

The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status

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I. AN OVERVIEW: LEGISLATIVE AND JUDICIAL ACTION TO GIVE TENANTS A LEGAL RIGHT TO HABITABLE DWELLINGS

As recently as 1965, Burby's well-known hornbook on Real Property stated as black-letter law that "[i]n general, the lessor does not impliedly warrant that the leased land is suitable for a specific purpose," subject to well-recognized exceptions for leases of space in buildings under construction and for short-term leases of furnished dwellings,¹ and "[i]n the absence of a statute, and in the absence of a controlling covenant, a lessor is not under a duty to maintain leased land in a state of repair."² In 1977, however, the American Law Institute in the Landlord and Tenant Section of its Restatement (Second) of Property in substance took the position that, "[e]xcept to the extent the parties to a lease validly agree otherwise," every residential lease contains an implied warranty and covenant by the lessor that "the leased property . . . is suitable for residential use (both on the date the lease is made and during the period, if any, between that date and the date the tenant is entitled to possession),"³ and the lessor will "keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes [and] keep safe and in repair the areas remaining under his control that are maintained for the use and benefit of his tenants."⁴

Although the new Restatement's black-letter rules⁵ do not state

1. W. BURBY, REAL PROPERTY § 63 (3d ed. 1965).

2. *Id.* § 64.

3. RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1977).

4. *Id.* § 5.5.

5. The *Restatement* sections cited *supra* are contained in Chapter 5, entitled "Condition of Leased Property Prevents Contemplated Use." The section headings are as follows: § 5.1 Condition Unsuitable on Date the Lease is Made—Remedies Before Entry; § 5.2 Unsuitable Condition Arises After Date of Lease—Remedies Before Entry; § 5.3 Effect of Entry by Tenant on Remedies Then Available; § 5.4 Unsuitable Condition Arises After Entry—Remedies Available; § 5.5 Obligation of Landlord to

with complete accuracy the case law in a majority of American jurisdictions, they at least approximate what is by now a "majority rule." As the introductory Note to chapter five of the Landlord and Tenant Section of the Restatement observes,

In recent years, the definite judicial trend has been in the direction of increasing the responsibility of the landlord, in the absence of a valid contrary agreement, to provide the tenant with [residential] property in a condition suitable for the use contemplated by the parties. This judicial trend has been supported by the statutes that deal with this problem. This judicial and statutory trend reflects a view that no one should be allowed or forced to live in unsafe and unhealthy housing.⁶

The new principle that the landlord must provide the residential tenant with a habitable dwelling is now established in at least thirty-one jurisdictions. In a majority of these jurisdictions, the principle resulted entirely from legislative action. In some of the others it arose from judicial action, and in the rest its origin was both legislative and judicial. Although neither the legislative nor the judicial approach has been uniform, the net result can accurately be characterized as a "revolution" in American landlord-tenant law.

The tenants' rights legislation of the 1960s and 1970s generally fall into three types:

- 1) Statutes that, without expressly creating any new rights, build on existing housing codes by detailing new tenant-initiated private remedies for the landlord's failure to provide a habitable dwelling.⁷
- 2) Statutes that expressly impose a new duty on landlords to provide tenants with a habitable dwelling, usually stated in terms of a

Keep Leased Property in Repair; § 5.6 Parties Agree Otherwise as to Landlord's Obligations in Regard to Condition of Leased Property. Chapter 5 is broader in coverage than the subject matter of this Article, for it states rules applicable to non-residential as well as residential tenancies. Chapters 10 and 11 deal with tenant remedies in detail.

6. RESTATEMENT (SECOND) OF PROPERTY § 5, Introduction at 150 (1977).

7. CONN. GEN. STAT. §§ 7-148(f), 19-347k to 347v, 19-371 & 19-400 (1977); 1968 Md. Laws ch. 459; MASS. ANN. LAWS ch. 111, §§ 127C-127N & ch. 239, § 8A (Michie/Law. Co-op 1975 & Supp. 1978); MICH. COMP. LAWS § 125.530 (MICH. STAT. ANN. § 5.2891(10) (Callaghan 1976)); MO. ANN. STAT. §§ 441.500-441.640 (Vernon Supp. 1978); N.J. STAT. ANN. §§ 2A:42-85 to 42-95 (West Supp. 1978); N.Y. MULT. DWELL. LAW §§ 302(1)(b), 302(a) (Consol. 1974); N.Y. MULT. RESID. LAW § 305-a (Consol. Supp. 1978); N.Y. REAL PROP. LAW ACTS §§ 755, 769-782 (Consol. 1974 & Supp. 1978); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1978-79); R.I. GEN. LAWS § 45-(24.2)-11 (SUPP. 1970); TENN. CODE ANN. §§ 53-5501 to 53-5507 (1977).

“warranty” or “covenant” of habitability, but without describing any duty or remedy in detail.⁸

3) Statutes that detail both the landlord’s duty to provide a habitable dwelling and the tenants’ remedies for breach. All but one of these statutes are embodied in comprehensive new codes of landlord-tenant law,⁹ and most of them are similar—though not identical—because based on either the Uniform Residential Landlord and Tenant Act (URLTA)¹⁰ or the Model Residential Landlord-Tenant Code.¹¹

Several states have statutes of more than one type.¹² Most of the statutes falling into all three categories include or are coupled with provisions that protect tenants against retaliatory action by landlords in cases where tenants assert statutory rights.¹³

The highest courts in at least eleven jurisdictions have recognized the tenants’ new right to a habitable dwelling by holding that all or most residential leases contain an “implied” warranty or covenant of

8. See IDAHO CODE §§ 6-320, 6-322 & 6-323 (Supp. 1977). See also MICH. COMP. LAWS § 554.139 (MICH. STAT. ANN. § 26.1109 (Callaghan 1976)); MINN. STAT. ANN. § 504.18 (West Supp. 1978); N.Y. REAL PROP. LAW § 235-b (Consol. Supp. 1978); R.I. GEN. LAWS § 34-(18)-(16) (1970); WIS. STAT. ANN. § 704.07 (West Supp. 1978).

Maine creates an implied warranty and covenant of habitability, but also details the tenant’s remedies for breach. ME. REV. STAT. tit. 14, § 6021 (Supp. 1978). The Wisconsin statute creates a duty on the landlord’s part without using the term “warranty” or “covenant,” and also contains a brief tenant’s remedy provision. WIS. STAT. ANN. § 704.07 (West Supp. 1978).

9. The exception is MD. REAL PROP. CODE ANN. § 8-211 (Supp. 1977).

10. ALASKA STAT. §§ 34.03.010 to 34.03.380 (1977); ARIZ. REV. STAT. §§ 33-1301 to 33-1381 (1974); CONN. GEN. STAT. §§ 47a-1 to 47a-20 (1977); FLA. STAT. ANN. §§ 83.40 to 83.63 (West Supp. 1978); 1978 Iowa Legis. Serv., pp. 449-511 (House file 2244); KAN. STAT. §§ 58-2540 to 58-2573 (1976); KY. REV. STAT. ANN. §§ 383.505-383.715 (Baldwin 1976); MONT. REV. CODES ANN. §§ 42-401 to 42-442 (Supp. 1977); NEB. REV. STAT. § 76.1401 to 76-1449 (1976); N.M. STAT. ANN. §§ 70-7-1 to 70-7-5 (Supp. 1975); OHIO REV. CODE ANN. §§ 5321.01-5321.19 (Page Supp. 1977); OR. REV. STAT. §§ 91.700-91.900 (1977); TENN. CODE ANN. §§ 64-2801 to 64-2864 (1976); VA. CODE §§ 55-248.2 to 55.248.40 (Supp. 1978); WASH. REV. CODE ANN. §§ 59.18.010-59.18.900 (Supp. 1977).

11. DEL. CODE tit. 25, §§ 5101-5112 (1974); HAW. REV. STAT. §§ 521-1 to 521-77 (1977), Hawaii is listed in 7a UNIFORM LAWS ANN. 499 (West 1978) as having adopted the URLTA, but in fact the Hawaii legislation more closely resembles the Model Code.

12. See notes 7, 8 and 10 *supra*.

13. This will be separately considered later in this Article. See notes 547-621 accompanying text *infra*.

habitability.¹⁴ In five other states lower courts have taken the same view.¹⁵ In several implied warranty jurisdictions—Massachusetts, Missouri, New Jersey, Pennsylvania and New York—judicially implied warranties of habitability have been superimposed upon Type 1 statutes.¹⁶ In Washington, the court retroactively implied a warranty of habitability into a lease that antedated new legislation adopting a comprehensive residential landlord-tenant code based on the ULTRA and the Model Code.¹⁷ A California court adopted the new implied warranty theory¹⁸ shortly after the legislature enacted amendments detailing the landlord's long-established statutory duty to provide his tenant with a habitable dwelling.¹⁹ In New York, however, the process was just the opposite: a legislative warranty of habitability followed judicial recognition of the warranty.²⁰ Similarly, in Iowa, Hawaii and Kansas, enactment of comprehensive landlord-tenant codes based on the Model Code and the URLTA, respectively, followed court recognition.²¹ In the District of Columbia, the local legislative body enacted an ordinance substantially codifying the judicially recognized implied warranty of habitability.²² Wisconsin enacted a Type 2 statute²³ a decade after the famous *Pines* decision that

14. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lund v. MacArthur*, 51 Haw. 473, 462 P.2d 482 (1969); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 166 (1973); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). It is arguable, however, that *Pines v. Perssion* was overruled *sub silentio* by *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). See note 25 *infra*.

15. *Old Town Dev. Co. v. Langford*, — Ind. App. —, 349 N.E.2d 744 (Ct. App. 1976); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (1975); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (1972); *Pugh v. Holmes*, — Pa. Super. Ct. —, 384 A.2d 1234 (1978).

16. See note 7 *supra*.

17. *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973).

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

19. See CAL. CIV. CODE §§ 1941.1, 1941.2, 1942, 1942.1 & 1942.5 (Deering 1972).

20. See note 8 *supra*.

21. See notes 10 and 11 *supra*.

22. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS § 2902.2 (1970).

23. See note 8 *supra*.

established an implied warranty of habitability.²⁴ The Wisconsin statute was enacted before, but took effect after, a decision that arguably overruled *Pines*.²⁵

The District of Columbia and Missouri courts have allowed tenants to assert new rights based on the theory that a lease is illegal if entered into when substantial housing code violations exist on the leased premises.²⁶ This argument is an alternative to rights based on the implied warranty of habitability theory. In the District of Columbia, a local municipal ordinance later codified the illegal contract theory.²⁷

Although both legislative and judicial development of the principle that landlords must provide residential tenants with habitable rental housing started before 1965, the trend accelerated tremendously between 1965 and 1979. While the reason for this acceleration is not entirely clear, a number of factors seem to have been operative: higher concentrations of low-income tenants in central cities, an increasingly serious shortage of affordable housing, the inadequacy of traditional modes of housing code enforcement, the civil rights movement of the 1960's, the riots in the urban ghettos, and the Johnson administration's Great Society program, which provided motivation, dedicated manpower, and financial support for the effort to alter traditional legal relationships between landlords and tenants in ur-

24. *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

25. *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). In *Posnanski*, the tenant alleged that certain defective conditions in his housing violated the Milwaukee Housing Code, which obviated any obligation of the tenant to pay rent while these code violations existed. Although all alleged violations arose after the beginning of the tenancy, the tenant clearly relied on the theory that these violations of the housing code made the lease an illegal contract, and hence unenforceable. The court held inadmissible all evidence intended to prove code violations, after stating that the issue was "whether the legislature and common council of the city of Milwaukee intended that the housing code be an implied covenant mutually dependent with a tenant's covenant to pay rent, and thereby utilize rent withholding as means of enforcing the housing code." *Id.* at 178, 174 N.W.2d at 531. The *Posnanski* opinion is puzzling because the court's statement of the issue is inconsistent with the tenant's asserted "illegal contract" defense, *Pines v. Perssion* is not even cited, much less distinguished, and the stated rationale of *Posnanski*— that the legislature and city council did not intend to give the tenant a private remedy for housing code violations—is directly contrary to the rationale in *Pines*.

26. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973).

27. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS § 2902.1 (1970).

ban areas.²⁸

II. TENANTS' RIGHTS LEGISLATION: THE HOUSING CODE APPROACH

As indicated above, one major recent statutory approach builds on existing housing codes. While not expressly creating new rights, these statutes provide detailed new tenant-initiated private remedies for the landlord's failure to provide a habitable dwelling. But, the modern housing code upon which these statutes are based, has a history that stretches back more than a century.

A. *From the 19th Century Tenement House Law to the Modern Housing Code*²⁹

The New York Tenement House Law of 1867, the direct ancestor

28. See Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976) [hereinafter cited as Abbott].

Abbott suggests that the new landlord-tenant law concerning the condition of leased premises did not develop until recently because in earlier days, despite a common law rule and express lease covenants placing the burden of repairs on tenants, landlords *de facto* assumed the burden of repairs. He further suggests that landlords will cease to assume this burden "when neighborhood change, declining demand, racial confrontations or increased operating costs threaten the landlord with a loss." *Id.* at 29. By implication, Abbott believes that these factors led to widespread abandonment by landlords to maintain low- and moderate-housing in urban areas during the 1950's and 1960's. However, the data adduced by Abbott are not persuasive on the question of landlords' *de facto* assumption of the maintenance burden. The notion that most urban landlords actually assumed that burden until fairly recently is inconsistent with the evidence of widespread failure of landlords to comply with local housing codes. Also, Abbott's implicit conclusion that the recent revolution in tenants' rights resulted from "neighborhood change, declining demand, racial confrontations, or increased operating costs" in the central cities raises more questions than it answers. All these factors were present, from time to time, in many American cities during the second half of the 19th and the first half of the 20th Centuries. Urbanization is not a late 20th-century phenomenon in the United States. Rather, it already was well advanced by the end of the 19th Century. Nor is the immigration of large numbers of poor people to the older central cities a late 20th-century phenomenon. A high percentage of the European immigrants who settled in American cities during the period from 1890 to 1920 were poor, as were the successive waves of black immigrants from the rural South who moved to northern cities during and after World War I. As Abbott points out, many of the cases that expanded tenants' rights were brought by legal services attorneys. Many of these attorneys also served as advocates for tenant interests before legislative committees. *Id.* at 5 n.9.

29. This section of text is based primarily on L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 25-55 (1968) [hereinafter cited as L. FRIEDMAN]; Abbott, *supra* note 28, at 41-44; F. Grad, Legal Remedies for Housing Code Violations 1-6 (1968) (Nat'l Comm'n on Urban Prob., Research Rep. No. 14) [hereinafter cited as F. Grad].

of all modern housing codes, applied only to lodging houses and multiple dwellings that housed three or more families within a building or two or more families on the same floor.³⁰ The 1867 statute, applicable only to New York City, contained nineteen sections mandating *inter alia* that "tenements" should have watertight roofs, adequate chimneys, fire escapes, ventilators, refuse containers, and "good and sufficient water closets or privies."³¹ That the principal purpose of the statute was to safeguard public health is evidenced by the designation of the Metropolitan Board of Health as the enforcement agency.³² In 1868, Massachusetts enacted a statute, applicable only to Boston, patterned on the New York formulation.³³ In New York, the need for a comprehensive housing law was forcefully demonstrated by Riis, DeForest, and Veiller,³⁴ whose efforts led to a new Tenement House Law, applicable to New York City and Buffalo, enacted in 1901.³⁵ The 1901 statute increased the number of sections setting out minimum standards from nineteen to one hundred, and provided for a system of tenement house registration and occupancy permits.³⁶

The pioneering New York and Massachusetts tenement house laws, by detailing minimum health and safety standards, stood as prototypes for the modern housing code. Today's codes, however, are much more comprehensive:

A housing code deals with the owner's and occupant's duty to keep existing housing in decent condition—to see to it that it is not occupied by more persons than are legally permitted for housing accommodations of that size; to keep it in proper repair; to maintain it in a sanitary condition; to see that it remains properly ventilated and lighted; to make sure that it has the required facilities for fire safety; that required machinery—elevators, boilers and heating plants, etc.—are kept in working order; and that required services—heat, hot and cold water—are provided in ac-

30. L. FRIEDMAN, *supra* note 29, at 26-27.

31. 1867 N.Y. Laws, ch. 908, §§ 1-19.

32. *Id.* See 1866 N.Y. Laws, ch. 74, §§ 1-33.

33. 1868 Mass. Acts, ch. 281, §§ 1-18.

34. See, e.g., THE TENEMENT HOUSE PROBLEM (R. DeForest & L. Veiller eds. 1903); Riis, *The Clearing of Mulberry Bend*, 12 REV. OF REVIEWS 172 (1895); Veiller, *The Tenement House Exhibition of 1899*, 10 CHARITIES REV. 19 (1900).

35. 1901 Laws of N.Y., ch. 334, §§ 1-149.

36. *Id.* § 121. For a discussion of the historical development of housing codes, see L. FRIEDMAN, *supra* note 29, at 25-39 & 44-55; Abbott, *supra* note 29, at 41-44.

cordance with minimal requirements of law.³⁷

A housing code generally provides minimum standards in regard to four different features of the housing it regulates: structural elements such as walls, roofs, ceilings, floors, windows, and staircases; facilities such as toilets, sinks, bathtubs, radiators or other heating fixtures, stoves, electrical outlets, window screens, and door and window locks; services such as heat, hot and cold water, sanitary sewage disposal, electricity, elevator service, central air conditioning, and repair and maintenance services for each dwelling unit; and occupancy standards setting limits on the number of occupants per dwelling or per bedroom.³⁸

Minimum code standards may be either qualitative or quantitative. A qualitative standard, for example, prescribes that the dwelling unit must be "clean" or "in good repair," or that a facility must be "in good condition," or that a service must be "adequate." A quantitative standard prescribes specific requirements, such as a mandate that sufficient heat must be supplied from October 1 through May 30 to keep a dwelling unit at seventy degrees during the day and sixty-five degrees at night, that window areas must equal ten percent of the

37. F. Grad, *supra* note 29, at 2. As Grad has pointed out, the term "housing code" really means more than a particular municipal ordinance: "Realistically, it includes the entire body of state and local law that prescribes housing standards and that may be relied upon to provide the source of power or authority for enforcement sanctions and remedies." *Id.* at 8.

