infraction of project rules,²⁶⁴ for late payment of rent, or for "key loans" when tenants have locked themselves out; assessments for repairs when no culpability on the part of the tenant has been established;²⁶⁵ repair charges added to rent, thereby subjecting tenants to summary eviction for failure to pay such charges; threats of illegal eviction; invasion of privacy of tenants' dwellings; inadequate utility allowances in leases resulting in added charge to tenants;²⁶⁶ charging of security deposits; and ineffectively promulgated rules and regulations.²⁶⁷ A major cause of these widespread practices is the lack of administrative guidelines for management. The HUD guidelines are restricted to technical, clerical, or record-keeping assistance. More specific standards may be imposed at the local level; generally, however, managers are given considerable latitude and power in running the project.

Another major source of irritation is the structure of the graded rent system.²⁶⁸ Tenants resent paying a large percent of their pay

represent, as the housing authority may determine, the largest numbers of tenants in that project. The housing authority shall inform the tenant organizations of its decisions on any matter presented. MASS. GEN. LAWS ANN. ch. 121, § 43 (Supp. 1968).

See also 12 WELFARE L. BULL. 9 (1968).

²⁶³ Davis & Schwartz, *supra* note 80, at 112-15, 149-51.

²⁶⁴ See Friedman, *supra* note 4, at 659, 663.

²⁶⁵ Often damage has been done by vandals or repairs are necessitated by normal depreciation and wear and tear.

²⁶⁶ In response to a suit by tenants who alleged that they had been charged up to \$100 in the winter quarter for excess use of gas, the NCHA announced that it was henceforth abolishing such excess charges and that it would absorb future costs without a raise in rents. Washington Post, Sept. 20, 1968, § B, at 4, col. 1.

²⁶⁷ Tenant dissatisfaction with these "fines" for transgressions that are not *malum in se* is heightened in many cases by the vagueness of the regulation and a lack of notice of its issuance. See notes 226-44 *supra* and accompanying text for a discussion of the procedural due process problems in management practice.

²⁶⁸ PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 29.

increases for additional rent.²⁶⁹ Charging back rent to tenants who fail to report income increases, including the income of secondary wage earners in computing rents, and using the same rent scale for older dwellings as for newer, more desirable dwellings are other sources of resentment.²⁷⁰ To reduce the confusion and irritation caused by rent adjustment, management should conduct income checks and make reassessments on an annual basis rather than requiring tenants to report interim changes in income. In addition, modifications are needed regarding secondary income in order to provide greater incentive to increase family income.²⁷¹

General Responsibility for Management

Although HUD's Management Manual, a mandatory directive, sets guidelines for income limits, rents, and eligibility standards for continued occupancy, the day-to-day management of public housing projects is within the almost exclusive jurisdiction and discretion of the Local Authority.²⁷² The Housing Act confers upon local public housing agencies "the maximum amount of responsibility in the administration of the low-rent housing program . . ."²⁷³ HUD's advisory directive, The Local Housing Authority Handbook, describes the role of the Local Authority as that of a private landlord charged with complete management responsibility.²⁷⁴

Similarly, state enabling legislation vests in the Local Authorities the responsibility for complete operation of public housing projects.²⁷⁵ Although the regulations of some Local

²⁶⁹ They also resent being evicted for "overincome."

²⁷⁰ PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 29.

²⁷¹ *Id.* at 30-31; Dep't of Housing and Urban Development, Circular (Mar. 22, 1968).

²⁷² HUD's definition of "rent schedules" may have some relevance in determining the legality of adding charges for repairs to a tenant's rent. See LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 3.3(e) (Oct. 1967).

²⁷³ 42 U.S.C. § 1401 (1964). The ACC's only admonition to Local Authorities is that their operation fulfill the objectives "of providing decent, safe and sanitary dwellings . . . within the financial reach of families of low income . . . in such a manner as to promote serviceability, efficiency, economy and stability." PHA, ACC, *supra* note 15, § 201.

²⁷⁴ The HANDBOOK does deal specifically with several of the problems enumerated above, such as charges for damages, setting of rents and rent collection. Outside of these areas, however, the Handbook's role seems limited to rendering technical assistance and advice to Local Authorities on such matters as manner of repair and maintenance. See PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, Pt. I, § 7, ¶ 4 (Aug. 1963).

²⁷⁵ See HOUSING ASSISTANCE ADMINISTRATION DRAFT ENABLING ACT § 8(b) (1965).