In this Article, the term "housing code" will be used to describe any state law or local ordinances dealing with the matters referred to in the quotation above. In some municipalities, housing code elements are lumped together with elements of building codes, plumbing codes, electrical codes, and the like. Thus, a provision for a minimum number of windows in a dwelling might be contained either in a "housing code" or a "building code," and minimum plumbing standards might be included in either of them or in a separate "plumbing code." But, for present purposes, the "housing code" should be clearly distinguished from other types of regulations. Building codes, plumbing codes, and electrical codes specify structural standards, materials and requirements for plumbing, electrical and heating installations in new or substantially remodeled buildings of all types, but they impose no continuing requirements as to maintenance or provision of services to tenants. Housing codes, in the sense in which the term is here used, apply only to dwelling units—primarily rental units—and impose only ongoing requirements as to maintenance and provision of services. When a housing code is enacted or amended, the new regulations generally apply to existing housing. When a building code, plumbing code, or electrical code is adopted or amended, the new regulations generally apply only to buildings constructed or substantially remodeled after adoption.

38. Abbott, *supra* note 28, at 40. For a more extended discussion of the contents of housing codes, see GRAD, HACK & MCAVOY, HOUSING CODES AND THEIR ENFORCEMENT 195-216 (1966).

floor space, that there must be 150 square feet of space for each additional occupant, or that each room in the unit must have one electrical outlet and one electric light fixture. Qualitative standards, since obviously highly subjective, leave wide discretion to the public agency responsible for inspecting housing subject to the housing code.³⁹

Broad similarities exist in the current housing codes, most of which are based on one of four or five model housing codes. The model codes themselves are quite similar. Beyond the many municipal housing codes, several state housing codes have been enacted. The substantive content of these state codes is substantially identical to that of the model codes and their municipal derivatives. Some of the state housing codes apply statewide. Others are applicable only to certain cities or to municipalities falling within certain population classifications. Some are "mandatory" but allow municipalities to adopt more stringent requirements. Others are "optional," *i.e.*, municipalities may, but need not, adopt them as local ordinances.⁴⁰

Housing codes were still not very common by 1954, as only fifty-six codes were then in force in the United States.⁴¹ But the Workable Program requirement of the 1954 Housing Act⁴² gave impetus to the spread of housing codes. Ten years later several amendments required the Federal Housing Administration to refuse certification or recertification of local Workable Programs unless the localities in question had housing codes in effect for at least six months and were

39. See Abbott, *supra* note 28, at 45-46; Mood, *The Development, Objectives, and Adequacy of Current Housing Code Standards*, in *Housing Code Standards: Three Critical Studies* (1969) (Nat'l Comm'n on Urban Problems, Research Rep. No. 19) [hereinafter cited as Mood] (surveying the requirements of four model housing codes, nine state housing codes, and sixteen city or county housing codes).

Housing legislation usually implies the existence of criteria of acceptability. It suggests that data are available which separate with precision unfit, unsanitary, unsafe, and inadequate housing from that which is decent, clean, safe and sanitary. Unfortunately, such a bank of data does not exist . . . The state of the art today is such that currently there is no single comprehensive evaluation procedure available that will clearly and concisely delineate the presence or absence of a relationship even between the quality of housing and health.

Id. at 13, 18.

40. See Mood, note 39 *supra*.

41. URBAN RENEWAL ADMINISTRATION, HOUSING & HOME FINANCE AGENCY, URBAN RENEWAL BULL. NO. 3, PROVISIONS OF HOUSING CODES IN VARIOUS AMERICAN CITIES (1968).

42. Housing Act of 1954, § 303, 42 U.S.C. § 1451(c) (Supp. III 1954) (amended 1970).

implementing codes through enforcement programs.⁴³ By 1968, under the stimulus of this legislation, at least 4,904 communities had local housing codes and at least six states had state-wide housing codes in force.⁴⁴

Until very recently, violation of a housing code provision was not considered a breach of any duty owed by the landlord, and these tenants had no direct remedies when code violations occurred. Enforcement of early tenement house laws was delegated to local administrative agencies, who were charged with the duty to inspect buildings covered by such laws both on a regular periodic basis and in response to tenant complaints. This continues to be the normal mode of enforcement today.⁴⁵ If the issuance of a violation notice and one or more informal or formal administrative hearings do not force remedial action, the enforcement agency has traditionally been authorized to obtain a court order for vacation of the building, followed by an order for demolition if the owner does not correct the violation within a designated time,⁴⁶ and to bring a criminal action against the building owner.⁴⁷ In some states additional modes of enforcement include a mandatory injunction requiring the building owner to bring his building into compliance with the housing code,⁴⁸ suits to impose a civil penalty on the building owner,⁴⁹ direct agency action to correct code violations by making repairs and improvements,⁵⁰ and suits for appointment of a receiver to apply building

43. Housing Act of 1964, § 301(a), 42 U.S.C. § 1451(a) (1964) (amended 1970).

44. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 34, 91st Cong., 1st Sess. 276-77 (1968).

45. When a housing inspector discovers and reports code violations, the code enforcement agency usually sends a violation notice to the owner of the building with a request that the violations be corrected. If the violation notice does not produce corrective action, the owner may be invited to discuss the reported code violations informally at the agency's office. The agency may also issue a formal show cause order demanding that the owner show cause why the agency should not initiate an enforcement action against him because of the reported code violations. Formal administrative hearings before a hearing officer may initially determine whether the reported conditions actually constitute code violations. More often, however, the reporting of a violation by the inspector is itself an administrative determination that a violation exists, and the administrative hearing is in substance an appeal from the inspector's determination. F. Grad, *supra* note 29, at 14-19.

46. *Id.* at 56-61.

47. *Id.* at 22-33.

48. *Id.* at 42-49.

49. *Id.* at 34-39.

50. *Id.* at 62-69.

rents toward correcting code violations.⁵¹

B. *The Failure of Traditional Modes of Housing Code Enforcement*

Substantial success in applying traditional modes of housing code enforcement would probably have rendered the "revolution" in landlord-tenant law unnecessary. But all observers agree that local governments have been notably ineffective in code enforcement.⁵² In part, this lack of success stems from the limitations of institutions charged with enforcement. Most code enforcement agencies are understaffed and underfunded, primarily because of a low level of public awareness of code enforcement problems and only lukewarm support of local elected officials.⁵³ Inspections are rarely carried out on any regular schedule and public prosecutors are largely indifferent to code enforcement.⁵⁴ Since housing inspectors are not very well

51. *Id.* at 42-55.

52. *See, e.g.*, COMMUNITY SERVICE SOCIETY OF NEW YORK, CODE ENFORCEMENT FOR MULTIPLE DWELLINGS IN NEW YORK CITY (PART II): ENFORCEMENT THROUGH CRIMINAL COURT ACTION (1965); B. LIEBERMAN, LOCAL ADMINISTRATION AND ENFORCEMENT OF HOUSING CODES: A SURVEY OF 39 CITIES (1969); PHILADELPHIA HOUSING ASS'N, IMPEDIMENTS TO HOUSING CODE COMPLIANCE (1963); M. TEITZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY (1971); Abbott, *supra* note 28, at 49-56; Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Castrataro, *Housing Code Enforcement: A Century of Failure in New York City*, 14 N.Y.L. FORUM 60 (1968); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. CHI. L. REV. 180 (1963); F. Grad, note 29 *supra*; Grad, Weiss & Hack, *Legal Remedies in Housing Code Enforcement in New York City* (1965) (Legislative Drafting Research Fund, Columbia University); J. Slavet & M. Levin, *New Approaches to Housing Code Administration* (1969) (Nat'l Comm'n on Urban Problems, Research Rep. No. 17).

53. Abbott, *supra* note 28, at 54-55.

54. . . . Few housing code enforcement agencies have legal staffs of their own, and even the ones that do must usually bring prosecutions through the municipality's regular legal department; *i.e.*, through the city attorney or corporation counsel, or through the city or county prosecutor. In the usual course, the municipal law officer or his deputies have little experience or knowledge of housing matters and tend to regard housing prosecutions as a very minor, troublesome, and unexciting area for the application of their legal expertise. Even in large cities, where hundreds and thousands of housing cases may be brought each year, they represent a low-prestige area of activity, for a young lawyer in the city's legal department gains neither friends nor glory by successfully prosecuting housing cases.

F. Grad, *supra* note 29, at 25. *See also* PHILADELPHIA HOUS. ASS'N, IMPEDIMENTS TO HOUSING CODE COMPLIANCE iv (1963); Abbott, *supra* note 28, at 53-54.

paid, code enforcement is often hindered by corruption.⁵⁵ Even honest housing inspectors grow discouraged and apathetic because of the ease with which landlords can obtain variances.⁵⁶

Most modes of enforcement—criminal prosecutions, civil actions, suits for mandatory injunction, and suits for receivership—share at least one common problem: the difficulty of obtaining personal jurisdiction over the owner of a noncomplying building. This often results from the common practice of placing title to low-income multi-family dwellings in corporations whose officers and offices cannot be located and whose agents cannot identify their principals.⁵⁷ Each of these methods of enforcement is also subject to its own peculiar problems, discussed below.

1. Order to Vacate and Demolish.⁵⁸ This remedy is generally too drastic to be used except in cases of immediate hazard of collapse or fire, although it may be utilized during periods of high vacancy in the community's standard housing stock. As Grad points out, "No housing code enforcement agency is likely to issue vacate orders, however attractive the remedy, when such an order would deprive tenants of a place to live; for even an inadequate dwelling is better than no dwelling at all."⁵⁹ The vacate order can be a powerful enforcement tool in periods when there is a high vacancy rate because it cuts off the landlord's rental revenue. Yet it must be a credible threat to induce housing code compliance. Since World War II, an overall shortage of

55. See J. Slavet & M. Levin, *New Approaches to Housing Code Administration* 179 (1969) (Nat'l Comm'n on Urban Problems, Research Rep. No. 17).

56. Lieberman reported that most code enforcement personnel believed that variance boards act on the basis of political considerations or emotion. "The results are disrespect for the inspector and his superiors; ineffective systematic code compliance programs; and disrespect for local regulatory measures." B. LIEBERMAN, *LOCAL ADMINISTRATION AND ENFORCEMENT OF HOUSING CODES: A SURVEY OF 39 CITIES* at 23 (1969).

57. Abbott, *supra* note 28, at 50. For a more detailed discussion of the problem, see F. Grad, *supra* note 29, at ch. IX (The Phantom Landlord: Finding the Absentee Landlord). Grad emphasizes that this problem is a serious one only in some of the larger cities and that it is a more serious problem when criminal prosecution is sought than when some form of civil action is used. Both Abbott and Grad point out that some jurisdictions require registration of owners and the authorization of service of process on a natural person living within the jurisdiction.

58. The discussion of this enforcement method is based on Abbott, *supra* note 28, at 49-50; F. Grad, *supra* note 29, at ch. VI; Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1261 (1966).

59. F. Grad, *supra* note 29, at 57.

low- and middle-income housing in most urban areas has prevented the threat from being credible.⁶⁰ Moreover, “. . . a vacate order can play into the hands of a recalcitrant landlord who wishes to rid himself of troublesome tenants without resort to the eviction prices. By allowing his building to become seriously substandard, the landlord can trigger an order to vacate that would allow him to remodel or tear down the vacant structure.”⁶¹

2. Criminal Prosecution.⁶² Although clearly the most common enforcement strategy utilized in the United States, criminal prosecution of the building owner has proved to be remarkably ineffective. The difficulty in securing personal jurisdiction over the owner of the building⁶³ is more pronounced in criminal cases because the individual owner must be physically present in court.⁶⁴ The enforcement process is likely to be characterized by interminable delays, both before and after a criminal prosecution begins.⁶⁵ And there is an even more fundamental difficulty:

60. A vacancy rate of more than 25% in standard housing is necessary before substantial use of vacate orders is feasible. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1261 n.29 (1966). Vacate orders were used effectively in New York City during the early 1900's, and again in the 1930's, when there were high vacancy rates. F. Grad, *supra* note 29, at 57.

61. Abbott, *supra* note 28, at 50.

62. The text of this enforcement method is based on Abbott, *supra* note 29, at 50-51, and F. Grad, *supra* note 29, at ch. III.

63. See note 57 and accompanying text *supra*.

64. F. Grad, *supra* note 29, at 23. "In the case of a corporate owner, all that is necessary is that the corporation be represented in court by an attorney." *Id.* at 35. Registration requirements for landlords have not proven useful in locating "phantom landlords" because normally the failure to register is itself only punishable as a criminal offense—and it is necessary to catch a building owner before he can be punished for failure to register. *Id.* at 32.

65. "Criminal prosecution [in New York City] is slow and its impact is negligible. In 1968-69, the average time between placement of a violation and first court appearance was over 18 months." M. TEITZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY xi (1971). The great majority of cases are adjourned at least once. Grad, Weiss & Hack, *Legal Remedies in Housing Code Enforcement in New York City* 40-41 (1965) (Legislative Drafting Research Fund, Columbia University). See also Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 819, 820 & 824 (1965). Where housing courts have been established, manned by judges who are specialists in housing problems (and who may even have investigative staffs of housing specialists), speedier disposition of cases is possible. But in metropolitan areas relatively few housing cases are actually tried: the overwhelmingly larger number are disposed of, without trial, by a guilty plea. This leaves the court with little else to do but to impose sentence. Although a housing court may result in

The underlying notion is that the threat of the penalty will cause owners to make proper repairs, and that the imposition of the penalty will not only deter the person punished from permitting further violations, but also set an example for the deterrence and warning of other code violators. Since jail sentences are hardly ever imposed (even where authorized), and since, with few exceptions, fines imposed are very low, the practical deterrence value of criminal penalties is very minimal for housing violations. Criminal penalties, moreover, are not really designed to lead to repairs—the criminal court's power does not extend to ordering the making of repairs, but merely to the punishment of the owner. On the contrary, the manner in which the system of criminal law operates actually encourages the postponement of repairs. An owner who fails to correct violations for many months until his case gets to trial, and who, in token of his "cooperativeness" repairs the faults just before sentencing, will not be treated significantly more harshly than the owner who does not make use of available legal delays. Since the cost of making the repairs may be—and usually is—substantially higher than the fine imposed, the occasional payment of fines may be viewed as part of the cost of the business of renting dwelling space. . . .⁶⁶

more consistent sentences, it may not in fact result in substantially speedier disposition of housing cases.

66. F. Grad, *supra* note 29, at 29.

Most housing laws and housing codes authorize both fines and jail terms. . . . Although in some jurisdictions jail terms up to six months may be authorized, most commonly 30 days is the maximum jail sentence that may be imposed for a housing violation. But, whatever the length of time authorized, the actual imposition of jail sentences is so unusual and infrequent as to play a relatively insignificant part in code enforcement. In the main, the situation is not too different with respect to the imposition of fines. Although fines ranging up to \$500 or even \$1,000 per violation may be authorized, only very minor fines are imposed in most jurisdictions.

Id. at 26.

All too often, however, where compliance occurs just before sentencing, courts will impose very minimal fines, even though the violation may have been outstanding, and may have caused actual harm to the comfort and health of the occupants, for months, if not years, before the case was prosecuted and was finally brought to the sentencing stage.

Id. at 24.

For those cases adjudicated in 1968-69 [in New York City], the average fine imposed by the court was \$12.62, or \$1 to \$3 per violation. Criminal prosecutions have little effect on violation removal. Of 329 cases studied in 1968-69, only 53 percent of the violations brought to court had been removed one year

3. **Civil Penalty.**⁶⁷ Generally, the civil penalty is a lump-sum amount recoverable by the municipality in a civil action, with the number of code violations determining the total penalty amount. Some statutes provide that unpaid civil penalties shall become a lien on the property in question. The rationale of these statutory and local code provisions is that unlawful economic advantages, such as failure to maintain rental property in compliance with code standards, should be penalized by measures that reduce the illegal profits of the owner. Although civil penalties were used with some frequency at the turn of the century in New York and elsewhere, they have fallen into disuse in cities where they remain on the books.⁶⁸ A primary reason for disuse of civil actions is that municipal attorneys find it easier to bring routine criminal prosecutions that involve little paper work rather than civil actions that require detailed pleadings and produce relatively small money judgments. The civil penalties presently authorized are generally not sufficiently varied to reflect the length of time a code violation has existed. Hence, as with criminal penalties, the landlord is likely to treat the periodic payment of civil penalties simply as a cost of doing business instead of being induced to correct the violations on his property.

4. **Mandatory Injunction.**⁶⁹ In theory this is an unusually effective mode of enforcement because, instead of punishing the owner of a

later; more than half of these had been removed before the case reached the Criminal Court.

M. TIETZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY xi (173).

The reluctance of the courts to treat housing offenses as 'crimes' is reflected not only in the low penalties that are imposed, but also in attempts to place such violations in some category that is intermediate between a 'criminal' and 'civil' violation. Although invariably subject to the basic requirements of criminal procedures, housing violations have been designated as 'quasi-criminal' or as 'quasi-civil' in some jurisdictions, and in New York City, which probably accounts for most of the court prosecutions of housing cases in the Nation, the housing code treats such violations as 'offenses,' defined as non-criminal violations of the law. F. Grad, *supra* note 29, at 31.

67. The text discussion of this mode of code enforcement is based on F. Grad, *supra* note 29, at ch. IV.

68. For a history of the extensive use of civil remedies in the early days of housing code enforcement in New York City, starting in 1903, see Grad, Weiss and Hack, *Legal Remedies in Housing Code Enforcement in New York City 60-65* (1965) (Legislative Drafting Research Fund, Columbia University).

69. The text discussion of this mode of code enforcement is based on F. Grad, *supra* note 29, at 40-42.

noncomplying building for past code violations, the injunction orders him to bring his building into compliance and only later punishes for contempt if he fails to do so. Moreover, a preliminary injunction may often be quickly obtained in emergency situations. And, since the injunctive remedy is flexible, the court can tailor its order to the specific circumstances of each case. This remedy, while indirectly authorized by the New York Tenement House Law of 1901, fell into disuse after the pioneering decision of *Tenement House Department v. Moeschen*.⁷⁰ Mandatory injunctions have been rarely used in the majority of states despite legislative authorization. In recent years, injunctions have been used, to some extent, in California⁷¹ and Philadelphia⁷² to enforce housing codes, but the most extensive use of the injunctive remedy for this purpose has occurred in Chicago.⁷³

5. Direct Agency Action to Effect Repairs.⁷⁴ This mode of en-

70. 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd*, 203 U.S. 583 (1906). The decision sustained the Tenement House Act in its entirety against constitutional attack. The failure of New York City to utilize the mandatory injunction after *Moeschen* is hard to explain. The New York code enforcement agency had authority to "institute any appropriate action . . . to prevent such unlawful construction, alteration, conversion or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said dwelling or structure or any part thereof, or to prevent any illegal act, conduct or business in or about such dwelling, structure or lot." N.Y. MULT. DWELL. LAW § 306 (McKinney), as enacted by 1929 N.Y. Laws, ch. 713.

71. The California statutory formulation, CAL. HEALTH & SAFETY CODE § 17981 (Deering 1976), has led to several sweeping mandatory injunctions, including an order requiring extensive repairs and reconstruction or the reconversion of dwellings to conditions prior to the illegal alterations. *See, e.g.*, *San Francisco v. Meyer*, 208 Cal. App. 2d 125, 25 Cal. Rptr. 99 (1962); *Knapp v. City of Newport Beach*, 186 Cal. App. 2d 669, 9 Cal. Rptr. 90 (1960); *People v. Morehouse*, 74 Cal. App. 2d 870, 169 P.2d 983 (1946).

72. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 827 (1965).

73. In 1963 the Chicago Department of Buildings obtained 178 mandatory injunctions against housing violations; in 1964, it obtained 223. The total number of injunctions secured is especially striking, since the Chicago courts have not merely issued perfunctory orders in the words of the statute, but have sought to shape effective decrees suited to end special problems. The Chicago effort is noteworthy, too, because the courts have insisted in housing injunction cases not only on the joinder of all interested parties, but also on the retention of jurisdiction for as long as necessary for a "complete determination of the controversy." Injunctions have apparently become so well established an enforcement device in Chicago that few challenges to their use have been attempted—and where attempted, they were quickly disposed of.

F. Grad, *supra* note 29, at 41.

74. This part of the text is based on F. Grad, *supra* note 29, at ch. VII.

forcement, authorized in a number of states, is based on the traditional power of local governments to abate public nuisances and health hazards. Under some statutes it is tied to the local government's power to order noncomplying buildings vacated for repair or demolition, but the authority has actually been used in only a few jurisdictions. New York City has been the only major city using direct agency action to a substantial extent. Potential constitutional impediments to the creation of an effective lien to secure the enforcement agency's right to reimbursement were largely eliminated by *Matter of Department of Buildings of City of New York*,⁷⁵ leaving the New York Department of Health to begin a direct repair program in 1965. The New York City experience is summarized by Grad as follows:

New York started out with a revolving repair fund. . . . It has given up on the revolving repair fund idea simply because the \$1 million in the fund refused to revolve. What happened was that the owners wouldn't pay for the repairs. Then you would have to impose a lien on the building for the repair costs, the lien just sat there since it was too much trouble to foreclose on it. Now New York does something much better. It not only has a lien on the property—it also has a lien on the rents. When emergency repairs have been made, the City instructs the tenants to pay the rents directly to the city, and in that fashion a major part of the repair costs are recouped. . . .⁷⁶

6. Receivership.⁷⁷ Although several states now have legislation authorizing appointment of a receiver empowered to take possession of rental property, collect rents, and correct housing code violations, substantial use of receiverships has occurred only in New York City and Chicago. The New York receivership statute was adopted in 1962 to meet the problem of financing repairs and improvements of greater magnitude than the "emergency" repairs dealt with under the direct repair program. The statute was enacted "under the shadow of the *Central Savings Bank* case, and the legislation that finally passed

75. 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964) (court held that the 1962 amendments to N.Y. MULT. DWELL. LAW § 309, providing for a lien with priority over existing mortgages, did not unconstitutionally impair the obligation of mortgagees' contracts nor deny them procedural due process).

76. Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URB. LAW. 577, 584 (1971). Cf. discussion of New York's direct repair program in F. Grad, *supra* note 29, at 65-67.

77. This section of text is based on F. Grad, *supra* note 29, at 42-55.

was the result of major efforts to avoid at least all of the procedural due process issues on which the prior [New York] lien law had floundered in *Central Savings*.”⁷⁸ The 1962 statute withstood constitutional attack in the 1964 New York Court of Appeals decision of *Matter of Department of Buildings of City of New York*.⁷⁹ Although observers generally agreed that the 1962 statute was a very effective tool for correcting major housing code violations, New York City substantially abandoned use of the receivership in 1965, “quite simply because it [receivership] is so expensive.”⁸⁰ Receiverships continue to be extensively utilized only in Chicago.⁸¹ That city’s program differs substantially from the New York City program in three respects: The court may appoint as receivers persons and groups other than government agencies—*e.g.*, the Community Renewal Foundation, a non-profit subsidiary of the Public Housing Authority; the Chicago receivership program generally has involved only relatively small buildings, often with fewer than ten dwelling units; and the problem of raising capital to repair a structure whose value has already been fully encumbered was solved by authorizing the receiver to issue interest-bearing certificates that constitute a lien having priority over all existing liens except those for taxes.⁸² The overriding priority of the receiver’s certificate has been sustained against constitutional attack,⁸³ and the available evidence suggests

78. *Id.* at 44. *Central Savings Bank v. City of New York*, 279 N.Y. 266, 18 N.E.2d 151 (1938), *motion to amend remittitur granted*, 280 N.Y. 9, 19 N.E.2d 659, *cert. denied*, 306 U.S. 661 (1939) (invalidated the Murray Prior Lien Law, 1937 N.Y. Laws, ch. 353).

79. 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964).

80. Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URB. LAW. 577, 582 (1971).

81. Under a 1953 amendment of what was then the Illinois Cities and Villages Act, a municipality was authorized to “make application to any court of competent jurisdiction for an injunction requiring compliance [with city ordinances] or for such other order as the court may deem necessary or appropriate to secure such compliance.” ILL. REV. STAT. ch. 24, § 23-70.3 (1955). The courts adopted the theory that appointment of a receiver was an appropriate way of securing compliance, and several receiverships were granted either upon application of the City of Chicago or of tenants in the buildings in need of repair. In 1965, the statute was amended to specifically authorize the appointment of receivers. See ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Supp. 1977).

82. The authorization for issuing receiver’s certificates was added by 1965 Ill. Laws, p. 2612. The language of the current statute reflects this provision. See ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Supp. 1977).

83. *Community Renewal Foundation, Inc. v. Chicago Title & Trust Co.*, 44 Ill. 2d 284, 255 N.E.2d 908 (1970).

that the Chicago program has been relatively effective.⁸⁴ However, receivership is clearly no panacea.⁸⁵

C. *The New Legislative Approach: Tenant-Initiated "Private" Remedies*

1. An Historical Overview

All of the statutes enacted during the 1960's and 1970's creating private remedies for tenants upon the failure of landlords to provide habitable dwellings share two basic characteristics: first, the withholding of rent from the landlord is the principal new remedy provided; and second, the right to withhold rent, or to obtain a court order for rent withholding, depends in most cases on proof of a serious violation of the applicable housing code.

Rent withholding as a private remedy for housing code violations was not an entirely new idea in the 1960's. Connecticut, Iowa and New York had rent withholding legislation long before 1960. The Connecticut⁸⁶ and Iowa⁸⁷ statutes provided that failure to obtain a certificate of compliance with the state housing law should bar any action by the landlord to recover rent or to evict for nonpayment of rent. A literal construction of the Connecticut statute barred a landlord's action if no certificate of compliance had been issued, even if the building actually complied with the substantive code requirements.⁸⁸ As so construed, the statute was held to be constitutional.⁸⁹ The Iowa statute received similar treatment by courts,⁹⁰ but neither of these statutes has ever seen much use. Connecticut enacted new legislation in 1969 to provide a more effective rent withholding remedy for serious housing code violations.⁹¹

When the New York Multiple Dwelling Law (MDL) was enacted

84. See F. Grad, *supra* note 29, at 50-51. For a brief discussion of receivership programs in other states, see F. Grad, *supra* note 29, at 52-55.

85. Abbott, *supra* note 28, at 52.

86. CONN. GEN. STAT. ANN. §§ 19-371, 19-400 (West Supp. 1977). Originally enacted in 1905, in its present form this statute applies to all multi-family dwellings except public housing.

87. IOWA CODE § 413.106 (1976) (originally enacted in 1919).

88. Dreamy Hollow Apts. Corp. v. Lewis, 4 Conn. Cir. Ct. 355, 232 A.2d 346 (1967), *cert. denied*, 288 A.2d 559 (1967).

89. *Id.* at 361, 228 A.2d at 350.

90. Burlington & Summit Apts. v. Manalato, 233 Iowa 15, 7 N.W.2d 26 (1942).

91. CONN. GEN. STAT. ANN. §§ 19-347 to 19-347v (1977 & Supp. 1978).

in 1929 to replace the 1901 Tenement House Law,⁹² section 302 of the MDL was quite similar to the Connecticut and Iowa rent withholding statutes. Although the New York statutory provision requiring vacation of any building not covered by a certificate of compliance would have, if literally construed, drastically limited use of the statute as a basis for rent withholding, section 302 was construed as giving the code enforcement agency discretion not to order vacation of the building so that the tenant could retain possession, withhold rent, and have a valid defense against any action by the landlord to recover rent or evict the tenant for nonpayment of rent.⁹³ This statute has been little used since New York adopted more effective rent withholding statutes in the 1960's.

A 1939 New York rent withholding statute,⁹⁴ provided for a stay of any action to recover rent or evict for nonpayment of rent where housing code violations constructively evicted the tenant from a portion of the premises occupied by him, on condition that the tenant should deposit with the clerk of the court all rent due when the stay was issued. This statute, held constitutional in 1957,⁹⁵ was used in 1966 as the initial basis for widespread tenant rent strikes. In most of the early 1968 cases where the statute was invoked the courts held for the tenants, but "shortly thereafter, cases in which the factors did not differ significantly from the ones in which judgment for the tenants had been granted earlier began to be decided in favor of landlords in an apparent shift in the courts' attitude toward tenant rent strike pro-

92. The Tenement House Law of 1901, 1901 Laws of N.Y. ch. 334, §§ 1-149, while finally repealed in 1952, continued to apply to the city of Buffalo until 1950, when Buffalo chose to come within the terms and provisions of the Multiple Dwellings Law. Section 3 of the current statute expressly provides that it "shall apply to all cities with a population of four hundred thousand or more," which makes it applicable only to New York City and the City of Buffalo. N.Y. MULT. DWELL. LAW § 3(1) (Consol. 1977). New York City enacted a Housing Maintenance Code to supplement the Multiple Dwellings Law and the provisions of the Building Code that apply to multiple dwellings. NEW YORK CITY, N.Y., LOCAL LAW NO. 56 (1967).

93. *Broadway-Sheridan Arms v. City of New York*, 195 Misc. 491, 89 N.Y.S.2d 623 (Sup. Ct. 1949). The New York courts have issued mandamus orders enabling tenants to remain in possession, despite unlawful occupancy under the statute, where the code enforcement agency decided not to require vacation of the premises. *See, e.g., 1350 Sixth Ave. Corp. v. Department of Hous. & Buildings*, 197 Misc. 982, 96 N.Y.S.2d 404 (Sup. Ct. 1950).

94. 1939 N.Y. Laws ch. 661, codified as amended at N.Y. REAL PROP. ACTS. LAW § 755 (Consol. 1977).

95. *Emray Realty Corp. v. DeStefano*, 5 Misc. 2d 352, 160 N.Y.S.2d 433 (Sup. Ct. 1957).

visions.”⁹⁶

Beginning in the 1960's many states enacted legislation that provided tenants with new private remedies for serious housing code violations.⁹⁷ The principal new remedy provided by this legislation involved an authorization to withhold rent during the existence of code violations. While some of the statutes will be detailed later, several general statements may serve to identify the rent withholding process.

Most of the new statutes leave for judicial determination the question whether a particular code violation or combination of violations is, in fact, serious enough to justify the withholding of rent. Most of the new statutes also require the tenant show, as the basis for rent withholding, that an official inspection of his dwelling was made and that the inspecting officer reported one or more code violations to the enforcement agency.

Most of the statutes now under consideration require payment of withheld rents, either into court or to some other agency, to be held in escrow. Some of the statutes require the tenant to bring suit and obtain a court order for rent withholding; others do not require the tenant to bring suit but allow him to set up the landlord's violations of the housing code as a defense in any action by the landlord to recover unpaid rent or to evict for nonpayment of rent. Some of the statutes allow a court or some other agency to apply the withheld rents to

96. F. Grad, *supra* note 29, at 126. Grad also observed that “[r]elying on the ‘constructive eviction’ concept referred to in Section 755, the tenants were able to achieve significant results, probably going well beyond the initial intent of the law.” *Id.*

97. See note 7 *supra*. For more detailed discussion of the statutes of particular states, see F. Grad, *supra* note 29, at 125-36. See also Angevin & Taube, *Enforcement of Public Health Laws—Some New Techniques*, 52 MASS. L.Q. 206 (1967); Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583 (1969); Krumholz, *Rent Withholding as an Aid to Housing Code Enforcement*, 25 J. HOUSING 242 (1968); Quinn & Phillips, *Landlord-Tenant Law: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORD. L. REV. 225 (1969); Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFF. L. REV. 573 (1966); Comment, *Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253 (1966); Comment, *Plight of the Indigent Tenant in Massachusetts: An Attempt by the Law to Provide Relief*, 8 SUFF. L. REV. 106, 108-111 (1973); Comment, *Abatement of Rent in New York*, 17 SYRACUSE L. REV. 490 (1966); Note, *Rent Withholding for Welfare Recipients: An Empirical Study of the Illinois Statute*, 37 U. CHI. L. REV. 798 (1970); Comment, *Rent Withholding in Pennsylvania*, 30 U. PITT. L. REV. 148 (1968); Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821 (1972).

correct the code violations that justify the withholding of rent, and some do not. Some of the statutes provide for rent abatement as well as rent withholding, and some do not. Some of the statutes authorize remedies in addition to rent withholding, such as recovery of damages, injunctive relief, or even the appointment of a receiver to collect rents and correct code violations. Many of the statutes include or are coupled with provisions designed to protect the tenant from retaliatory action by the landlord when the tenant asserts his statutory rights. Most of the statutes expressly bar any waiver of the remedial rights conferred on the tenant by statute.

In several states the new tenants' rights acts cover all rental housing. In other states only multi-family dwellings—most often defined as buildings with three or more dwelling units—are covered. In a few states, coverage is even more limited. Most of the statutes have state-wide application.

While it is impossible to detail each rent withholding statute, an examination of the more significant formulations follows.

2. The New York Statutes

New York has a greater variety of rent withholding statutes than any other state. In the 1960's, adding to the two statutes mentioned above,⁹⁸ New York adopted two new rent withholding statutes and substantially strengthened one of the older statutes.⁹⁹

98. See notes 92-96 and accompanying text *supra*.

99. One addition, a provision applicable to New York City and Buffalo, allowed rent abatement for multiple dwellings that posed a serious threat to health or safety. 1965 N.Y. Laws, ch. 911 (currently codified at N.Y. MULT. DWELL. LAW § 302-a (Consol. 1977)). A virtually identical provision was made applicable to all other New York municipalities. 1966 N.Y. Laws, ch. 291 (currently codified at N.Y. MULT. RESID. LAW § 305a Consol. 1977)). In addition, an entirely new article provided a method for tenants to use in remedying dangerous conditions. 1965 N.Y. Laws, ch. 909 (currently codified at N.Y. REAL PROP. ACTS. LAW Art. 7A, §§ 769-782 (Consol. Supp. 1977)). Article 7A applies only to New York City and to Nassau, Suffolk, Rockland and Westchester counties. *Id.* at § 769(1) (as amended by 1974 N.Y. Laws, ch. 861-62). N.Y. REAL PROP. ACTS. LAW § 755 (Consol. 1976), which allowed tenants to obtain a stay in proceeding to evict for non-payment of rent, was significantly amended. 1969 N.Y. Laws, ch. 820 (currently codified at N.Y. REAL PROP. ACTS. LAW § 755 (Consol. Supp. 1977)). In addition to making § 755 applicable to all New York municipalities, rather than just New York City, several substantive changes were also made. See notes 119-24 and accompanying text *infra*. Except for Article 7A, which applies only to buildings with six or more dwelling units, all of the statutes apply to buildings having at least three units. See N.Y. REAL PROP. ACTS. LAW, Art. 7A, § 782 (Consol. Supp. 1977); N.Y. MULT. DWELL. LAW § 4(7) (Consol. 1977); N.Y. MULT. RESID. LAW § 4(33) (Consol. 1977).

a. Section 302-a

Under New York Multiple Dwelling Law section 302-a, if the code enforcement agency notes in its official records that a rent-impairing violation, designated as such by the agency,¹⁰⁰ exists within a multiple dwelling structure, the building's owner has notice of the condition, and the official violation notation is not cancelled within six months, "then for the period that such violation remains uncorrected after the expiration of said six months, no rent shall be recovered [for any premises] in which the condition constituting such rent impairing violation exists."¹⁰¹ To avail himself of the protection of section 302-a, the tenant must deposit with the clerk of the court in which the landlord sues to recover rent or to evict for nonpayment of rent, "the amount of rent sought to be recovered . . . or upon which the proceeding to recover possession is based."¹⁰²

Perhaps the most striking feature of section 302-a is that none of the rent accruing after the end of the six-month period and prior to

100. The section requires the code enforcement agency to promulgate a list of conditions constituting violations of the Multiple Dwelling Law and also to designate "those violations which it proposes to classify as rent impairing." N.Y. MULT. DWELL. LAW § 302-a (Consol. 1977). The statute generally defines a "rent impairing" violation as "a condition in a multiple dwelling which, in the opinion of . . . [the code enforcement agency], constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof." *Id.* at § 302-a(2)(a).

101. *Id.*

102. To invoke the protection of § 302-a in an action by the landlord to recover rent or to evict for nonpayment of rent, the tenant must affirmatively plead and prove the existence of the rent impairing violation, the notation thereof in the official records of the enforcement agency, the giving of notice to the landlord, and the subsistence of the violation for six months after the landlord was notified.

In a condition constituting a rent impairing violation exists in any part of a multiple dwelling used in common by residents or under the control of the owner, the violation "shall be deemed to exist in the respective premises of each resident of the multiple dwelling." *Id.* at § 302-a(3)(a).

When a tenant asserts his § 302-a defense, the landlord will prevail if "(i) the condition referred to in the department's notice to the owner . . . did not in fact exist, notwithstanding the notation thereof in the records of the department; (ii) the condition . . . has in fact been corrected, though the note thereof in the department has not been removed or cancelled; (iii) the violation has been caused by the resident from whom rent is sought to be collected or by members of his family or by his guests or by another resident of the multiple dwelling or the members of the family of such other resident or by his guests, or (iv) the resident proceeded against for rent has refused entry to the owner for the purpose of correcting the condition giving rise to the violation." *Id.* at § 302-a(3)(b).

correction of the rent impairing violations is recoverable by the landlord even if the landlord ultimately corrects all rent impairing violations. It seems clear that the legislature intended this as a penalty for the landlord's failure to act within a reasonable time—probably with the hope that the complete forfeiture of rent in such instances would provide a strong incentive for landlords to take corrective action within the six-month period.