Authorities are detailed and specific in the areas of admission and eviction, other areas are marked by a complete lack of guidelines for daily operation.²⁷⁶

Assessment of Fees and Charges

Cost of repairs. A common, if not universal, practice of project management is the assessment of the cost of repairs necessitated by the tenant's failure to maintain their individual units in a proper manner. Although this practice has direct federal sanction and encouragement,²⁷⁷ repairs made necessary by reasonable wear and tear are excepted from assessment.²⁷⁸ A common allegation of public housing tenants, however, is that charges are made for repairs necessitated by normal depreciation and for damages resulting from external causes, such as vandalism, over which the tenant had no control.²⁷⁹ Another recurrent complaint is that while the tenant may be responsible for the damage, the charge is determined and levied without a right of hearing for the tenant or a review from the decision of a single management official. The determination of culpability is made, if at all, by the maintenance personnel who make the repair. Since these charges are normally added to rent, a tenant is subjected to dispossession if he fails to pay them. This collection procedure does not seem to be authorized at the federal level.²⁸⁰ The Local Authority's basis for this practice is a clause in the lease by which the tenant agrees to pay such charges "as additional rent."²⁸¹

The practice of assessing the tenant the cost of repairs and adding the charge to rent has no parallel in the private landlord-

²⁷⁶ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 36; JOINT COMM. ON PUBLIC HOUSING, *supra* note 256, at 19.

²⁷⁷ LOCAL AUTHORITY HANDBOOK, *supra* note 24, Pt. II, § 6, ¶ 3(a) (Feb. 1966).

²⁷⁸ *Id.*

²⁷⁹ See Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 8, *Humphrey v. New York City Housing Authority*, Civil No. 4236/67 (S.D.N.Y., filed Oct. 31, 1967) & *Lockman v. New York City Housing Authority*, Civil No. 4414/67 (S.D.N.Y., filed Nov. 12, 1968), noted in 12 WELFARE L. BULL. 8 (1968); NATIONAL CAPITAL HOUSING AUTHORITY, PROGRESS REPORT at 2 (1966) (on tenant concerns).

²⁸⁰ Such changes are not contained in the LOW-RENT MANAGEMENT MANUAL's statement of what items shall be included in rent schedules. LOW-RENT MANAGEMENT MANUAL, *supra* note 22, § 3.3(e) (Oct. 1967).

²⁸¹ *E.g.*, Housing Authority of the Birmingham (Ala.) District, Dwelling Lease, HADB No. 75, ¶ 2(e) (Feb. 1960); Chicago Housing Authority, Dwelling Lease, CHA 543 FR, ¶ 6

tenant sector. While it is true that in the lease of private housing the tenant may agree to pay for repairs necessitated by his own negligence, this is only an affirmation of his common law liability for waste.²⁸² Such liability is determined by the judiciary in a civil action rather than by the landlord. Private landlords do use the security deposit device to insure payment at the termination of a tenancy for damages resulting from tenant negligence or destruction;²⁸³ however, forfeiture of the security deposit is unrelated to liability for rent and possible summary dispossession of the tenant for failure to pay rent.²⁸⁴

Furthermore, if repair charges, charges for key loans, assessments for late payment and the like are added to and considered to be rent, the final sum payable may exceed the maximum permissible rent chargeable in relation to the tenant's income. The inequity is compounded in cases where the damage was not due to the tenant's fault or where fees for key loans or other service charges bear no reasonable relationship to the cost of the service provided. As a practical matter, the excess charge in these cases can be characterized only as an increase in rent without a concomitant increase in income.

Tenants' Remedies

The following relief would seem to be available to a tenant whose rental liability has been increased by the tacking of repair charges and other fees.

A Defense to eviction. Where a tenant is subjected to a summary eviction proceeding based on his failure to pay rent, it can be argued that the landlord is entitled to possession only if the tenant is in arrears in rent. The tenant is not required to pay the repair charge in order to maintain his possession.²⁸⁵

(Jan. 1967); National Capital Housing Authority, Dwelling Lease, NCHA 583, ¶ 3(g) (Aug. 1961).

²⁸² See note 309 *infra*.

²⁸³ Very often, however, private landlords cannot get such deposits from low income tenants.

²⁸⁴ The commission of waste can be a ground for the forfeiture of a lease. See generally Annot., 3 A.L.R. 672 (1919). The decisions indicate, however, that to justify a forfeiture of a tenant's term for waste the circumstances must show a "wanton disregard" of the lessor's rights. *E.g.*, Klein v. Longo, 34 A.2d 359 (D.C. Mun. Ct. App. 1943).

²⁸⁵ If the tenant has signed a lease clause whereby he has purportedly agreed to pay such assessments as additional rent, the argument can be made that his consent was not an

Requiring judicial determination of liability. A common provision concerning liability for repairs is found in the Boston Housing Authority Dwelling Lease in which the tenant supposedly agrees "to pay when billed for any damage to any of the premises or equipment of the Authority which the Authority *shall determine* to have resulted directly or indirectly from causes within the control of the Tenant or his family." It would seem elementary that the Housing Authority cannot usurp the function of the judiciary in determining liability for tenant-caused damage. If the liability is based on contract²⁸⁶—the terms of the lease—it could be contended that it is contrary to public policy for a Local Authority to set itself up, by contract, as the sole judge of a tenant's liability and thus deprive him of the right to have his liability determined by a court. Moreover, contractual liability in the absence of standards or measures agreed upon by the parties is determined by a standard of reasonableness. Since reasonableness is an issue for a court or jury,²⁸⁷ the tenant in these cases is entitled, at the very least, to a judicial determination of liability and the amount of damages. Even where the tenant's liability for damage to the premises is based upon an Authority's rule or regulation which may be nothing more than a reaffirmation of a tenant's common-law or statutory liability for waste, the tenant is certainly entitled to a *de novo* judicial review.²⁸⁸