When the New York City Commission of Housing and Buildings promulgated a list of conditions considered as rent impairing violations for purposes of section 302-a, a suit was immediately brought to invalidate twenty-five of the fifty-seven listed violations as arbitrary and capricious, and to invalidate the statute itself on the ground that, by sanctioning withholding of rents by tenants while they enjoyed the use of the property, it deprived landlords of property without due process of law.¹⁰³ The New York Supreme Court, at Special Term, upheld the statute, finding that it addressed a legitimate end and that the measures taken were reasonable and appropriate to secure that end.¹⁰⁴ The court sustained the entire list of rent impairing violations as having a "rational basis in fact and law."¹⁰⁵ The court did not expressly deal with the argument that substantive due process required that the landlord recover at least the fair rental value of the premises in their defective condition, but the court apparently thought that the statutory bar to recovery of any rent for the period of rent impairment was justified as a "new means to induce or compel owners of multiple dwellings to maintain and repair their properties."¹⁰⁶

Commentators have expressed conflicting views on section 302-a, both as to its constitutionality and its desirability from a policy viewpoint. In any case, as one commentator writing in 1968 stated,

103. *Ten West 28th Street Realty Corp. v. Moerdler*, 52 Misc. 2d 109, 275 N.Y.S.2d 144 (Sup. Ct. 1966).

104. *Id.* at 111, 275 N.Y.S.2d at 146.

105. *Id.*

106. *Id.* at 111, 275 N.Y.S.2d at 147. Subsequently, in *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (Civ. Ct. N.Y. 1971), the court struck down the statutory provision requiring that rent demanded by a landlord in a summary proceeding for nonpayment of rent be deposited in court before the tenant can interpose the § 302-a defense as "wholly arbitrary, unreasonable and a violation of procedural due process." *Id.* at 23, 318 N.Y.S.2d at 21. The court also held that it was not in accord with the legislative intent to require such deposit, despite the clear statutory language on this point.

Section 302-a of the Multiple Dwelling Law, with its careful attempts at balancing landlords' and tenants' interests, has seen almost no application at all in New York State, despite the prompt promulgation of a lengthy list of rent impairing violations by the New York City Department of Buildings. The reason for the neglect of the provision is that, simultaneously with 302-a, the legislature enacted an entirely new Article 7A of the Real Property Actions and Proceedings Law, which not only gave the initiative for bringing the action to the tenants, but also allowed a group of tenants to proceed immediately without any lengthy waiting period and without the necessity for demonstrating that violations noted by the code enforcement agency had remained uncorrected. It is Article 7A of the Real Property Actions and Proceedings Law that now carries the major burden of tenant rent strike efforts in New York.¹⁰⁷

b. Article 7A

New York Real Property Actions and Proceedings Law Article 7A authorizes one-third of the tenants in a building having six or more dwelling units (or the administrator of the New York City code enforcement agency) to maintain a special proceeding on the ground that the building has a "lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation of rodents, or any combination of such conditions."¹⁰⁸ If the court finds in favor of the petitioners, it must direct that all rents due from the petitioners at the date of judgment, all rents due from other tenants in the building on the dates of service

107. F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 128 (1968).

By substituting relatively specific standards for the vague concept of constructive eviction, this statute [§ 302-a] eliminates much of the risk the tenant would otherwise have to undergo. Once the tenant has produced a copy of the Department of Buildings record showing that a violation has existed for six months, the burden shifts to the landlord, who must prove that the violation has been removed. Owing to the six-month waiting period, however, many serious violations, such as lack of heat, are unaffected by the statute.

Note, *Tenant Rent Strikes*, 3 COLUM. J. OF L. & SOC. PROB. 1, 6 (1967).

108. N.Y. REAL PROP. ACTS. LAW § 770(1) (Consol. Supp. 1977).

Such a special proceeding may also be initiated by the New York City housing code administrator, but "one-third or more of the tenants may, at any time thereafter during the pendency of the proceeding or after final judgment . . . petition for substitution of themselves in place . . . of such administrator" and the court is required to order such substitution "unless good reason to the contrary shall be shown." *Id.* at § 770(2).

of the judgment on them, and all future rents of all tenants in the building be deposited with an administrator appointed by the court,¹⁰⁹ who may be the New York City housing code administrator or his designee,¹¹⁰ and that sufficient amounts of such deposited rents shall be used to remedy the conditions found to exist in the building.¹¹¹ The court-appointed administrator is, in fact, a rent receiver and has the usual powers of a rent receiver.¹¹² Appointment of an administrator may be averted if the owner or mortgagee of the building, on application to the court, can demonstrate "the ability promptly to undertake the work required," posts adequate security for performance, and receives the authorization of the court.¹¹³

Unlike section 302-a, article 7A does not allow abatement of rent because of dangerous conditions on the premises. It only authorizes the payment and application of rent to correct such conditions. Thus article 7A appears less vulnerable to constitutional attack on due process or "taking" grounds. The statute was, in fact, sustained against constitutional challenge in *Himmel v. Chase Manhattan Bank*,¹¹⁴ where the court said that article 7A merely creates a new remedy for enforcement of preexisting tenants' rights¹¹⁵ and is a valid exercise of the state's police power.¹¹⁶ The *Himmel* court also held that defective air conditioning equipment and elevators in a *luxury* apartment could be "dangerous conditions" within the meaning of the statute.¹¹⁷

109. *Id.* at § 776(b).

110. *Id.* at § 778(1).

111. *Id.* at § 776(b).

112. The administrator is not only empowered to collect the rents and to remove or remedy the conditions specified in the judgment, but also "to institute all necessary legal proceedings, including, but not limited to, summary proceedings for the removal of any tenant or tenants; and to rent or lease for terms not exceeding three years any part of said premises." *Id.* at § 778(1).

113. *Id.* at § 777.

114. 47 Misc. 2d 93, 262 N.Y.S.2d 515 (Civ. Ct. N.Y. 1965).

115. *Id.* at 96, 262 N.Y.S.2d at 519.

116. *Id.* at 97-98, 262 N.Y.S.2d at 520.

117. *Id.* at 98, 262 N.Y.S.2d at 520-21. *See also* *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (Civ. Ct. N.Y. 1965). In *DeKoven*, the court found that, despite a high incidence of crime and inadequate police protection, the absence of a round-the-clock doorman did not constitute a "condition dangerous to life, health or safety" within the meaning of article 7A. *Id.* at 954, 266 N.Y.S.2d 466. In addition, the tenants had alleged 34 dangerous conditions which were found too trivial or non-existent, after an on-site inspection by the court, to support withholding of rents. *Id.* at 956-57, 266 N.Y.S.2d at 468-70 ("conditions found by the inspector

Article 7A has proved to be an effective tool for rent withholding in connection with rent strikes in New York. Although only one-third of the tenants in an apartment building are required to join in the petition, a finding in favor of the petitioners allows the deposit of rents from *all* tenants in the building. This obviously gives strong leverage to a minority of tenants who are willing to take the initiative in bringing an article 7A proceeding.¹¹⁸ In a period of inflationary cost increases, however, the effectiveness of article 7A as a remedy for large-scale code violations requiring structural improvements would seem to be dependent on the administrator's willingness and ability to raise rents.

Apparently not satisfied with section 302-a and article 7A, in 1969 the New York legislature adopted several important amendments to section 755 of the Real Property Actions and Proceedings Law.¹¹⁹ One of these changes made the statute applicable to all New York municipalities.¹²⁰ Another amendment broadened the authority of the court to stay an action to recover rent or to evict for non-payment of rent, including situations where any condition "is, or is likely to become, dangerous to life, health, or safety," as well as cases where conditions "constructively evict" a tenant from a portion of the premises.¹²¹ The new statute makes it unnecessary for a tenant to prove that the housing code enforcement agency has issued a notice or order to "remove or cease maintaining a nuisance or violation" or to make necessary repairs, as required by the previous formulation.¹²²

are not of such a magnitude, individually or collectively, as to constitute a danger to the life, health or safety of the tenants").

118. This statute provides the first coercive remedies directly enforceable by the tenant. Theoretically, therefore, a tenant no longer is compelled to live with dangerous violations because of inefficiency or laxity of the public authorities and/or inability on the part of the landlord. Whether or not this theory does achieve a practical reality will depend upon the ability of tenants to effectively join together and pursue their remedy.

Comment, *Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253, 264 (1966).

119. 1969 N.Y. Laws, ch. 820 (currently codified at N.Y. REAL PROP. ACTS. LAW § 755 (Consol. Supp. 1977)).

120. *Id.* The Act prior to the 1969 amendment was only applicable in New York City.

121. *Id.* at § 755(1)(a).

122. The 1969 amendments added a new subsection (b), which allows a tenant to prove the existence of a dangerous condition without having to show any prior involvement by the local agency. *Id.* at § 755(1)(b).

The new language as to conditions dangerous to life, health, or safety establishes substantially the same standard for relief under section 755 as required under section 302-a,¹²³ and it eliminates any doubt as to the right of the tenant to remain in possession of his entire dwelling unit, withhold rent, and assert the section 755 defense.¹²⁴

c. Section 756

Section 756 of the Real Property Actions and Proceedings Law provides that if "utilities are discontinued in any part of a multiple dwelling because of the failure of the landlord . . . to pay for utilities for which he may have contracted, any proceeding to dispossess a tenant from said building or . . . for rent shall be stayed until such time as the landlord . . . pays the amount owing for said utilities and

123. Under this standard, of course, the tenant's lawyer is never quite sure how things will go in court, even when the code enforcement agency has issued a notice or order with respect to dangerous conditions on the leased premises. When no notice or order has been issued, the tenant has the burden of proving the existence of a condition on the premises that will justify a stay. If such a notice or order has been issued, "the landlord or petitioner shall have the burden of disproving the condition of the dwelling as . . . is described in the notice or order." *Id.* at § 755(1)(a). As was the case prior to the amendment, the tenant is still required to deposit all rent due with the clerk of the court when the tenant raises the statutory defense, but the court is now empowered to release all or part of the money deposited with the clerk "to a contractor or materialman [to pay] for the maintenance of and necessary repairs to the building . . . upon a showing by the tenant that the landlord is not meeting his legal obligations therefor. Upon the entry of an order vacating the stay the remaining money deposited shall be paid to the plaintiff or landlord. . . ." *Id.* at § 755(3).

124. Since § 755 provides a stay of eviction proceedings for nonpayment of rent when conditions on the premises are such as to constructively evict the tenant from a portion of the premises, it is clear that the legislature did not intend to require the tenant to completely abandon the premises as a condition precedent to obtaining a stay based on constructive eviction. If the tenant has already abandoned the premises, there is obviously no need for the landlord to bring an eviction proceeding and the statute would never have any application in such an action. This fact seems to be recognized in early cases. *See, e.g.,* *Malek v. Perdina*, 58 Misc. 2d 960, 297 N.Y.S.2d 14 (Civ. Ct. N.Y. 1969). But confusion arose when the New York City Civil Court later dismissed a tenant's contention of constructive eviction, in a case where a stay was sought under § 755, with the offhand comment that "to entitle her to a suspension of the rent because of partial constructive eviction, tenant was required to actually abandon the premises. . . . A tenant cannot claim uninhabitability and at the same time continue to inhabit." *Zweighaft v. Remington*, 66 Misc. 2d 261, 264, 320 N.Y.S.2d 151, 154 (Civ. Ct. N.Y. 1971). In any case, § 755 no longer requires the court to find a constructive eviction before staying the landlord's rent action or eviction proceeding, since a stay may be authorized on an alternative finding that a condition on the premises "is, or is likely to become, dangerous to life, health, or safety." N.Y. REAL PROP. ACTS. LAW § 755(1)(a) (Consol. Supp. 1977).

. . . the utilities are restored to working order.” Although it contains no express authorization for rent withholding, section 756 is clearly intended to protect the tenant who withholds rent when utility service is discontinued as a result of the landlord’s default. Presumably the legislature intended the tenant in such a case to pay the whole amount of delinquent rent once the landlord has restored the utilities to working order. It is unlikely that a complete forfeiture of all rents accruing while utilities are discontinued was intended, although the legislative intent is unclear. The cognate statute, section 755, does not authorize any forfeiture of rents. The law is similarly silent as to whether the discontinuation of utilities creates a condition sufficient to create a constructive eviction, and thereby invoke section 756 as a method of paying utility costs out of the rental sums.

d. The Spiegel Law

New York’s Spiegel law¹²⁵ provides that payments for or toward the rents of a welfare recipient may be made directly by the public welfare department to the landlord, but that “[e]very public welfare official shall have power to . . . withhold the payment of any such rent” if he knows of an outstanding violation of law in the welfare recipient’s building that is dangerous, hazardous or detrimental to life or health.¹²⁶ In addition, the statute declares that “[i]t shall be a valid defense in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building wherein such welfare recipient resides which relate to conditions which are dangerous, hazardous or detrimental to life or health, [provided such violations have been reported to the] public welfare department by the department or agency having jurisdiction over violations.”¹²⁷ Even after the violation of law has been removed by

125. N.Y. SOC. SERV. LAW § 143b (Consol. 1976) (enacted by 1962 N.Y. Laws, ch. 997).

126. *Id.* at § 143b(2). One of the many points not made clear by the draftsman concerns *whose* life or health must be endangered or detrimentally affected. It is certainly not clear that the welfare recipient’s life or health must be thus affected by conditions in the building where he lives. If the tenant is paying his or her own rent, the statute does not authorize the tenant to withhold rent because of general housing code violations.

127. *Id.* at § 143b(5)(a), (c). If the welfare agency should start to withhold rent on the basis of *knowledge* of a serious code violation, *without* an official report, a welfare recipient whose rent was withheld would have no defense against an action by the landlord to recover rent or to evict for nonpayment of rent, since the statutory defense is available only where the violation is reported to the public welfare department by

correction of the condition constituting the violation, the statute protects against retaliation by forbidding the entry of any money judgment or any eviction order against the tenant "on the basis of nonpayment of rent for any period during which there was outstanding any violation of law relating to dangerous or hazardous conditions or conditions detrimental to life or health."¹²⁸ The statute also provides, however, that nothing therein contained "shall prevent the public welfare department from making provision for payment of the rent which was withheld . . . upon proof satisfactory to it that the condition constituting a violation was actually corrected."¹²⁹

Like the more traditional modes of housing code enforcement, rent withholding under the Spiegel law is dependent upon action by a local administrative agency. Rent withholding is not authorized unless the agency is already paying some or all of the welfare recipient's rent directly to the landlord, and even then the welfare recipient cannot compel the agency to withhold rents because of the existence of housing code violations.

The constitutionality of the Spiegel law was challenged in two cases in the lower courts of New York. The Binghamton City Court held the statute unconstitutional,¹³⁰ while the New York City Court reached a contrary conclusion.¹³¹ This split was resolved by the Court of Appeals in *Farrell v. Drew*,¹³² where Judge Fuld, for the majority, held that the statute does not deny equal protection of the law merely because it is aimed only at landlords of welfare recipients.

the agency having jurisdiction over code violations. It is thus anomalous that the statute authorizes withholding by the welfare agency on the basis of "knowledge that there exists . . . any violation . . . which is dangerous, hazardous or detrimental to life or health," without specifying that it must have been officially reported. Moreover, it is not clear from the language of § 143b whether the determination that existing violations are dangerous, hazardous or detrimental to life or health is to be made by the code enforcement agency or by the welfare agency.

128. *Id.* at § 143b(5)(b).

129. *Id.* at § 143b(6). While § 143b(6) and § 143b(5)(b) are arguably inconsistent, they may perhaps be reconciled by construing them to authorize the welfare agency to pay the landlord any rent withheld for a period *after* correction of the violations that gave rise to the right to withhold. By construing § 143b(6) to give the public welfare department discretion to pay *all* withheld back rents upon correction, this provision would emasculate the power of a welfare agency to assist the welfare tenant.

130. *Trozze v. Drooney*, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Civ. Ct. N.Y. 1962).

131. *Schaeffer v. Montes*, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (Civ. Ct. of N.Y. 1962).

132. 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967).

In addition, the court found no procedural due process violations because it failed to specifically call for notice and hearing to landlords. Finally, the statute did not unconstitutionally impair any of the landlord's contractual rights since all contracts are made subject to the exercise of the state's police power, which is paramount to any rights under contracts between individuals. Unfortunately, however, the *Farrell* court did not consider other constitutional issues—*e.g.*, whether the statute is made invalid by the lack of statutory standards to guide the exercise of administrative discretion in determining whether a particular housing code violation is a danger to, or detrimentally affects, life or health; whether the lack of statutory standards to guide the welfare agency in deciding whether to retain the withheld rents renders the statute invalid; and whether retention of the withheld rents by the welfare agency, without paying the landlord the reasonable value of the tenant's use and occupation, would in any case deprive the landlord of property without due process of law.

In *Farrell*, the code violation that triggered the right to withhold rent involved a faulty door in an apartment occupied by a tenant who was *not* a welfare recipient. There was no code violation in the apartment of the welfare recipient on whose behalf rents were withheld. It thus appears, though somewhat anomalous, that the power of the welfare agency to withhold rents and the welfare recipient's right to the statutory defense against an action to recover rent or to evict for nonpayment is not dependent on the existence of any code violation in the welfare recipient's dwelling unit, nor even upon any finding that the code violation is dangerous, hazardous or detrimental specifically to welfare recipients.¹³³

3. The Massachusetts Statutes

Massachusetts has two rent withholding statutes, both originally enacted in 1965.¹³⁴ One of these statutes,¹³⁵ in effect, gives tenants a

133. The dissent was critical on this point. *Id.* at 494, 227 N.E.2d at 828, 281 N.Y.S.2d at 7 (Van Voorhis, J., dissenting). Judge Van Voorhis noted that the statute was overinclusive, as it allowed withholding of rent for welfare tenants because of conditions affecting non-welfare tenants. Also, the non-welfare tenants were forced to suffer through defective conditions because obliged continue paying rent since not on public relief. Finally, the provisions of the statute were unrelated to its intended purpose of eliminating slums since the statute *prevented* any rent from being used for repairs or improvements.