The penalty for late payment of rent is the only financial sanction mentioned in the federal directives. The Low-Rent Management Handbook, after indicating that the policy of assessing penalties for late payment has met with varying success among Local Authorities, advises that "only substantial penalties are effective in improving rental collections."²⁸⁹ However, in terming

informed consent. For an argument that the lease is a contract of adhesion because many of its terms, including this clause, were thrust upon the tenant by virtue of the Local Authority's over-powering bargaining position, see notes 298-302 *infra* and accompanying text.

²⁸⁶ *But cf.* notes 321-23 *infra* and accompanying text.

²⁸⁷ See 1 A. CORBIN, CONTRACTS § 99 (1963).

²⁸⁸ However, damages for waste are unrelated to liability for rent and require a separate cause of action. In no case should separate liability for waste be the basis for a suit for possession because of nonpayment of rent. Under modern pleading, counts asking damages for waste and possession because of nonpayment of rent may be joined in the same complaint; however, they would require separate allegations and different proof. See, e.g., D.C. CODE ANN. §§ 16-1109 to 11 (1967).

²⁸⁹ LOCAL AUTHORITY HANDBOOK, *supra* note 24, Pt. 11, § 4, ¶ 10 (Aug. 1961).

the charge for late payment as a penalty and indicating the effectiveness of large penalties, the Handbook advocates a practice of punitive measures which is in complete discord with anti-poverty objectives and sound legal principles.

Attacks on fines as punitive and as contrary to the legislative purpose. The Housing Act provides that "rents shall be fixed by the public housing agency and approved by the [Secretary of HUD] after taking into consideration (a) the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability of the family, and (b) the economic factors which affect the financial stability and solvency of the project."²⁹⁰ The rent schedules submitted for approval do not include charges such as key loans or fines for rule infractions.²⁹¹ The arbitrary inclusion of additional charges as rent not only violates the statute, it defeats the very purpose of the low-rent housing program which was designed to provide "decent, safe and sanitary dwellings within the financial reach of families of low income." The fees or charges exacted for late payment of rent,²⁹² for a key loan,²⁹³ or for infraction of rules and regulations²⁹⁴ are in excess of the cost or damages incurred by the Authority by reason of the breach. Such fees are designed solely to prevent such infractions.²⁹⁵

If the assessment is characterized as damages for breach of contract, it should be compensatory and not punitive in order to be

²⁹⁰ 42 U.S.C. § 1402(1) (1964).

²⁹¹ An argument could be made that these charges are within the "legal, economic, and social factors" which the Local Authority may take into consideration in fixing rents, See LOCAL AUTHORITY HANDBOOK, *supra* note 24, Pt. VII, § 2 (May 1964). However, assuming *arguendo* the validity of the position, the charges usually have no reasonable relation to cost or damage and should not be used as revenue raising measures.

²⁹² These charges are often as high as \$5. See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 33.

²⁹³ The amount varies not only from project to project but from tenant to tenant depending on the favor the tenant holds with the project manager. *E.g.*, JOINT COMM. ON PUBLIC HOUSING, *supra* note 256, at 18.

²⁹⁴ One NYCHA tenant family was fined \$5 because their child was riding a bicycle on a project sidewalk, \$2 for playing ball on a sidewalk, and \$1 for walking on snow-covered grass. Memorandum of Law in support of Plaintiffs' Motion for a Preliminary Injunction at 8, *Humphrey v. New York City Housing Authority*, Civil No. 4236/67 (S.D.N.Y., filed Oct. 31, 1967) & *Lockman v. New York City Housing Authority*, Civil No. 4414/67 (S.D.N.Y., filed Nov. 12, 1968), noted in 12 WELFARE L. BULL. 8 (1968).

²⁹⁵ The LOCAL AUTHORITY HANDBOOK fosters this policy by indicating that "only substantial penalties are effective in improving rental collections." Note 289 *supra* and accompanying text.

enforceable. However, the NYCHA Tenant Rules and Regulations describe the fines as:

. . . liquidated damages, a reasonable charge imposed by the Landlord, for extra services required by reason of the infraction by the Tenant or any member of his family of requirements or rules established for the proper administration of the project, the protection of the Landlord's property or the safety and convenience of other tenants.²⁹⁶

This provision is a contradiction in terms in that liquidated damages are by definition fixed as to amount before any breach. Furthermore, liquidated damages must have a reasonable relation to the actual or probable loss.²⁹⁷

The alternative basis of tenant liability, tort damages, like that for breach of contract, must be compensatory except in those few areas where courts allow the award of punitive damages.

Adhesive nature of the leases. Many of these charges are not specifically mentioned in the lease; rather the lease merely incorporates by reference all the rules and regulations of the Authority presently in effect and thereafter to be established.²⁹⁸ Under strict contract law the tenant seems to have agreed to all the Authority's rules and regulations. However, an examination of the context in which a public housing lease is executed reveals many factors which should lead to judicial reluctance to enforce certain of these lease provisions. Foremost, of course, is the fact that the tenant has no voice in determining the terms of his lease since he is most often unaware of, or confused by, its vague terms and complicated clauses. He approaches the transaction with hat-in-hand and, feeling that he is a fortunate recipient of a governmental largess,²⁹⁹ is not disposed to question the terms of his tenancy as dictated by the Authority. There is no opportunity for him to negotiate the terms of his lease.³⁰⁰ Many Authorities neither inform

²⁹⁶ NEW YORK CITY HOUSING AUTHORITY, TENANT RULES AND REGULATIONS (Sept. 1959).

²⁹⁷ *Kothe v. Taylor Trust*, 280 U.S. 224, 226 (1930); 5 A. CORBIN, CONTRACTS § 1059 (1964); 5 S. WILLISTON, CONTRACTS § 779 (3d ed. W. Jaeger 1961).

²⁹⁸ *But see* 1 A. CORBIN, CONTRACTS § 95 (1963). Any unilateral determinations must be made in good faith and subject to some prescribed standard or implied limitations. *Id.*

²⁹⁹ *See Briar, Welfare From Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370, 374-77 (1966).

³⁰⁰ *See* notes 321-24 *infra* and accompanying text (discussion of adhesion contracts).

the tenant of, nor make available to him, the incorporated rules and regulations which comprise a substantial portion of his agreement.³⁰¹ Quite often he is not informed of rule changes or additions made during his tenancy. In addition, uniform charges for damages and extra services usually are not listed and no procedure is provided for denying liability or challenging the amount of the charge.³⁰² Hopefully, courts confronted with the inequities surrounding the execution of public housing leases will strike financial sanctions and other onerous clauses as an unconscionable perversion of our national anti-poverty and housing objectives.

Recommendations

Uniform, nation-wide regulation. In order to eliminate the great diversity in managerial practices and to restrict the latitude and power in operation presently vested in project managers HUD must take a more active and direct role in the supervision of project operations. A necessary first step toward this goal is the standardization of rules and regulations governing day-to-day project management.³⁰³

It has been charged that project managers and other personnel, who are property oriented by background and inclination, are concerned primarily with the operation and maintenance of physical property and are not attuned to the socio-legal rights and demands of tenants.³⁰⁴ Since public housing should be heavily committed to rehabilitating the dependent poor, the qualifications and criteria of project managerial staffs should be reexamined and a reorientation program instituted where necessary.³⁰⁵ In addition,

³⁰¹ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 31.

³⁰² In comparison, private landlords in a similar superior bargaining position have not resorted to financial sanctions; nor do private leases customarily refer to rules and regulations of the landlord in effect or to be subsequently enacted. The entire undertaking of the tenant is encompassed by the lease; he need not look elsewhere to determine his obligations. *Id.* The non-promulgation of rules raises another procedural due process issue. See notes 213-25 *supra* and accompanying text.

³⁰³ Although it would be quite difficult for the federal authority to completely control the caliber of management personnel, it could very easily implement specific guidelines to govern their actions in the everyday administration of public housing.

³⁰⁴ See generally Friedman, *supra* note 4, at 654-56, 664-69.

³⁰⁵ One study has recommended that this re-orientation should include "an in-service training program, and an outside educational program at a local college or university such

federal guidelines as to qualifications and background for employment should be promulgated to guide Local Authorities in the selection of sociologically oriented and properly motivated personnel.

This federal formalization of internal procedures and practices should be carried out with a view to enlarging the self-respect and dignity of tenants and minimizing the undue concern for physical project property. To reach this goal the breadth of the regulations should be substantially reduced. Supervision over tenants should at least be limited to those areas commonly regulated by private landlords and should be accompanied by uniform procedural rules which will provide adequate safeguards for due process and review.

Increased tenant involvement. To ameliorate hostile management-tenant relationships, to instill pride, dignity, and a sense of self-determination in tenants, and to minimize arbitrary and capricious management practices, tenants should be afforded meaningful participation with management in everyday project operation.³⁰⁶ Tenant involvement can take several forms—for example, the creation of separate tenant organizations to be recognized as legitimate bargaining agents for tenants,³⁰⁷ tenant participation with management officials on commissions which would handle a myriad of operational tasks such as setting and enforcing regulations, and acting on grievances concerning management. Long-range plans should include the consideration of alternatives to the present public housing program. The desirability of centralized management can be seriously questioned. Among the proposals being explored is the creation of small owning-managing corporations eligible to receive subsidies conditioned upon specified rental and operating policies. Perhaps rent subsidies or a guaranteed annual income will provide a viable alternative to the present programs. It has also been suggested that it might be less expensive and more conducive to family responsibility if subsidies were given for the purchase of family homes rather than for rentals. A more moderate proposal is that the practice of forcing over-

as those provided to para-professional personnel in other community institutions." JOINT COMM. ON PUBLIC HOUSING, *supra* note 256, at 22.