134. 1965 Mass. Acts, ch. 888 (currently codified at MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op Supp. 1978)); 1965 Mass. Acts, ch. 898 (currently codified at MASS. ANN. LAWS ch. 111, §§ 127A-127N (Michie/Law. Co-op 1975 & Supp.

right to withhold rents where serious violations of the minimum standards of fitness for human habitation established by state and local housing codes have occurred, without bringing suit to obtain a

1978)). Both rent withholding remedies are ultimately based on ch. 111, § 127A, which in substance provides for a state housing code. The state public health department is enjoined to "adopt . . . public health regulations to be known as the state sanitary code," which "shall designate those conditions which, when found to exist upon inspection of residential premises, shall be deemed to endanger or materially impair the health or safety of persons occupying the premises." *Id.* Adoption of the state sanitary code, however, "shall not be deemed to limit the right of any [local] board of health to adopt such rules and regulations [as to housing] as, in its opinion, may be necessary for the particular locality under its jurisdiction" so long as such rules and regulations are consistent with state laws and with the state sanitary code. Moreover, designation in the state sanitary code of conditions dangerous to health or safety will not preclude a housing inspector from "certifying that any other violation or combination or series of violations of said code or other applicable laws, ordinances, by-laws, rules or regulations may endanger or materially impair the health or safety of said persons when such certification is otherwise appropriate." *Id.*

§ 127B of the statute provides for enforcement in the traditional manner through issuance of an administrative order to the owner or occupant, requiring the owner or occupant "to vacate, to put the premises in a clean condition, or to comply with the regulations set forth in said [state sanitary] code which are not being complied with or to comply with the rules and regulations adopted by the board of health as being necessary for the particular locality," and making the costs incurred by the enforcement agency "in cleaning up the premises or in causing such structure to be demolished or removed" a "debt due the city or town" and "a lien on the land upon which the structure is or was located." *Id.* at § 127B.

135. MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op 1975 & Supp. 1978). This statute does not expressly authorize rent withholding, but the right to withhold follows from the statute's express protection against eviction for nonpayment of rent, where such nonpayment is based on the existence of conditions making the premises unfit for human habitation. Such protection is accorded the tenant, however, only upon proof that the landlord or his agent "knew of such conditions before the tenant . . . was in arrears in his rent." *Id.*

As amended in 1977, ch. 239, § 8A further provides:

Proof that the premises are in violation of the standard of fitness for human habitation established under the state sanitary code, the state building code, or any other ordinance, by-law, rule or regulation establishing such standards and that such conditions may endanger or materially impair the health, safety or well-being of a person occupying the premises shall create a presumption that conditions existed . . . entitling the tenant . . . to a counterclaim or defense under this section. Proof of written notice to the owner or his agents, servants, or employees, . . . of an inspection of the premises, issued by the board of health, or in the city of Boston by the commission of housing inspection, or by any other agency having like powers of inspection relative to the condition of residential premises, shall create a presumption that on the date such notice was received, such person knew of the conditions revealed by such inspection and mentioned in such notice.

Id.

court order for rent withholding. The other statute¹³⁶ requires tenants to bring suit and obtain judicial authorization prior to withholding rents, based on a finding that serious violations of the same minimum housing standards exist. And there are other significant differences between the two statutes with respect to which rental housing is covered;¹³⁷ the provisions for giving the landlord notice of serious housing code violations;¹³⁸ the burden of proving that the tenant is not responsible for such violations;¹³⁹ the necessity of proving that the tenant is not in arrears in his rent when initiating rent withholding;¹⁴⁰ the need for a judicial finding that payment of the "fair

136. *Id.* ch. 111, §§ 127F-127G (Michie/Law. Co-op 1975 & Supp. 1978). Although the tenant may prove that the premises have been inspected by an appropriate agency and found to be in violation of state or local housing codes, he may also simply allege and prove that a violation exists, that a request for inspection was made to the appropriate agency at least 24 hours before the petition was filed, and that no inspection was made. *Id.* §§ 127C & 127H. In either case, the tenant under ch. 111 must allege and prove that the violation "may endanger or materially impair the health and well-being of such tenant," although if the tenant relies on an official inspection, he apparently need not allege or prove that such a potential effect was noted in the inspection report itself.

137. Section 127C applies to rental units in "any building or any part thereof used for residential purposes." MASS. ANN. LAWS ch. 111, § 127C (Michie/Law. Co-op 1975 & Supp. 1978). Section 8A expressly exempts rental housing located in a hotel or motel or in "a lodging house or rooming house wherein the occupant has maintained . . . occupancy for less than three consecutive months." *Id.* ch. 239, § 8A.

138. *See* notes 134 & 135 *supra*.

139. The tenant must allege and prove that "the conditions in question were not substantially caused by the tenant or any person acting under his control." MASS. ANN. LAWS ch. 111, § 127C (Michie/Law. Co-op 1975 & Supp. 1978). In contrast, the landlord who brings a summary action to evict under § 239 must prove that a code violation raised as a defense by the tenant was caused by the tenant or "any other person acting under his control," except where the violation exists "solely within that portion of the premises" under the tenant's control "and not by its nature reasonably attributable to any action or failure to act" of the landlord. *Id.* ch. 239, § 8A.

Furthermore, "the tenant" in the phrase from ch. 111 quoted above seems to mean "the petitioner or any other affected tenant" whose health, safety or well-being may be threatened by the code violation. If so, the petitioning tenant is not entitled to relief under ch. 111 unless he proves that no tenant in the building was responsible for the violation complained. But "the person occupying the premises" in the quoted phrase from ch. 239, § 8A clearly means the person who is authorized to set up the code violation as a defense against eviction. Thus a tenant who withholds rent and otherwise qualifies for protection under ch. 239, § 8A is immune from summary eviction even if the landlord can prove that the violation was caused by some other tenant in the same building.

140. A tenant seeking a rent withholding order under ch. 111, §§ 127F-127H need not show that he is not in arrears, provided he is willing to pay any arrearage into the court if ordered. *Id.* §§ 127F-127H. But a tenant withholding rent without a court

value of the use and occupation of the premises into court is necessary to remedy the condition constituting the violation;" the court's authority, in determining how much the tenant should pay into court, to reduce the fair value of the use and occupation by the amount awarded a tenant for any counterclaim;¹⁴¹ and the definition of "ar-rears of rent."¹⁴²

Despite these significant differences, the two Massachusetts statutes have important similarities. A tenant who properly withholds rent is protected against eviction for nonpayment of rent under both statutes.¹⁴³ A court acting under either statute may order the tenant who

order and relying on ch. 239, § 8A apparently is required to show that he was "not in arrears in his rent" when the landlord learned of the conditions making the premises unfit for human habitation, and cannot rely on his willingness to pay the arrearage into court after determination of the amount in arrears. *Id.* ch. 239, § 8A. If a tenant withholds rent without notifying the landlord of the conditions which in the tenant's view justify rent withholding, the tenant would be well advised to file a petition under ch. 111, § 127F or § 127H indicating his willingness to pay any arrearage into the court as ordered. A tenant who follows this course and obtains a court order for rent withholding and payment of "the fair value of the use and occupation" into court under those sections would be protected against eviction for nonpayment of rent despite failure to comply with the notice requirement of ch. 239, § 8A. *See* note 142 *infra*.

141. Under ch. 111, § 127F the court must find that payment of the "fair value of the use and occupation of the premises" into court is "necessary to remedy the condition constituting the violation," MASS. ANN. LAWS ch. 111, § 127F (Michie/Law. Cop 1975 & Supp. 1978), but no such finding is required under ch. 239, § 8A. Chapter 239, § 8A, however, provides that the court must reduce the fair value of use and occupation by "the amount awarded the tenant or occupant for any claim." *Id.* ch. 239, § 8A. Chapter 111 specifies no such reduction.

142. Ch. 111, § 127F provides that:

[a] person occupying the premises shall not be considered to be in arrears in his rent when the amount of rent the landlord alleges in good faith to be due is equal to or less than the amount of any counterclaim that said person may bring in good faith against the landlord, including any damages owed because of a breach of warranty or a violation of any other law.

Id. ch. 111, § 127F.

143. Chapter 239, § 8A expressly provides that "[t]here shall be no recovery of possession . . . pending final disposition of the plaintiff's action" if the court finds that the tenant has established the statutory prerequisites for a defense or counterclaim based on "the condition of the premises or the services or equipment provided therein," and further that "[t]here shall be no recovery of possession . . . if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant . . . by reason of any counterclaim or defense under this section." *Id.* ch. 239, § 8A. Moreover:

[i]f the amount found to be due the landlord exceeds the amount found to be due the tenant . . . , there shall be no recovery of possession if the tenant . . . within one week after having received written notice from the court of the balance due,

withholds rent to pay into court "the fair value of the use and occupation," taking into account any evidence relative to the conditions allegedly constituting a breach of warranty or housing code violations in determining fair value;¹⁴⁴ and a court may order moneys paid by the tenant to be used for making repairs.¹⁴⁵ References in the current versions of both of the Massachusetts rent withholding statutes to "breach of warranty," "defense," "counterclaim," and "fair value of the use and occupation" are obviously based on the judicial recognition of an implied warranty of habitability in *Boston Housing Authority v. Hemingway*.¹⁴⁶

Withholding and receivership may be combined in Massachusetts

pays to the clerk the amount due landlord, together with interest and costs of suit, less any credit due the tenant . . . for funds already paid by him to the clerk under this section. In such event, no judgment shall enter until after the expiration of the time for such payment and the tenant has failed to make such payment.

Id. An editorial note indicates that the 1977 amendment, approved Jan. 11, 1978, "completely rewrote the section to provide procedures for tenants' assertion of claims and defenses in landlords' summary proceedings." *Id.*

Chapter 111, §§ 127A-127N, does not expressly protect a tenant who withholds rent and pays it into court pursuant to court order. However, in any case where the landlord knew of the conditions making the leased premises unfit for human habitation when the tenant began paying the rent into court and the tenant was not then "in arrears," the tenant is clearly protected against eviction for nonpayment of rent by ch. 239, § 8A. But if the tenant begins withholding rent on his own, before the landlord learns of the conditions making the premises unfit for human habitation, he is not entitled to protection under ch. 239, § 8A. Instead, he apparently must rely on § 4 of the act, which originally added §§ 127A-127N to ch. 111 in 1965. This section, for reasons unknown, was never assigned either to ch. 111 or ch. 239 and still remains uncodified. As amended in 1968, this statute provides as follows:

Notwithstanding any contrary provision of law, in any action of summary process to recover possession of . . . premises occupied for dwelling purposes where the tenancy has been terminated . . . for nonpayment of rent, no judgment and execution shall issue for the plaintiffs while the rents payable for said premises are to be paid into court pursuant to an order issued under section one hundred and twenty-seven F or section one hundred and twenty-seven H of chapter one hundred and eleven of the General Laws and are so being paid nor shall any such judgment and execution issue during the nine month period next following the date of such order ceases to be operative or is revoked if that tenancy has been terminated without fault of the tenant.

Editorial note to MASS. ANN. LAWS ch. 111, § 127F (Michie/Law. Co-op 1975).

144. MASS. ANN. LAWS ch. 111, §§ 127F-127H (Michie/Law. Co-op Supp. 1978); *id.* ch. 239, § 8A (Michie/Law. Co-op Supp. 1978).

145. MASS. ANN. LAWS ch. 111, §§ 127F-127H (Michie/Law. Co-op Supp. 1978); *id.* ch. 239, § 8A (Michie/Law. Co-op Supp. 1978).

146. 363 Mass. 184, 293 N.E.2d 831 (1973).

if the tenant initially files the rent withholding petition in the superior court, or if an action started in the district court is removed to the superior court,¹⁴⁷ but the right to withhold rent is not dependent on appointment of a receiver as under New York's article 7A¹⁴⁸ and the Connecticut statute modeled on article 7A.¹⁴⁹ Once appointed under chapter 111, the Massachusetts receiver is authorized to "collect all rents and profits of the property as the court shall direct and use all or any of such funds . . . to enable such property to meet the standards of fitness for human habitation."¹⁵⁰

In 1972 the Massachusetts legislature authorized residential tenants to "repair or have repaired the defects or conditions constituting the violations" found to exist by the board of health or other local code enforcement agency, and certified by it or by a court of law as likely to "endanger or materially impair the health, safety or well-being of a tenant or tenants," and to deduct from any subsequently due rent the amount paid for repairs.¹⁵¹ This broad authorization is limited, however, by a proviso that no tenant may deduct "an amount greater

147. MASS. ANN. LAWS ch. 111, § 127H (Michie/Law. Co-op Supp. 1978).

148. N.Y. REAL PROP. ACTS. LAW. Art. 7A, §§ 769-782 (Consol. Supp. 1977). *See* note 99 *supra*.

149. CONN. GEN. STAT. § 19-347g (1977).

150. MASS. ANN. LAWS ch. 111, § 127I (Michie/Law. Co-op 1975), which also provides: "A receiver shall have such powers and duties as the court shall determine, including the right to evict for nonpayment of rent. A receiver may be a person, partnership or corporation." *Id.*

The statute also provides that:

The court, after hearing, may, by decree, authorize the receiver to apply for such financial assistance, if it finds such assistance is necessary, that it is in a reasonable amount and that the sum required to repair and rehabilitate the premises is not so excessive as to constitute an imprudent and unreasonable expenditure to accomplish the purpose. . . . The balance owed by the receiver to the commonwealth shall, together with interest thereon . . . , constitute a debt due the commonwealth, upon the rendering of an account therefor to the owner of record, and shall be recoverable from such owner in an action of contract. Any such debt . . . shall constitute a lien on the property involved, if a notice of such lien is recorded on behalf of the commonwealth . . . within ninety days after the debt becomes due.

Id. § 127J.

It appears that the draftsman of the 1965 Massachusetts tenants' rights legislation anticipated that a tenant might first qualify for ch. 239, § 8A protection against eviction for withholding of rent and then, after the court had entered an order for payment of the fair value of use and occupation into court, obtain appointment of a receiver pursuant to ch. 111, § 127H.

151. *Id.* ch. 111, § 127L (Michie/Law. Co-op Supp. 1978).

than four months' rent in any twelve-month period, or period of occupancy, whichever is shorter," and that "[w]here the violation affects more than one unit of a multi-unit structure, or a portion of the structure reserved for the common use of tenants, the amount deducted for repairs for all affected tenants shall not exceed the total of four months' rent due to the owner from all affected tenants." Moreover, the owner is authorized to "recover from the tenant any excessive amount deducted from the rent," defined as any amount in excess of four months' rent, or an amount unreasonable under all the circumstances, including "the alternatives available to the tenant at the time the violations were first reported, the urgency of the need to repair, and the quality and cost of the work done." However, the landlord can only recover the "excessive amount" in a contract action, not in an action for possession of the rental premises. Although this last provision is rather ambiguous, the legislature apparently intended to preclude summary eviction of a tenant for nonpayment of rent in cases where the tenant makes repairs and deducts an excessive amount, but to allow the landlord to recover any sums wrongfully deducted in an ordinary action for rent.

For many years a Massachusetts statute¹⁵² had provided for fines or imprisonment of any landlord of rental housing, "other than a room or rooms in a hotel, lodging house or rooming house," who was required by express or implied terms of the rental agreement to furnish specified services such as water, heat, light, gas, or elevators, and who wilfully or intentionally failed "to furnish any of those services, or who wilfully or intentionally interfere[d] with the quiet enjoyment of such . . . premises." Although this statute was apparently little used, it seems to have been intended to cover cases in which the tenant retained possession of the premises and therefore, under traditional common law theory, could not recover damages for breach of the express or implied covenant of quiet enjoyment in the lease. A recent amendment now makes it applicable to all rental housing except hotel rooms, expands "specified services" to include those required by law, and provides that a landlord who violates the statute shall also be liable for any actual and consequential damages or three months' rent, whichever is greater, and the costs of the action—including a reasonable attorney's fee—all of which may be applied in setoff or recoupment against any claim for rent owed.¹⁵³

152. *Id.* ch. 186, § 14 (Michie/Law. Co-op 1969) (originally enacted in 1927).

153. *Id.* as amended by 1973 Mass. Acts, ch. 778, § 2.

This amendment, in referring to specified services "required by law," is presumably intended to encompass all services required by the state sanitary code or local housing codes. In addition to providing a new damage remedy, the statute also gives the superior and district courts jurisdiction in equity to restrain violations.¹⁵⁴

Abbott surveyed records of landlord suits for possession and unpaid rent in the Boston Housing courts to ascertain the incidence of rent abatement defenses under the Massachusetts tenants' rights legislation, and found that less than fifteen per cent of the tenant-defendants ever raised the abatement defense, although most of the cases involved low-income tenants represented by legal service attorneys.¹⁵⁵ In most cases when the defense was raised, the tenant was given a rent abatement and the landlord was given a judgment for possession. The success of landlords in obtaining judgments for possession suggests that most tenants who withheld rent failed to comply with the requirements of chapter 239, section 8A, and therefore had no valid defense against eviction for nonpayment of rent, although under *Boston Housing Authority v. Hemingway*¹⁵⁶ they were able to set off their damages for breach of the implied warranty of habitability against the landlord's rent claim. As Abbott notes:

The provisions of section 8A in effect when the survey was taken required the tenant, while not in arrears in the rent, first to give written notice of his intention to withhold rent to the landlord, then to secure an inspection of the unit to certify the existence of a code violation that 'may endanger or materially impair the health or safety' of the occupants. Failure to follow these procedures eliminated the tenant's defense to eviction, although his defense against the landlord's claim for back rent remained.¹⁵⁷

In its present form, chapter 239, section 8A does not require written notice to the landlord of a tenant's intention to withhold rent, nor does it require an inspection of the dwelling unit to certify the existence of a serious code violation.¹⁵⁸ Thus it would seem that under

154. *Id.*

155. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 63-64 (1976). For the data on which Abbott's conclusions are based, see *id.* at 142-43 (Appendix, Table IV).

156. 363 Mass. 184, 293 N.E.2d 831 (1973).

157. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 62 (1976).

158. See note 135 *supra*. Proof of written notice of an official inspection creates a presumption that on the date of receipt of the notice the landlord "knew of the conditions revealed by such inspection and mentioned in the notice," and ch. 239, § 8A

the statute in its present form tenants should more often be successful in defeating summary eviction suits.