³⁰⁶ See Dep't of Housing and Urban Development, Circular (Mar. 22, 1968).

³⁰⁷ See generally Comment, *Tenant Unions: Legal Rights of Members*, 18 CLEV.-MAR. L. REV. 358 (1969).

income tenants out of public housing should be discontinued in favor of permitting continued occupancy at slightly increased rentals.³⁰⁸

Elimination of financial sanctions. The arbitrary and unjust system of assessing financial sanctions and collecting them as part of rent must cease. An action for rent or for possession based on nonpayment of rent should be limited to that sum of money which the tenant is required to pay based on his income pursuant to established and approved rent schedules. Further, a tenant's liability for repairs ought not be more than a private tenant's responsibility, which is customarily limited to repairs indisputably occasioned by active commission of waste or through negligence.³⁰⁹ In assessing charges adequate safeguards for due process and appeal procedures are essential. If procedural safeguards are not established the tenant must be afforded a trial de novo to determine his liability and the reasonableness of the charge.

Other than liability for waste, assessment of fees, fines, and other financial sanctions should be abolished. These strictly penal charges are not customarily assessed in private low-income housing arrangements and are certainly incompatible with the objectives of this nation's housing and poverty programs.

V. UNCONSCIONABLE CLAUSES IN PUBLIC HOUSING LEASES

The plethora of one-sided terms imposed on tenants in public housing leases is symptomatic of the impervious attitude of Local Authorities toward the public housing clientele. Public housing leases, generally far more restrictive than those employed in the private sector, take advantage of the poor and are designed to strip the tenant of his rights and remedies. The shortage of decent low-income private housing and public housing units in urban areas, the

³⁰⁸ Proposals of this nature are being considered by the National Housing Policy Forum. PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at 46-47.

³⁰⁹ The traditional common law duty should be changed in one respect. The common law recognized an implied duty on the part of the tenant to make minor repairs. This duty arose from his duty not to commit waste. While this rule was fair in an agrarian society where the repairs were simple and the necessary tools were close at hand, today the lessor is in a better economic position to make repairs, and the tenant should be relieved of his common law duty, absent a specific covenant. The common law rule has been changed by statute in a number of jurisdictions through the enactment of housing codes and other public health and safety statutes. 1 AMERICAN LAW OF PROPERTY § 3.78 (A.J. Casner ed. 1952).

impossibility of negotiating terms and the voluminous forms and application blanks of a massive bureaucracy all serve to give the Local Authority an overwhelming amount of bargaining power.

Federal and state enabling legislation and the ACC are silent as to the contents of public housing leases. The Low-Rent Management Handbook merely comments that, in addition to the standard landlord-tenant obligations, the public housing lease must require the tenant to report changes in income or status and agree to rental increases based on such changes. The Local Authorities, however, have seized on the Handbook recommendation that the lease be from month to month³¹⁰ as a license to gear the lease in their favor.

The following examples of the types of clauses found in public housing leases demonstrate the onerous terms imposed by the Local Authorities. Public housing leases create, at most, month-to-month tenancies. The tenancies are usually of even shorter duration because a month-to-month tenancy requires thirty day's notice to terminate whereas most public housing tenancies can be terminated on lesser notice. A fifteen-day notice requirement is most common; however, at least one Authority provides for a period of only ten days.³¹¹ The tenant must often agree to waive even the limited notice described above upon the breach of any clause or condition in the lease or upon the termination of the lease. The clause containing this provision also grants to management "all rights and privileges accorded by law for the purpose and to the end of obtaining immediate possession of the said premises."³¹² *Richardson v. Housing Authority*³¹³ focused on a lease provision compelling a female tenant to waive her right to all notices required by law and all legal proceedings to recover possession if she gave birth to an illegitimate child. This same waiver of the right to possession "without legal notice or the institution of any legal

³¹⁰ PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK Pt. IV, § 6, (d)(1) (July 1965).

³¹¹ E.g., Housing Authority of the Birmingham (Ala.) District, Dwelling Lease, HABD no. 75, ¶ 1(c) (Feb. 1960); Housing Authority of New Orleans, Dwelling Lease, Form D-104 (May 1, 1960).

³¹² E.g., Housing Authority of New Orleans, Dwelling Lease, Form D-104, ¶ 3 (May 1, 1960).

³¹³ Civil No. 678 (E.D.N.Y. May 13, 1968) (consent order).

proceedings whatsoever" takes effect in some leases at the moment the tenant's income exceeds maximum limits.³¹⁴

Public housing leases generally contain provisions requiring the tenant to pay the Authority's costs and attorney's fees in connection with any legal proceedings against the tenant.³¹⁵ Moreover, cognovit clauses concerned with collection procedures generally deny the tenant's basic legal and constitutional rights in providing for a confession of judgment, waiver of service of process and trial by jury, and consent to immediate execution.

In violation of the Handbook, exculpatory clauses immunize the Authority from liability for personal injuries to the tenant or damage to his property.³¹⁶ The Authorities also attempt through these leases to disclaim liability for failure to provide basic services and utilities,³¹⁷ and to shift the duty of repair to the tenant. All leases enumerate various obligations and liabilities and then designate the Authority as the sole judge of whether the tenant has committed any prohibited acts.

The tenant may also be forced to relinquish ownership of personal property left on the premises when he vacates.³¹⁸ Furthermore, despite the Gwinn Amendment cases,³¹⁹ clauses can still be found conditioning occupancy in public housing on non-membership in subversive organizations.

³¹⁴ *E.g.*, Housing Authority of New Orleans, Dwelling Lease, Form D-104 (May 1, 1960).

³¹⁵ A recent New York statute provides that if a lease of residential property contains a provision that the landlord may recover attorney's fees and expenses incurred as a result of the tenant's failure to perform any covenant in the lease, there shall also be an implied covenant by the landlord to pay the tenant attorney's fees and expenses incurred as a result of the landlord's failure to perform any covenant or in the successful defense of any action by the landlord. N.Y. REAL PROP. LAW § 234 (McKinney 1967).

³¹⁶ *See* Thomas v. Housing Authority, 71 Wash. 2d 69, 70-71, 426 P.2d 836, 837 (1967); Housing Authority of the Birmingham (Ala.) District, Dwelling Lease, HABD no. 75, ¶ 4 (Feb. 1960); Boston Housing Authority, Dwelling Lease, Conditions of Occupancy, no. 28; National Capital Housing Authority, Dwelling Lease, NCHA 583, ¶ 3(j) (Aug. 1961).

³¹⁷ *See* Cleveland Metropolitan Housing Authority, Dwelling Lease, CMHA 8-4W, ¶ B(3) (Nov. 1961); Housing Authority of New Orleans, Dwelling Lease, Form D-104, ¶ 2 (May 1, 1960); Housing Authority of the City and County of San Francisco, Dwelling Lease, AC 65 (Feb. 1, 1965).

³¹⁸ *See* Housing Authority of the Birmingham (Ala.) District, Dwelling Lease, HABD No. 75, Conditions of Occupancy, no. 13 (Feb. 1960). The general common law rule is that the tenant does not forfeit title to his personal property by failing to remove it after the expiration of the lease, even if he fails to do so within a reasonable time. 32 AM. JUR. *Landlord and Tenant* § 842 (1941).

³¹⁹ *See* notes 344-47 *infra* and accompanying text.

Perhaps the most humiliating waiver a tenant must make is that of his "right of privacy." Many leases require the tenant to submit to a search of his dwelling at any time for almost any reason. Such clauses requiring consent to searches without a search warrant or even probable cause are of doubtful validity.³²⁰

Contracts of Adhesion

The public housing lease is the epitome of a contract of adhesion—an agreement "in which one party's participation consists in his mere adherence, unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise."³²¹

Courts have stricken burdensome clauses in various types of contracts when acceptance by one of the parties was unavoidable because of circumstances surrounding the negotiation and execution of the contract.³²² An argument has been made that all the elements of an adhesion contract exist in the lease of private slum property to an indigent tenant.³²³ This argument applies with greater force in the case of the public housing lease. Lease clauses are fairly standardized throughout the Authorities because the Authorities are the draftsmen. Provisions such as those listed above are patently beneficial only to the Authority which is in a more dominant position than the private landlord. An applicant for public housing has no choice but to adhere to the dictated terms; if he objects he remains in, or is relegated to, private slum housing.

Although take-it-or-leave-it behavior has continued to flourish in the private sector under the guise of freedom of contract, the public housing lease must be examined not as a bargained-for contract but as a set of rules and conditions laid down by the Local Authority. Each clause must be scrutinized in the light of legislative policy. When so viewed the incompatibility of these conditions with

³²⁰ See also *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (welfare benefits may not be conditioned upon the recipient's consent to unconstitutional searches); Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1348-50 (1963).

³²¹ Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953).

³²² See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

³²³ Schoshinski, *supra* note 64, at 555.

the basic purposes of the low-income housing program becomes obvious. These harsh terms certainly cannot be rationalized as promoting the legislative purposes of alleviating oppressive slum conditions and providing a "suitable living environment" for all.

Courts have mitigated the severity of adhesion contracts in several ways.³²⁴ In the case of the public housing lease the appropriate relief would be a declaration that the unconscionable conditions are null and void.

Attacks on Exculpatory Clauses

The Low-Rent Management Handbook expressly prohibits any attempt by Local Authorities to disclaim liability for their negligence.³²⁵ Exculpatory provisions of this nature contradict the enunciated public policy of several states³²⁶ as well as the stated federal purpose of providing "decent, safe and sanitary dwellings for families of low income."³²⁷ The policy of freedom of contract should not be enforced against the public housing tenant who, lacking any bargaining power, is the alleged beneficiary of state legislation and local housing regulations which impose duties of safe maintenance on the landlord. Such exculpatory attempts have met with judicial and statutory disapproval in the private sector.³²⁸

Attempts by Local Authorities to shift statutory obligations of repair and maintenance to the impecunious tenant contravene public policy and federal housing legislation as do disclaimers of liability for failure to supply heat, water, and electricity "for any cause whatsoever."³²⁹ The Supreme Court of Washington has held that a clause exculpating a Local Authority from liability for personal injuries of a tenant, arising from "any existing or future condition" or "defect" in the premises, is void as violative of public policy. The court founded its decision on the Authority's "public duty" and on the great inequality of bargaining power

³²⁴ *Id.* at 556.