4. The Pennsylvania Statute

The Pennsylvania Rent Withholding Act¹⁵⁹ provides that, notwithstanding "any agreement, whether oral or in writing," whenever one of several designated housing code enforcement agencies "certifies a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay, and the right of the landlord to collect rent shall be suspended without affecting any other terms or conditions of the landlord-tenant relationship, until the dwelling is certified as fit for human habitation or until the tenancy is terminated for any reason other than nonpayment of rent."¹⁶⁰ The statute further provides that, if the tenant continues to occupy the dwelling during any period when the duty to pay rent is suspended, the tenant shall deposit the rent in an escrow account, to be paid the landlord when the dwelling is finally certified as fit for human habitation.¹⁶¹ If the dwelling has still not been certified as fit for human habitation at the end of six months from the date it was certified as unfit, any money in escrow becomes payable to the depositor, except that funds may be used to make the dwelling fit for habitation or to pay utility bills that the landlord, though obligated, has refused to pay.¹⁶² Tenants who withhold rent under the statute are protected by a prohibition against eviction "for any reason whatsoever while rent is deposited in escrow."¹⁶³

The Pennsylvania Rent Withholding Act was upheld in *Depaul v. Kauffman*,¹⁶⁴ where the court rejected constitutional challenges based on improper delegation of power, vagueness,¹⁶⁵ substantive

requires only that the landlord shall have known of the conditions alleged make the premises unfit for human habitation "before the tenant . . . was in arrears in his rent." Chapter 239, § 8A also makes "[a] copy of an inspection report issued by" any code enforcement agency "admissible in evidence and . . . prima facie evidence of the facts stated therein." *Id.*

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

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 441 Pa. 386, 272 A.2d 500 (1971).

165. The holding on this point was based largely on PHILADELPHIA, PA., HOUSING CODE § 7-506 (1970), which defines as "unfit for human habitation any dwelling

due process,¹⁶⁶ and impairment of contract arguments.¹⁶⁷ The court

which constitutes a serious hazard to the health or safety of the occupants or to the public because it is dilapidated, unsanitary, vermin-infested or lacking in the facilities and equipment required by" the Code. *See* 441 Pa. at 393, 272 A.2d at 504. It is not clear why the court thought its reference to the standards applicable in Philadelphia should be conclusive as to the validity of the general standard set forth in the statute, since the statute applies to housing throughout Pennsylvania. However, a study published in 1972 found generally that "in Pennsylvania the appropriate inspecting units have specified certain guidelines for certification" so that "the interpretation problem caused by the vagueness of other jurisdiction's standards is substantially avoided." Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821, 853 (1972).

166. On this point, the court said:

. . . [A]mong the legitimate objects of the regulation of property for the general welfare [under the police power] is an adequate supply of safe and decent housing. . . .

It is evident that the sanctions imposed by the Act bear a real and substantial relationship to its objective of assuring decent and habitable rental property. . . . It seems a matter of common sense that one in the business of renting real estate for profit who is faced with the temporary or permanent loss of rental income will, in some instances, take steps to avoid that loss. . . .

Appellants' real complaint is that the Act is too severe, that it is 'unduly oppressive' or patently beyond the necessities of the case. In this regard, they note that under the terms of the Rent Withholding Act a tenant may but need not necessarily employ the escrow funds to make the needed improvements and can avoid eviction during the period of rent suspension notwithstanding his mistreatment of the property or other violation of his lease, and the landlord may irretrievably lose rentals if, after making a good faith and reasonable effort, he cannot rehabilitate the property within six months after its certification as unfit. . . .

That the Rent Withholding Act permits but does not require the necessary improvements to be made with the escrow funds is surely not unreasonable. . . . [I]t is to be expected that most landlords possess either the skills needed to make property repairs or, at least, the knowledge of whom to hire to make such repairs. Tenants, as a class, are not likely to possess these skills and this knowledge in the same degree. Thus, it is far from unreasonable to put the burden on the landlord rather than the tenant to make the needed repairs. Of course, the Act imposes an additional burden upon the landlord in the sense that he will be out of pocket to the extent of the cost of the repairs until the repairs are completed and the rents released from escrow, but we do not deem this unduly oppressive.

Neither are we persuaded by the sample of a landlord who is unable to make the required improvements within six months notwithstanding his good faith efforts to do so. . . . A half a year is surely not an unreasonably short time. Furthermore, there can be little sympathy for the landlord who despite diligence and good faith cannot repair his property within the allotted time. Landlords have a [statutory] duty to maintain their properties in a condition fit for human habitation not only after that property has been certified as unfit but *at all times*. . . . Thus it is not unreasonable that a landlord suffer a financial penalty even if he cannot render his property fit within six months of its certification as unfit. This situation might have even been contemplated by the Act: the goal of good hous-

also clarified two important questions in holding that a tenant may not remain in possession of the premises without paying the withheld rent into escrow, and that the final sentence of the Act—prohibiting eviction for any reason whatsoever while rent is in escrow—“does not require the *renewal* of an existing lease [which expires during the six-month withholding period] but only an extension of the original lease as long as rent is in escrow.”¹⁶⁸

It seems clear that the effectiveness of the Pennsylvania Rent With-

ing would be served not only by rehabilitating houses which are certified as unfit but also by *detering* owners of rental property from allowing their property to degenerate into a condition of unfitness in the first place.

The provision of the Rent Withholding Act that insulates a tenant from eviction during the rent withholding period is not a constitutional deficiency. To be sure, this statutory right is a windfall to the tenant. However, it serves as an additional deterrent inducing the landlord to maintain his property in a habitable condition.

441 Pa. at 393, 395-98, 272 A.2d at 504-06.

167. The court brushed aside the impairment of contract argument by observing: We have already concluded that the Rent Withholding Act is a legitimate exercise of the police power. In light of the paramount public interest in safe and decent housing, the landlord's pre-existing duty to comply with housing code standards, and the fact that in most instances there will be no permanent rent loss, we do not consider the Act to be an unconstitutional impairment of contract obligations. *Id.* at 399, 272 A.2d at 507.

168. On this point the court explained:

. . . Undoubtedly, a portion of those who rent unfit dwellings are tenants from month to month or at will. With respect to this class of tenants, if the Act were construed to require no extension of the tenant's possessory right, the landlord could largely avoid the impact of the Act by giving notice to vacate as soon as the first rental payment was put in escrow. However, in the case of a tenancy from year to year or longer set to expire one or two months prior to the expiration of the rent withholding period, the objectives of the act would not be served and the landlord would be needlessly burdened, if he were required to renew the lease for an entire additional term.

Id. at 396, 272 A.2d at 505.

The *Kauffman* court, in holding that an existing lease is extended by the Act “only . . . as long as rent is in escrow,” seems somewhat disingenuous in not referring to the court's own decision, just three months earlier, in *Klein v. Allegheny County Health Dept.*, 441 Pa. 1, 269 A.2d 647 (1970), where it held that there is to be not only one six-month withholding period, but as many periods as are necessary “until the dwelling is certified as fit for human habitation.” The *Klein* ruling makes it clear that in cases where the landlord, despite good faith efforts to do so, is unable to make the necessary repairs and improvements, the tenant may continue to occupy the premises rent-free for an indefinite period. At the end of each six-month period, if the dwelling has not yet been certified as fit for human habitation, the tenant will be able to recover all of the rent paid into escrow, and a new six-month withholding period will start.

holding Act will depend in large measure upon the way in which its escrow procedure works. That there have been problems with the escrow procedure is evidenced by a lower court decision in 1970¹⁶⁹ allowing tenants to bring a class action to compel a city to name a bank as the depository for escrowed rents. Moreover, the Act does not clearly indicate whose authorization is needed to obtain a release of the escrowed rents for the purpose of making repairs during the withholding period. In *Kauffman*, however, the court assumed that the tenant must authorize any such release. A 1972 study found that tenants and escrow agents had generally so construed the statutes, and that the policy of some escrow agents was to counsel tenants to refuse to authorize any release of rents for repairs.¹⁷⁰

The Pennsylvania Rent Withholding Act says nothing about the disposition of escrowed rents when a tenant moves during the six-month withholding period. Since there is no requirement in the Act that a tenant must remain in possession for the full six-month period, it can be argued that a tenant who moves before the end of the period should be entitled to the escrowed rents if the dwelling remains unfit at the end of the period. If the tenant stays in possession, however, and simply stops paying rent into escrow, it is clear that the tenant may be evicted during the six-month period. Moreover, it would seem that the landlord, after evicting the tenant, may obtain the rent deposited in escrow despite his failure to make the dwelling fit for human habitation.

5. The Connecticut Statutes

In 1969 Connecticut adopted three new statutes providing for rent withholding. One of these statutes, in its current form¹⁷¹ provides that "[n]o apartment in any apartment house containing three or more housing units in any municipality which adopts the provisions of this section . . . shall be occupied for human habitation, after a vacancy, until a certificate of occupancy has been issued by the person designated by . . . such municipality to administer the provisions of this section, certifying that such apartment conforms to the requirements of the applicable housing ordinances of such municipality and this chapter . . . , and [n]o rent shall be recoverable by the owner

169. *Feliciano v. City of Lancaster*, 63 *Lanc. Rev.* 191 (C.P. 1971).

170. Comment, *The Pennsylvania Project—A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 *VILL. L. REV.* 821, 873 (1972).

171. *CONN. GEN. STAT. ANN.* §§ 19-347k to 19-347q (1979).

or lessor of such apartment house for the occupation of any apartment for which a certificate of occupancy has not been obtained prior to the rental thereof."¹⁷² There are exceptions for apartment houses "constructed or substantially reconstructed within a period of ten years next preceding the date such certificate of occupancy would otherwise be required hereunder," and for public housing.¹⁷³ This statute appears to be potentially more effective than the 1905 statute previously mentioned,¹⁷⁴ since the new statute requires older rental housing to comply with current state and municipal housing codes whenever a new tenant leases a dwelling unit covered by the new statute. The new formulation was recently sustained in the federal district court¹⁷⁵ against constitutional challenges that the statute denied equal protection of the laws because it exempted apartment buildings less than ten years old and public housing, and the statute deprived apartment owners of property without due process of law because it failed to establish any particular procedure or time limit for issuance of certificate of occupancy.

Another of the Connecticut statutes enacted in 1969¹⁷⁶ provides for rent withholding in connection with a receivership granted on the complaint of a majority of the tenants occupying a tenement house, defined as a building with dwelling units rented to three or more families. Under this statute, which seems to be modeled on New York's article 7A,¹⁷⁷ the receiver may be appointed if the court finds "the existence of one or more of the following conditions: Housing code violations, lack of heat, running water, electricity, light or adequate sewage disposal facilities, other conditions dangerous to life, health or safety and infestation of rodents, vermin or other pests."¹⁷⁸ Although these conditions are stated in the disjunctive, it is clear that all of them will, in fact, constitute violations of the state tenement house law or a local housing code. If a receiver is appointed, the tenants must deposit the withheld rents with the receiver.¹⁷⁹ As under New York's article 7A, the court may authorize the owner or mortgagee of

172. *Id.* § 19-347r(a),(b).

173. *Id.* § 19-347r(c).

174. *See* notes 86 and 91 *supra*.

175. *Hill Const. Co. v. Connecticut*, 366 F. Supp. 737 (D. Conn. 1973).

176. CONN. GEN. STAT. ANN. §§ 19-347k to 347q (1977).

177. N.Y. REAL PROP. ACTS. LAW. ART. 7A, §§ 769-782 (Consol. Supp. 1977).

178. CONN. GEN. STAT. ANN. §§ 19-347k & 19-347q (1979).

179. *Id.* § 19-347n.

the building to remove or remedy the conditions found to exist upon a showing of the ability promptly to undertake the work required and the posting of adequate security, in which case withholding of rents is not authorized and no receiver will be appointed.¹⁸⁰

The third of the 1969 Connecticut statutes¹⁸¹ authorizes a "municipal fair rent commission" created pursuant to the statute, which is only an enabling act, to order suspension of rent payments by tenants in rent-controlled housing after it has determined that violations of state or local health or safety regulations exist on the premises, until the landlord brings the premises into compliance. During the period of suspension, rent must be paid to the local fair rent commission to be held in escrow, but the statute does not expressly authorize use of the withheld rents to effect repairs.

The Connecticut statute fails to address the question whether a tenant who has paid his rent to the commission will be protected against an action by the landlord to recover rent or to evict for non-payment of rent, but the statute will presumably be construed as giving the tenant such protection. The Connecticut statute also fails to indicate whether the landlord, after correcting the violations, is entitled to rents held by the commission. Perhaps the legislature intended to leave this issue to local option, although it would seem better to have a uniform, state-wide rule.

6. Other Statutes

Missouri¹⁸² and New Jersey¹⁸³ require the tenant to bring suit and obtain a court order before he is entitled to withhold rent. Maryland,¹⁸⁴ Michigan,¹⁸⁵ Rhode Island,¹⁸⁶ and Tennessee¹⁸⁷ permit the tenant to withhold rent without first bringing suit. Under all of the statutes just mentioned, the basis of the tenant's right to withhold rent is the existence of conditions, generally in violation of an applicable

180. *Id.* § 19-347p.

181. CONN. GEN. STAT. ANN. § 7-148f (Supp. 1978).

182. MO. ANN. STAT. §§ 441.500-441.620 (Supp. 1978).

183. N.J. STAT. ANN. §§ 24:42-85 to 24:42-96 (Supp. 1978).

184. 1968 Md. Laws, ch. 459 (applicable only to residential tenancies in Baltimore where the weekly rent is \$50 or less).

185. MICH. COMP. LAWS ANN. § 125.520 (1976).

186. R.I. GEN. LAWS § 45-24.2-11 (1970).

187. TENN. CODE ANN. §§ 53-5501 to 53-5507 (Supp. 1978) (applicable only to residential tenancies where the rent does not exceed fifty dollars per week).

housing code, that seriously threaten the life, health, safety, or welfare of the tenant or make the premises unfit for human habitation.¹⁸⁸ All of these statutes except those of Maryland and Tennessee permit the rents paid into court, or to another escrow agency, to be used for the purpose of removing the conditions making the tenant's dwelling uninhabitable.

The 1968 Michigan "tenants' rights" legislative package provided other tenant-initiated remedies in addition to rent withholding. Tenants as well as the code enforcement agency may bring an action to enforce the state housing code, and if the court finds any code violations or unsafe, unhealthy or unsanitary conditions, it may issue a mandatory injunction requiring the landlord to make repairs, authorize the code enforcement agency to make repairs, authorize the tenant to "repair-and-deduct," or appoint the municipality or a proper local agency as receiver of the premises of the purpose of restoring them to a safe, decent and sanitary condition.¹⁸⁹

The New Jersey statute also combines rent withholding and receivership.¹⁹⁰ These receivership provisions, like those in Connecticut and Massachusetts, seem to be based on New York's article 7A,¹⁹¹ but the New Jersey provisions differ in that they authorize a receivership only "if the owner, any mortgagee or lienor of record of parties in interest . . . apply to the court to be permitted to remove or remedy the conditions specified in [the petition and the court issues] an order permitting such person to perform the work, [and the court later] shall determine that such [person] is not proceeding with due diligence [or has failed] to complete the work in accordance with the provisions of said order."¹⁹² There is no express provision for appointing a receiver if no one applies to the court for permission to make the necessary repairs, although in that case withheld rents deposited by tenants "shall be used, subject to the court's direction, to the extent necessary to remedy the . . . conditions alleged in the peti-

188. Although the right to withhold rent under the Michigan statute is triggered by proof that no certificate of compliance with the state housing code is in force, the substantive standard for refusal to issue, or revocation of, a certificate of compliance is not a mere violation of the state housing law but the existence of "conditions . . . [that] constitute a hazard to the health or safety of those who may occupy the premises." MICH. COMP. LAWS ANN. § 125.530 (1976).

189. MICH. COMP. LAWS ANN. § 125.523 (1976).

190. N.J. STAT. ANN. § 2A:42-92 to 42-93 (Supp. 1978).

191. N.Y. REAL PROP. ACTS. LAW ART. 7A, §§ 769-782 (Consol. Supp. 1977).

192. N.J. STAT. ANN. § 2A:42-93 (Supp. 1978).

tion.”¹⁹³

The Illinois rent withholding legislation, adopted in 1967, formalized and extended to welfare recipients throughout the state certain informal procedures used in Chicago since 1961.¹⁹⁴ It is similar to New York’s Spiegel law in that it applies only to rental housing occupied by welfare recipients. The statute is broader than New York’s, however, in that it authorizes county or local welfare agencies to withhold both the rent allowances included in periodic payments to welfare recipients and rent payments ordinarily made directly to landlords, if a report of the appropriate municipal or county authority shows that any building occupied by a welfare recipient “violates any law or ordinance establishing construction, plumbing, heating, electrical, fire prevention or other health and safety standards and by reason thereof is in a condition dangerous, hazardous or detrimental to life or health.”¹⁹⁵ The welfare agency must give landlords notice that rent allowances or direct rent payments on behalf of welfare recipients will be withheld unless the violations are corrected within ten days after the notice is mailed.¹⁹⁶

Like New York’s Spiegel law, the Illinois statute protects welfare recipients from eviction or other action by landlords as a result of rent withholding under the statute. Withholding is authorized whenever a serious code violation exists in any building occupied by a welfare recipient, even if the violation is not in the dwelling unit actually occupied by the welfare recipient.¹⁹⁷ Unlike the Spiegel law, however, the Illinois statute specifically provides for payment of varying percentages of the withheld rent to the landlord if he corrects code violations within specified periods of time,¹⁹⁸ and the Illinois Welfare Department or the local governmental unit, or both, are expressly authorized to intervene on behalf of a welfare recipient in any action brought against him by the landlord during the period when rent is withheld.¹⁹⁹

193. *Id.* § 2A:42-92.

194. ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1978).

195. *Id.*

196. *Id.*

197. *Id.*

198. If code violations are corrected within 90 days, all the withheld rent is paid to the landlord; if not, there is a 20% deduction as an “administrative penalty,” and for each 30-day period after the expiration of the initial 90-day period during which violations remain uncorrected, and additional penalty of 20% is deducted. *Id.*

199. *Id.*

A 1970 study of experience with the Illinois legislation²⁰⁰ concluded that these statutes had only limited effect. Rent was in fact withheld in only twenty-one per cent of the cases in which rent withholding was authorized, and compliance with the housing codes was achieved in only 7.5% of those cases. Moreover, statutory rent withholding appeared to have substantially no effect on the rate of demolition of substandard rental housing. Of the seventy-nine per cent of eligible cases where no rent was actually withheld, the failure to withhold rent was due to preventable administrative problems in sixty-seven per cent of such cases, and only thirty-three per cent was due to nonpreventable factors. As these statistics suggest, "the administration of the rent withholding statute is extremely complex."²⁰¹ A comparison between buildings in which rent was withheld and other buildings housing public aid recipients revealed that compliance was achieved in thirty-six per cent of the buildings where rent was withheld, as compared to only twenty-two per cent of the other buildings. Since both groups of buildings were in approximately the same condition, the higher rate of compliance for buildings where rent was withheld seems to indicate that rent withholding was effective in inducing compliance.

III. TENANTS' RIGHTS LEGISLATION: THE WARRANTY OF HABITABILITY APPROACH

A. *The 19th Century Legislation*

During the 19th Century, several states adopted legislation imposing a duty on landlords to deliver leased premises in a condition fit for the tenant's intended use or, more narrowly, fit for human habitation, and an additional duty to make at least some necessary repairs during the lease term. It is probable that the ultimate source of all such legislation was the civil law of western Europe. The Louisiana and Georgia legislation is clearly traceable to civil law sources.

1. The Louisiana Statute

The English common law regarding landlord-tenant relations never received acceptance in Louisiana, and the French civil law provided rules for judicial decision even after Louisiana became part of

200. Note, *Rent Withholding for Welfare Recipients: An Empirical Study of the Illinois Statute*, 37 U. CHI. L. REV. 798 (1970).

201. *Id.* at 816.

the United States. Current Louisiana Civil Code provisions, originating either in the Code Napoleon or early 19th Century additions thereto, impose on all lessors a duty, in the absence of a contrary agreement, to deliver the leased premises to the lessee in a condition fit for the purpose for which the lease was made,²⁰² make all major repairs not required by wrongful conduct of the lessee,²⁰³ and make even minor repairs made necessary by "unforeseen events or decay."²⁰⁴ The lessee, on the other hand, is responsible for other minor repairs customarily undertaken by tenants unless there is a contrary agreement between the parties.²⁰⁵ If the lessor does not make the repairs for which he is responsible, the lessee may "call on him to do it," and if the lessor refuses or neglects to make the repairs "the lessee may himself cause them to be made, and deduct the price from the rent due [and to become due], on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable."²⁰⁶ Moreover, the lessee may obtain a judgment dissolving the lease if the lessor fails to perform his statutory duties to deliver the leased premises in good condition and to keep them in repair.²⁰⁷

Lease provisions purporting to impose upon the lessee the duty of keeping leased premises in repair or stating that the lessee accepts the

202. LA. CIV. CODE ANN. arts. 2693, 2695 (West 1952). For cases interpreting these provisions, see *Bennett v. Southern Scrap Material Co.*, 121 La. 204, 46 So. 211 (1908); *Dean v. Beck*, 46 La. Ann. 1168, 15 So. 357 (1894); *King v. Grant*, 43 La. Ann. 817, 9 So. 642 (1891); *Siracusa v. Leloup*, 28 So. 2d 406 (La. App. 1946); *Mosher v. Burglass*, 170 So. 416, *reinstated*, 172 So. 124 (La. App. 1937).

203. LA. CIV. CODE ANN. arts. 2692-2693, 2717 (West 1952). For cases interpreting these provisions, see *Dehan v. Youree*, 161 La. 806, 109 So. 498 (1926); *Lirette v. Sharp*, 44 So. 2d 221 (La. App. 1950) (roof); *Roppolo v. Pick*, 4 So. 2d 839 (La. App. 1941) (ceiling); *Warren v. Metropolitan Life Ins. Co.*, 190 So. 855 (La. App. 1939); *Richard v. Tarantino*, 131 So. 701 (La. App. 1931) (floor).

204. LA. CIV. CODE ANN. art. 2717 (West 1952).

205. *Id.* art. 2716. The Louisiana Court of Appeals has indicated that the list is only illustrative and that the lessee is responsible for repair of all those minor defects customarily assumed to be caused by the lessee's negligence. *Lowe v. Home Owner's Loan Corp.*, 1 So. 2d 362 (La. App. 1941).

206. LA. CIV. CODE ANN. art. 2694 (West 1952). The English translation of the French text in LA. CIV. CODE ANN. art. 2664 (1825) was incomplete as it omitted the bracketed words "and to become due."

207. LA. CIV. CODE ANN. art. 2729 (West 1952) provides: "The neglect of the lessor or lessee to fulfill his engagements, may also give cause for a dissolution of the lease, in the manner expressed concerning contracts in general, except that the judge can not order any delay of the dissolution."

premises "in the condition in which they now are" have been very narrowly construed by the Louisiana courts. Thus it has been held that a lease provision requiring the lessee to maintain the building at all times in a good condition to repair at his own expense only relieved the lessor of the duty of making ordinary repairs, and that the lessor remained responsible for structural repairs.²⁰⁸ Moreover, a provision reciting that the lessee "accepts the demised premises in the condition in which they now are, and agrees to keep them at a good state of repair during the term of this lease" has been held not to deprive the lessee of warranty protection afforded by articles 2692 and 2695.²⁰⁹

The lessee's repair-and-deduct remedy under article 2694 is optional; the lessee is not under any duty to the lessor to "repair-and-deduct."²¹⁰ The lessee cannot, however, deduct the cost of repairs made by him unless he has notified the lessor of the need for repairs²¹¹ and, after giving the lessor a reasonable time to make the

208. *Maggio v. Cox*, 63 So. 2d 167 (La. App. 1953) ("structural repairs" included restoring the roof and ceiling, painting inside and out, and even replacing a wooden shed—"if [the shed] involves framework and supporting timbers which . . . are of a structural nature"). Under this construction, the lessee's covenant to repair seems to add little to the lessee's statutory duty of repair under LA. CIV. CODE ANN. arts. 2715 & 2716 (West 1952). See also *Barrow v. Culver Bros. Garage*, 78 So. 2d 69, 71 (La. App. 1955) where the lease contained the following clause:

(lessee) agrees during the term of this lease to maintain the building on said premises in good condition and to make all repairs thereto at his own expense that become necessary.

The court held that the responsibility for repairing electric wiring condemned by the city inspector at the beginning of the lease term was the lessor's. "The defects were, therefore, not such as become necessary during the term of the lease; they already existed when the lease was executed." *Id.* at 72.

209. *Reed v. Classified Parking System*, 232 So. 2d 103 (La. App. 1970). In *Barrow* the court noted that the lease did not contain a clause stating that the lessee had inspected the premises and accepted them "as is," leaving an implication that such a clause might be effective. But an "as is" clause alone will clearly not relieve the lessor of his duty to make major repairs that become necessary because of defects arising during the term of the lease. *Barrow v. Culver Bros. Garage*, 78 So. 2d 69, 72 (La. App. 1955).

210. *Thomas v. Catalanotto*, 164 So. 171 (La. App. 1935). The lessee's right to make necessary repairs under LA. CIV. CODE ANN. art. 2694 (West 1952) does not affect the guaranty imposed on the lessor by art. 2695 to protect the lessee from "all the vices or defects of the thing, which may prevent its being used" and to "indemnify him for the same." *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 952, 72 So. 513, 515 (1916).

211. *Hartz v. Stauffer*, 163 La. 382, 111 So. 794 (1927); *Boignac v. Boisdore*, 272

repairs, has made them at his own expense.²¹² The lessor's breach of his duty to make repairs does not justify rent withholding by the lessee except for the purpose of utilizing the "repair-and-deduct" remedy under article 2694, or where the lessee has dissolved the lease under article 2729.²¹³ Some early Louisiana cases indicated that dissolution of the lease is not a favored remedy and that the lessee must attempt to "repair-and-deduct" before seeking the more drastic dissolution.²¹⁴ The most recent cases take a more favorable view of dissolution if the lessor's breach is substantial.²¹⁵ Where the lessee successfully elects dissolution, he remains liable for the rent until he vacates the leased premises.²¹⁶ The parallel to constructive eviction in common law jurisdictions is obvious.

2. The Georgia Statute

Georgia law differentiates between a landlord-tenant relationship giving the tenant a mere "usufruct" and a landlord-tenant relationship arising from the conveyance of an estate for years.²¹⁷ The parties may expressly agree as to which type of relationship they are creating but, absent such an agreement, a lease for less than five years

So. 2d 463 (La. App. 1973), *aff'd*, 288 So. 2d 31 (La. 1973); Duchain v. Ben Roumain, Inc., 176 So. 696 (La. App. 1937).

212. Mullen v. Kerlec, 2 Teiss. 340, 40 So. 46 (La. App. 1905). *But cf.* Leggio v. Manion, 172 So. 2d 748 (La. App. 1965) (dictum that "the necessary repairs must begin within a reasonable time after the lessee exercises the privilege of retaining the rent therefor" in order to give the lessee a defense against summary eviction for non-payment of rent).

213. Bruno v. Louisiana School Supply Co., 274 So. 2d 710 (La. App. 1973); Leggio v. Manion, 172 So. 2d 748 (La. App. 1965); Mullen v. Kerlec, 2 Teiss. 340, 40 So. 46 (La. App. 1905). All three cases allow eviction for non-payment of rent where the lessee had not made the repairs, but note the *Leggio* dictum, note 212 *supra*.

214. *E.g.*, Meyers v. Drewes, 196 So. 2d 607 (La. App. 1967); Lafayette Realty Co. v. Travia, 11 Teiss. 275 (La. App. 1914).

215. *E.g.*, Shear v. Castrinos, 327 So. 2d 558 (La. App. 1976) (dictum); Broussard v. O'Bryan, 270 So. 2d 127 (La. App. 1972), *application denied*, 272 So. 2d 374 (La. 1973) (to justify cancellation of lease, lessee must show that lessor's action seriously disturbed lessee's full use and enjoyment of leased premises); Reed v. Classified Parking System, 232 So. 2d 103 (La. App. 1970).

216. Mulhaput v. Enders, 38 La. Ann. 744 (1886); Reed v. Classified Parking System, 232 So. 2d 103 (La. App. 1970); Goldstein v. Stone, 12 La. App. 702, 127 So. 73 (1930).

217. GA. CODE ANN. §§ 61-101 & 85-802 (1966 & Supp. 1978). A principal difference is that the tenant may not convey a usufruct except by the landlord's consent, and it is not subject to levy and sale. *Id.* § 61-101.

is presumed to create only a usufruct,²¹⁸ while a lease for five years or more is presumed to create an estate for years.²¹⁹ As the Georgia Supreme Court has stated, “[w]here an estate for years is created, our Civil Code, . . . following the common law, makes the tenant bound for all repairs or other expense necessary for the preservation and protection of the property; but where simply the relation of landlord and tenant exists, the tenant in such case having no estate but only a usufruct in the rented premises, the civil law is adopted, and the landlord must keep the premises in repair”²²⁰

The statute adopting the civil law rule whereby the tenant has a mere usufruct²²¹ has been construed to impose upon the landlord not only a duty to repair but also a duty to lease his property in a condition reasonably fit for the purpose for which it is intended to be used, if full rent is reserved.²²² The tenant’s remedies for breach of the landlord’s statutory duties have been held to include an action for damages,²²³ a rent reduction or recoupment,²²⁴ and the self-help remedy of “repair-and-deduct.”²²⁵ Before any of these remedies are available, however, the landlord must receive notice of the condition requiring repair.²²⁶ The old rule allowing an effective waiver of the landlord’s duty by an express lease covenant obligating the tenant to

218. *Id.* § 61-101 (1966).

219. *Warehouses, Inc. v. Wetherbee*, 203 Ga. 483, 46 S.E.2d 894 (1948).

220. *Mayer v. Morehead*, 106 Ga. 434, 435, 32 S.E. 349, 350 (1899). The “common law rule” is codified in GA. CODE ANN. § 85-805 (1978), and the civil law rule is codified at § 61-111. *See also* § 61-112 (1966), which makes the landlord liable for personal injuries “arising from defective construction or . . . from failure to keep the premises in repair” when the tenant has only a “usufruct.”

221. GA. CODE ANN. § 61-111 (1966).

222. *E.g.*, *Driver v. Maxwell*, 56 Ga. 11 (1876); *Whittle v. Webster*, 55 Ga. 180 (1875).

223. *E.g.*, *Lewis & Co. v. Chisholm*, 68 Ga. 40 (1881); *Whittle v. Webster*, 55 Ga. 180 (1875).

224. *E.g.*, *Mayer v. Morehead*, 106 Ga. 434 (1899); *Lewis & Co. v. Chisholm*, 68 Ga. 40 (1881); *Guthman v. Castleberry*, 48 Ga. 172 (1873).

225. *E.g.*, *Lewis & Co. v. Chisholm*, 68 Ga. 40 (1881); *Valdes Hotel Co. v. Ferrell*, 17 Ga. App. 93, 86 S.E. 333 (1915); *Dougherty v. Taylor & Norton Co.*, 5 Ga. App. 773, 63 S.E. 928 (1909).

226. *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S.E. 204 (1901); *White v. Montgomery*, 58 Ga. 204 (1877); *Cassel v. Randall*, 10 Ga. App. 587, 73 S.E. 858 (1912). Even without actual notice, the landlord may be deemed to have received constructive notice in personal injury cases. *Aycock v. Houser*, 96 Ga. App. 99, 99 S.E.2d 298 (1957).

make repairs or releasing the landlord from any duty to do so²²⁷ has been abrogated by recent legislation,²²⁸ which also seems to abrogate the old rule barring any remedy against the landlord for failure to make repairs if the tenant knows of the need for repairs at the inception of the tenancy.²²⁹

3. The California Statute and its Descendants

Early California legislation similar to the Louisiana and Georgia legislation discussed above may perhaps ultimately be traced to the civil law, but it is immediately derived from the 1848 Field Draft for a New York Civil Code.²³⁰ Although the Field Code was not adopted in New York, sections 990 and 991 of the Draft Code were adopted in California in 1872 as sections 1941²³¹ and 1942²³² of the California Civil Code. These sections remained unchanged between 1873 and 1970.²³³ Judicial decisions prior to 1970 made it clear that

227. *E.g.*, *Bell House v. Wilkins*, 34 Ga. App. 285, 129 S.E. 797 (1925); *Heriot v. Connerat*, 12 Ga. App. 203, 76 S.E. 1066 (1912); *Carter v. Noe*, 118 Ga. App. 298, 163 S.E.2d 348 (1968).

228. 1976 Ga. Laws, p. 1372; GA. CODE ANN. § 61-102(b)(1), (2) (Supp. 1978).

229. *Elijah A. Brown Co. v. Wilson*, 191 Ga. 750, 13 S.E.2d 779 (1941); *Bazemore v. Burnet*, 117 Ga. App. 849, 161 S.E.2d 924 (1968). On the effect of the 1976 legislation, see Comment, *New Act is a Step Toward Landlord-Tenant Equality in Georgia*, 28 MERCER L. REV. 351, 355-62 (1976).

230. FIELD'S DRAFT CIVIL CODE (1898).

231. The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine.

CAL. CIV. CODE § 1941, Legislative History (Deering 1972).

The phrase, "in the absence of an agreement to the contrary" was added in 1873. *Id.* § 1941. Section 1929, based on FIELD'S DRAFT CIVIL CODE § 983 (1848), originally provided: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence." In 1905, "want of ordinary care" was substituted for "ordinary negligence" at the end of the section. CAL. CIV. CODE § 1929, Legislative History (Deering 1972).

232. If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. CAL. CIV. CODE § 1942, Legislative History (Deering 1972).

233. The original 1872 version had provided: "If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the

repair-and-deduct or vacation of premises were the only remedies available to the lessee for breach of the lessor's statutory duty,²³⁴ and that these rights under both sections could be expressly waived.²³⁵

The 1874 versions of sections 1941 and 1942 were adopted practically verbatim at an early date in Montana,²³⁶ Oklahoma,²³⁷ North Dakota²³⁸ and South Dakota.²³⁹ The only significant differences were that the Oklahoma, North Dakota and South Dakota formulations did not limit the tenant's repair-and-deduct remedy to one month's rent of the premises,²⁴⁰ and North Dakota gave the tenant an additional right, if the landlord should fail to make required repairs, to recover repair expenditures "in any other lawful manner from the lessor."²⁴¹

From the viewpoint of the modern urban residential tenant, statutes derived from the Field Draft Civil Code were deficient insofar as they allowed waiver of the landlord's duty to maintain the leased premises in habitable condition,²⁴² and (except in North Dakota) limited the tenant's remedies for breach of the landlord's duties to either repair-and-deduct or vacation of the premises and termination of the lease.²⁴³ Moreover, the "one month's rent" limitation (except

lessee may repair the same himself, and deduct the expenses of such repairs from the rent, or otherwise recover it from the lessor." CAL. CIV. CODE § 1942, Legislative History (Deering 1972).

234. *E.g.*, Sieber v. Blanc, 76 Cal. 173, 18 P. 260 (1888); Van Every v. Ogg, 59 Cal. 563 (1881).

235. An express waiver of the lessor's § 1941 duty or of the lessee's repair-and-deduct remedy under § 1942 was effective to waive that remedy. *Arnold v. Klighaun*, 169 Cal. 143, 146 P. 423 (1915); *Curtis v. Arnold*, 43 Cal. App. 97, 184 P. 510 (1919). Presumably an express waiver of the lessor's § 1941 duty would also bar the lessee's alternate remedy of vacation and termination of the lease under § 1942.

236. MONT. REV. CODES ANN. tit. 42, §§ 201-202 (1961).

237. OKLA. STAT. ANN. tit. 41, §§ 31-32 (West 1954).

238. N.D. CENT. CODE §§ 47-16-12 (repealed 1977), 47-16-13 (1960).

239. S.D. COMPILED LAWS ANN. §§ 43-32-8 to 43-32-9 (1967).

240. *See* notes 237-39 *supra*.

241. N.D. CENT. CODE § 47-16-13 (1960). In *DeMers, Inc. v. Fink*, 148 N.W.2d 820 (N.D. 1967), the court indicated that a tenant could counterclaim for damages, without having made repairs, in an action for rent, although the counterclaim failed for lack of proof.

242. *See* note 233 *supra*.

243. *See* text accompanying note 234 *supra*. For cases indicating that the statutory remedies are exclusive, see, *e.g.*, *Lake v. Emigh*, 118 Mont. 325, 167 P.2d 575 (1946); *Staples v. Baty*, 206 Okla. 288, 242 P.2d 705 (1952); *Armstrong v. Thompson*, 62 S.D. 567, 255 N.W. 561 (1934).

in North and South Dakota) upon the repair-and-deduct remedy precluded the tenant's use of this remedy when major repairs were required to make the premises habitable.