³²⁵ PUBLIC HOUSING ADMINISTRATION, LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK Pt. IV, § 1, ¶ 6, (d)(2) (July 1965).

³²⁶ *E.g.*, N.Y. GEN. OBLIGATIONS LAW § 5-321 (McKinney 1964).

³²⁷ 42 U.S.C. § 1401 (1964).

³²⁸ See *Papakalos v. Shaka*, 91 N.H. 265, 18 A.2d 377 (1941); *3175 Holding Corp. v. Schmidt*, 150 Misc. 853, 270 N.Y.S. 663 (Mun. Ct. N.Y. 1934); *Boyd v. Smith*, 372 Pa. 306, 94 A.2d 44 (1953).

³²⁹ See note 317 *supra* and accompanying text.

between the Authority and the tenant.³³⁰ A sympathetic court would have little difficulty in also finding that such disclaimers destroy the mutuality of the parties' obligations.³³¹ A recent well-reasoned decision³³² recognized that a dwelling lease is a contract, and as such it "must always be most strongly construed against the party who prepared it, particularly where the other party has no voice in its terms."³³³

Waiver of Statutory Remedies

Public housing leases are replete with "waivers" by the tenant of rights, privileges, exemptions, and remedies which would otherwise be accorded him by law. Although courts sometimes will sanction such waivers in freely negotiated contracts between private parties,³³⁴ a strong argument can be made that these attempted waivers are inoperative for the reason stated by Professor Corbin:

It is obvious that when a right, a privilege, or a defense is conferred upon an individual by law, it is conferred upon him because it is believed to be in the public interest to do so. In many such cases it is believed to be contrary to the public interest to permit him to waive or to bargain away the right, privilege, or defense; and when it is so believed the attempted waiver or bargain is inoperative.³³⁵

Waivers should not be accorded the traditional judicial sanction when they appear in public housing agreements because they are not the result of a freely negotiated, arm's-length bargain between two private parties of relatively equal contractual power. The extortion of basic legal rights by a federally-funded, state-created, and locally administered public housing authority raises serious constitutional questions.³³⁶

Even if such protections can be waived, execution of the lease may not be a free and knowing waiver of tenant rights. If

³³⁰ *Thomas v. Housing Authority*, 71 Wash. 2d 69, 76-80, 426 P.2d 836, 841-43 (1967), noted in 44 WASH. L. REV. 498 (1969). For a similar early holding, see *Housing Authority v. Morris*, 244 Ala. 557, 14 So.2d 527 (1943).

³³¹ See I A. CORBIN, *CONTRACTS*, § 16, at 36-37 (1963).

³³² *United States v. Blakney*, Civil No. L&T 90300 (D.C. Ct. Gen. Sess., July 29, 1966).

³³³ *Id.* at 2.

³³⁴ See generally 6A A. CORBIN, *CONTRACTS*, § 515, at 727-33 (1962).

³³⁵ *Id.* at 728.

³³⁶ See notes 346-47 *infra* and accompanying text.

covenants in public housing leases constitute a waiver of rights given to a tenant by statute, an argument may still be made that individuals should not be easily permitted to waive statutory provisions enacted specifically for their protection.³³⁷

Confession of Judgment Clauses

A further illustration of the sweeping denial of legal protections to public housing tenants is the confession of judgment clause contained in the Chicago Housing Authority lease.³³⁸ Admittedly such clauses are "legal" in Illinois,³³⁹ but resort to such devices by public housing authorities is deplorable. They are peculiarly inappropriate in a lease of any kind, and especially so in a public housing lease.³⁴⁰

The public interest in protecting debtors in an inferior bargaining position has led to the abolition of confession of judgment agreements in many states.³⁴¹ In other jurisdictions, substantial limitations have been placed on their use.³⁴² In view of this widespread antipathy toward confessions of judgment, their use in public housing is appalling.

Authority As the Sole Judge of Tenant Conduct

Many leases attempt to establish the authority as the sole arbiter of tenant liability. The lack of an expressed standard by which liability is to be determined should render such clauses too uncertain and indefinite for enforcement.³⁴³ At the very least, a standard of reasonableness should be implied and judicial determination substituted for that of the Local Authority.

³³⁷ "[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy (citations omitted). Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Brookline Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

³³⁸ See note 281 *supra*.

³³⁹ ILL. REV. STAT. ch. 110, § 50 (1967). See Pyes, *Reappraisal of the Confession of Judgment Law*, 48 ILL. BAR J. 764 (1960).

³⁴⁰ Note, *Standard Form Leases in Wisconsin*, 1966 WIS. L. REV. 583, 590.

³⁴¹ For a listing of these states, see Note, *Confessions of Judgment*, 102 U. PA. L. REV. 524 n.5 (1954).

³⁴² *Id.* at 525 n.6.

³⁴³ See 1 A. CORBIN, CONTRACTS, § 393-410 (1963).

Gwinn Amendment Clauses

Clauses in which the tenant warrants that he is not a member of a "subversive organization" and in which he "agrees" to vacate should he become a member, were determined invalid more than a decade ago.³⁴⁴ Such a clause imposes an unconstitutional requirement as a condition of the tenancy because the tenant must relinquish his constitutionally protected rights of freedom of speech and assembly.³⁴⁵ One Local Authority's imposition of such a condition was held to be state action in violation of the equal protection clause of the fourteenth amendment.³⁴⁶ Legislatures or government agencies may set up reasonable criteria for the dispensation of a "privilege," but they cannot attach unconstitutional conditions to its grant.³⁴⁷

Recommendations

A model low-income lease must recognize and attempt to further the goals of public housing. Public housing legislation is not intended to protect landlords; its purpose is to aid indigent tenants by providing them with a decent, safe environment at a rental they can afford. Rather than fostering these ideals, however, current leases restrict the rights of tenants and insulate the liability of their landlords. To establish a cooperative management-tenant relationship and to reflect the intent of public housing legislation, leases must be based on three cardinal principles: clarity, brevity, and mutuality of obligation.³⁴⁸

1. A necessary first step toward the creation of a more equitable landlord-tenant relationship is the excision or amelioration of the unconscionable clauses discussed in this section. The lease should take the form of a mutual contract with privileges and obligations for both parties.³⁴⁹

³⁴⁴ See generally Williams, *Tenant's 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).

³⁴⁵ Cf. e.g., *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1964).

³⁴⁶ *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, cert. denied, 350 U.S. 882 (1955).

³⁴⁷ See O'Neil, *supra* note 147.

³⁴⁸ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at A-51-59.

³⁴⁹ An example of a private housing clause which adequately expresses mutuality of obligation is the following:

2. At present, and traditionally, leases are written in a form of legalese which is baffling to laymen and unclear to many lawyers. If a tenant is expected to accept his responsibilities under the lease, he must first understand them; therefore, the lease terms should be expressed in a clear, concise manner.³⁵⁰

3. If management's rules and regulations are not contained in the lease, a copy of them should be furnished to the tenant when the lease is signed. The tenant should be orally notified of the presence of these rules, and the more important ones, such as conditions of occupancy, should be explained to him.

VI. CONCLUSION

Born of a New Deal concern for those temporarily dispossessed by the Depression, the American system of public housing has found itself at the core of a new social context, including changes in tenants and their expectations.³⁵¹ Serious conflicts, which must be resolved by the judiciary and the legislatures, have resulted from these changes. The preceding discussion has reviewed four major legal problems confronting public housing tenants: sub-standard housing conditions, unreasonable admission and eviction standards, unfair management practices, and unconscionable lease terms.

To the extent that sub-standard public housing is allowed to stand, it is susceptible to the Supreme Court's indictment of privately owned slums. "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn."³⁵²

The landlord recognizes his continuing obligation to maintain this property. The landlord agrees that he or his duly appointed agent will inspect the premises subject of this agreement at least twice yearly during daylight hours or by special appointment, to note conditions and to arrange for the immediate correction of those conditions which fall within the landlord's responsibility in accordance with this agreement. The tenant hereby agrees to permit the inspection of these premises twice yearly and as well when emergency requires, and to arrange and pay for the immediate correction of those conditions which have been caused by his negligence or that of his invitees. The tenant further agrees to notify the landlord of conditions which require corrections. FED. BAR ASSN, MODEL RENTAL AGREEMENT, 57 GEO. L.J. 480, ¶ 7 (1968).

³⁵⁰ See PUBLIC HOUSING IS THE TENANTS, *supra* note 7, at A-51-53.

³⁵¹ See Friedman, *supra* note 4, at 642-54.

³⁵² Berman v. Parker, 348 U.S. 26, 32-33 (1954).

When tenants are subjected to unreasonable and irrelevant standards for admission and eviction, the public housing system perverts its reason for being. The care of those citizens who cannot find shelter in the private sector should be the central motivation of Local Authorities. When admission and eviction practices seek to accomplish any other goal, they illegitimately discriminate against the poor.

Unfair management practices and unconscionable lease terms are cruel deceptions of those who are often without any effective bargaining power. The inability of the poor to utilize the tools of the marketplace is exacerbated when the power of the state lies behind an inequitable contract. The misery arising from the physical deficiencies of many projects is aggravated by irrelevant regulations imposed by the management.

These injustices must be corrected if the public housing system is to fulfill its promise of twenty years ago to the Nation's indigent. It is no adequate defense to demonstrate that problems have arisen from changes in the social milieu. The requirements of the general welfare have always been a function of social change.