A 1970 amendment to California Civil Code section 1942 further limited the repair-and-deduct remedy, providing that this remedy "shall not be available to the lessee more than once in any 12-month period."²⁴⁴ Other 1970 amendments, however, substantially enlarged the rights of tenants by detailing conditions deemed to make a dwelling untenable,²⁴⁵ invalidating waivers of the tenant's rights under sections 1941 and 1942 "with respect to any condition which renders the premises untenable" unless the tenant agrees "to improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental,"²⁴⁶ and providing new protection for the tenant against retaliatory action by the landlord based on the tenant's assertion of his statutory rights.²⁴⁷ Finally, a 1970 amendment detailed the tenant's affirmative obligations, any substantial breach of which will excuse the landlord from performance of his duties in regard to maintenance of the premises.²⁴⁸

In 1976 South Dakota enacted important amendments to its statutes dealing with the lessor's duty of maintenance of residential premises. The South Dakota residential tenant is now protected by a provision, similar to a 1970 California amendment, that the parties to a lease "may not waive or modify the requirements imposed by" the statute, except that "the lessor may agree with the lessee that the lessee shall perform specified repairs or maintenance in lieu of rent."²⁴⁹ In addition, the South Dakota residential tenant now has the right to withhold rent if the cost of necessary repairs exceeds one month's rent "until such time as the lessor makes the repairs, at which time the lessee shall release the deposit [of withheld rents] to the lessor or until sufficient money is accumulated in the account for

244. CAL. CIV. CODE § 1942(a) (Deering 1972). § 1942(b), added in 1970, provides: "For the purpose of this section, if a lessee acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a presumption affecting the burden of producing evidence." *Id.* § 1942(b).

245. *Id.* § 1941.1.

246. *Id.* § 1942.1.

247. *Id.* § 1942.5.

248. *Id.* § 1941.2.

249. S.D. COMPILED LAWS ANN. § 43-32-8 (Supp. 1976).

the lessee to cause the repairs to be made and paid for."²⁵⁰

B. *Recent Legislation Creating a Warranty of Habitability*

1. Simple Warranty of Habitability Statutes

Idaho, Maine, Michigan, Minnesota, New York, Rhode Island, and Wisconsin have recently enacted statutes that simply impose on landlords a new duty to provide tenants with habitable dwellings (often phrased in terms of a "warranty of habitability"), without defining the duty or, except for the Maine statute, prescribing the tenant's remedies for breach in much detail. None of these statutes form part of a comprehensive new code of landlord-tenant law. The Maine²⁵¹ and New York²⁵² statutes create a warranty that the leased premises are habitable without creating an express duty to maintain them in a habitable condition. The Maine statute contains language making it clear that the landlord does have a duty,²⁵³ and the Idaho,²⁵⁴ Michigan,²⁵⁵ Minnesota,²⁵⁶ and Rhode Island²⁵⁷ statutes expressly impose such a duty. The Michigan and Minnesota statutes,²⁵⁸ in addition, impose on the landlord a duty to keep the premises in compliance with applicable housing codes. The Wisconsin²⁵⁹ statute, on the other hand, imposes a duty to maintain the premises, but does not expressly state that the landlord "warrants" the premises to be habitable.

Of the new statutes, only the Maine²⁶⁰ and Wisconsin²⁶¹ statutes expressly provide remedies for breach of the landlord's duty. The Wisconsin act provides that the tenant "may remove from the prem-

250. For a discussion of the 1976 amendments, see Wolff, *Balancing Act: Strengthening South Dakota's Landlord-Tenant Law*, 22 S.D.L. REV. 15 (1977).

251. ME. REV. STAT. tit. 14, § 6021 (Supp. 1977).

252. N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1977).

253. Paragraph 4 of the statute authorizes suits by tenants whenever "a condition exists in a dwelling unit which renders the dwelling unit unfit for human habitation." See note 253 and accompanying text *infra*.

254. IDAHO CODE §§ 6-320, 6-322 & 6-323 (Supp. 1977).

255. MICH. COMP. LAWS ANN. § 554.139 (Supp. 1977).

256. MINN. STAT. ANN. § 504.18 (West Supp. 1978).

257. R.I. GEN. LAWS § 34-18-16 (1970).

258. *Supra* notes 255, 256.

259. WIS. STAT. ANN. § 704.07 (West Supp. 1977).

260. ME. REV. STAT. ANN. tit. 14, § 6021 (West Supp. 1977).

261. WIS. STAT. ANN. § 704.07 (West Supp. 1975).

ises unless the landlord proceeds promptly to . . . eliminate the health hazard; or . . . if the inconvenience to the tenant by reason of the nature and period of repair . . . or elimination would impose undue hardship on him."²⁶² Moreover, "[i]f the tenant justifiably moves out . . . the tenant is not liable for rent after the premises become untenable and the landlord must repay any rent paid in advance apportioned to the period after the premises become untenable." On the other hand, if the tenant remains in possession while the landlord is eliminating the health hazard, "rent abates to the extent the tenant is deprived of the full normal use of the premises."²⁶³ The Wisconsin statute clearly gives the tenant less in the way of remedial rights than the 19th century statutes still in force in Louisiana, Georgia, California, Montana, Oklahoma, North Dakota, and South Dakota, for it does not allow the tenant to repair and deduct and limits the tenant to termination of the lease in cases where the landlord is unwilling to make the required repairs.

The Idaho statute²⁶⁴ expressly provides that the remedies for breach of the landlord's duty to maintain the premises in habitable condition shall be "damages and specific performance." It is not clear whether this will be construed to exclude other possible remedies such as termination or "repair-and-deduct."

The remedies provided by the new Maine statute²⁶⁵ are more extensive. Maine authorizes the tenant to file a civil complaint "[i]f a condition exists in a dwelling unit which renders the dwelling unit unfit for human habitation"—i.e., if there is a breach of the statutory warranty—but there is no reference at all to housing code violations. The complaint must allege that the condition "endangers or materially impairs the health or safety of the tenants; that it was not caused by the tenant or another person acting under his control; that written notice of the condition was given to the landlord without unreasonable delay; that the landlord unreasonably failed to take prompt, effective steps to remedy the condition; and that the tenant was current in his rental payments at the time written notice was given."²⁶⁶ If the court finds these allegations to be true, the landlord is "deemed to

262. *Id.*

263. *Id.*

264. See note 254 *supra*.

265. ME. REV. STAT. ANN. tit. 14, § 6021 (West Supp. 1977). The statute is somewhat similar to MASS. ANN. LAWS ch. 111, §§ 127C-127H (Michie/Law. Co-op 1977).

266. ME. REV. STAT. ANN. tit. 14, § 6021 para. 3 (West Supp. 1977).

have breached the warranty of fitness for human habitation . . . as of the date when actual notice of the condition was given to the landlord"; the court is authorized to provide the following relief "in addition to any other relief or remedies which may otherwise exist":

A. The court may issue appropriate injunctions ordering the landlord to repair all conditions which endanger or materially impair the health or safety of the tenant;

B. The court may determine the fair value of the use and occupancy of the dwelling unit . . . from the date when the landlord received actual notice of the condition until such time as the condition is repaired, and further declare what, if any, moneys the tenant owes the landlord or what, if any, rebate the landlord owes the tenant for rent paid in excess of the value of use and occupancy. In making this determination, there shall be a rebuttable presumption that the rental amount equals the fair value of the dwelling unit free from any condition rendering it unfit for human habitation. . . .

C. The court may authorize the tenant to temporarily vacate the dwelling unit if the unit must be vacant during necessary repairs. No use and occupation charge shall be incurred by the tenant until such time as the tenant resumes occupation of the dwelling unit.

D. The court may enter such other orders as the court may deem necessary to accomplish the purpose of this section. The court may not award consequential damages for breach of the warranty of fitness for human habitation.²⁶⁷

Presumably the "remedies which may otherwise exist," though not specified, include an action for damages due to breach of the statutory warranty and the right to terminate the lease and vacate the premises, as in cases of constructive eviction. Since the statute provides a rent withholding-rent abatement remedy, it seems unlikely that the Maine courts will allow tenants to withhold rent "on their own," without bringing the action contemplated by the statute and obtaining a court order with respect to the "fair value of the use and occupancy of the dwelling unit."

Under statutes that expressly create a warranty or covenant of habitability but fail to specify remedies for breach, all the normal remedies for breach of contract are presumably available to the tenant. Contract remedies would include an action for damages²⁶⁸ (or a

267. *Id.* para. 4.

268. N.Y. REAL PROPERTY LAW § 235b (McKinney Supp. 1977) clearly implies in para. 3 that the damage remedy is available. Paragraph 3 provides that "[i]n deter-

counter-claim or set-off of claimed damages against the landlord's claim for rent) if the tenant elects to remain in possession; rescission or termination of the lease if the tenant elects to surrender possession (substantially creating a "constructive eviction" defense) coupled, in many cases, with a claim for restitution or damages; and possibly even a suit for specific performance of the landlord's warranty obligation. Problems arising in connection with these contract remedies will be treated in more detail in connection with remedies for breach of judicially established implied warranties of habitability.

In addition to normal contract remedies, at least two state courts have held that breach of a statutory covenant of habitability justifies the tenant in withholding rent while he remains in possession, and that the tenant who withholds rent can set up the breach of covenant as a defense in the landlord's summary action to evict the tenant for nonpayment of rent.²⁶⁹ In both of these cases, the landlord's statutory covenant of habitability and the tenant's express covenant to pay rent were held to be mutually dependent rather than independent, contrary to the traditional common law doctrine that a tenant's covenant to pay rent is independent of his landlord's express covenant to maintain the leased premises in a habitable condition.

In *Fritz v. Warthen*,²⁷⁰ the Minnesota Supreme Court held that a breach of the statutory covenant of habitability is admissible in a summary action to evict for nonpayment of rent. The court reached its conclusion without much aid from the statutory language. The court said that the statute creating the new covenant of habitability expressly mandated liberal construction of the covenant and that the statutory objective of assuring "adequate and tenantable housing" would be "promoted by permitting breach of the statutory covenants to be asserted as a defense in unlawful detainer actions."²⁷¹ In *Rome v. Walker*²⁷² the Michigan Court of Appeals reached the same conclusions as the Minnesota court with the aid of a new provision in the Michigan summary eviction act authorizing the tenant to interpose the defense that "the plaintiff [landlord] has committed a breach of

mining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

269. *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973).

270. 298 Minn. 54, 213 N.W.2d 339 (1973).

271. *Id.* at 59, 213 N.W.2d at 342.

272. 38 Mich. App. 458, 196 N.W.2d 850 (1972).

the lease which excuses the payment of rent.”²⁷³ After *Rome* the Michigan summary eviction act was amended to provide that in an action to evict for nonpayment of rent (1) “the jury or judge shall deduct any portion of the rent which the jury or judge finds to be excused by the plaintiff’s breach of the lease or by his breach of one or more statutory covenants,”²⁷⁴ and (2) “[w]hen the judgment for possession is for nonpayment of money due under a tenancy . . . the writ of restitution shall not issue if, within . . . [ten days after entry of judgment], the amount as stated in the judgment . . . is paid to the plaintiff.”²⁷⁵ The use of the word “excused” to describe what is, in substance, a set-off of damages for breach of the statutory covenant of habitability is peculiar, but the amended summary eviction act makes it clear that the Michigan tenant may withhold rent because of his landlord’s breach of the statutory covenant, wait for the landlord to bring a summary eviction action, and set up the landlord’s breach of the statutory covenant as a defense. If the trier of fact finds that there was such a breach and that some part of the rent is therefore “excused,” the tenant will be able to retain possession of the premises by paying the “unexcused” portion of the rent within the ten day period allowed by the summary eviction statute. In this way the tenant can avoid dispossession and obtain a partial abatement of the rent. Moreover, the tenant need not pay any rent into escrow unless the court, in the course of the eviction action, enters a protective order requiring payment of the rent into court. To date, no Michigan appellate court has held that such a protective order is required when the tenant asserts breach of the statutory warranty of habitability as a defense in a summary action to evict for nonpayment of rent.²⁷⁶ The

273. This language was inserted in the summary eviction act in 1968, MICH. COMP. LAWS ANN. § 600.5634, as part of the Michigan tenants’ rights legislation enacted in that year. See *Rome v. Walker*, 38 Mich. App. 458, 460 n.1, 196 N.W.2d 850, 851 n.1 (1972) (listing six separate acts constituting the “tenants’ rights package”).

274. MICH. COMP. LAWS ANN. § 600.5741 (Supp. 1978).

275. *Id.* § 600.5744(6).

276. “Non-statutory” rent withholding, in reliance on the rights given the tenant by MICH. COMP. LAWS ANN. §§ 600.5741 to 600.5744(6) (Supp. 1978), is clearly a more attractive course of action for the Michigan tenant than invocation of the statutory rent withholding procedure under MICH. COMP. LAWS ANN. § 125.130 (Supp. 1978). This is true for several reasons: The tenant can use the breach of statutory covenant defense even if a certificate of compliance covering his dwelling unit has been issued and never suspended; the tenant can retain all the withheld rent instead of having to pay it into escrow; and the substantive requirements for proving a breach of the statutory covenants seem to be less rigorous than those for initiating a statutory rent withholding.

Minnesota court, however, held in *Fritz v. Warthen* that trial courts should enter protective orders in such cases. The rationale of this requirement is stated as follows:

. . . [P]ending final determination of the tenant's claim of breach of the statutory covenants, the landlord will be deprived of all or a portion of the rent while the tenant remains in possession. However, during this period the landlord will continue to experience normal operating and overhead expenses. In a building where all or a substantial number of tenants withhold their rent, this could be devastating to the landlord. Because he is deprived of rental income, he may be unable to correct the very conditions that the tenant contends render the premises untenable. In some of the cases, the landlord may prevail and may not then be able to collect the rents due and yet would have been unable to dispossess the tenant during the delays occasioned by court proceedings.

Recognizing these potential problems, we have concluded that once the trial court has determined that a fact question exists as to the breach of the covenants of habitability, that court will order the tenant to pay the rent to be withheld from the landlord into court . . . and that until final resolution on the merits, any future rent withheld shall also be paid into court. The court under its inherent powers may order payment of amounts out of this fund to enable the landlord to make repairs or meet his obligations on the property or for other appropriate purposes. In the majority of cases, final determination of the action will be made quickly and this procedure will not have to be used. It is anticipated that the trial court, in lieu of ordering the rent paid into court, in the exercise of its discretion may order that it be deposited in escrow subject to appropriate terms and conditions or, in lieu of the payment of rents, may require adequate security therefor if such a procedure is more suitable under the circumstances.²⁷⁷

Where the obligation allegedly breached by the landlord is a duty to repair conditions that render the premises uninhabitable, it is likely that the landlord will not be deemed "in default" unless he fails to make the needed repairs within a reasonable time after discovering or receiving notice of the existence of the conditions making repairs necessary. This is the general rule in cases where the lease contains an express covenant by the landlord to make repairs, and there is no apparent reason why the same rule should not be applied

277. 298 Minn. at 61-62, 213 N.W.2d at 343.

in cases where the duty to make repairs is imposed by statute.²⁷⁸

Of those statutes which simply create a warranty or covenant of habitability in leases, the Michigan²⁷⁹ and Rhode Island²⁸⁰ statutes authorize "a modification" of the statutory warranty or covenant where the lease or letting has a current term of "at least 1 year" (Michigan), or of "nine (9) months or more" (Rhode Island). Neither the Michigan nor the Rhode Island statute expressly requires the modification to be embodied in a separate written agreement, or even to be in writing. The Minnesota statute,²⁸¹ which is otherwise very similar to Michigan's, declares that the parties to a lease "may not waive or modify the covenants imposed by" the statute. The Maine statute provides that "[a] written agreement whereby the tenant accepts certain specified conditions which may violate the warranty of fitness for human habitation in return for a stated reduction in rent or other specified fair consideration shall be binding on the tenant and the landlord. Any [other] agreement . . . by a tenant to waive any of the rights or benefits provided by this section shall be void."²⁸² The New York statute simply states that any waiver or modification agreement "shall be void as contrary to public policy."²⁸³

2. The Warranty of Habitability as Part of a Comprehensive New Landlord-Tenant Code

Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Maryland, Montana, Nebraska, New Mexico, Ohio, Oregon, Tennessee, Virginia and Washington have all recently enacted comprehensive residential landlord-tenant codes which include detailed provisions amounting, in substance, to warranties of habitability.²⁸⁴ Because, except for Maryland, all of these states have based their new residential landlord-tenant codes on the Uniform

278. As indicated in the text accompanying notes 213 & 214 *supra*, ME. REV. STAT. ANN. tit. 14, § 6021(3) (West Supp. 1977) expressly provides that there is a breach of the warranty of habitability only if the landlord "unreasonably failed under the circumstances to take prompt, effective steps to repair or remedy the condition" alleged to make the premises uninhabitable.

279. MICH. COMP. LAWS ANN. § 554.139 (Supp. 1977).

280. R.I. GEN. LAWS § 34-18-16 (1970).

281. MINN. STAT. ANN. § 504.18 (West Supp. 1978).

282. ME. REV. STAT. tit. 14, § 6021 (Supp. 1977).

283. N.Y. REAL PROP. LAW § 235b (McKinney Supp. 1977).

284. See notes 9-11 *supra*.

Residential Landlord and Tenant Act (URLTA)²⁸⁵ or, to a lesser extent, the Model Residential Landlord-Tenant Code (Model Code),²⁸⁶ the statutes are generally very similar.

Both the URLTA and the Model Code are applicable to substantially all residential rental units within the state,²⁸⁷ not just to multi-family rental housing or to housing covered by local or state housing

285. 7 UNIFORM LAWS ANN. 506-59 (Supp. 1978). The URLTA was approved by the commissioners on uniform state laws in 1972.

For discussion of the URLTA as adopted, or proposed for adoption, in particular states, see Bailis, *Ohio Landlord-Tenant Act*, 3 OHIO NORTH. L. REV. 122 (1975); Baird, *Uniform Landlord-Tenant Act in Arizona: The Need for Re-examination and Amendment*, 1975 ARIZ. ST. L.J. 463 (1975); Boyer, *Up From Feudalism—Florida's New Residential Leasing Act*, 28 U. MIAMI L. REV. 115 (1973); Brand, *New Residential Landlord and Tenant Act*, 44 J. KAN. B.A. 227 (1975); Davis, *URLTA, Kansas, and the Common Law*, 21 KAN. L. REV. 387 (1973); Fuller, *Landlord-Tenant Reform: Habitability and Repair Under the Uniform Residential Landlord and Tenant Act*, 3 UCLA-ALASKA L. REV. 123 (1973); Kalish, *Nebraska Residential Landlord and Tenant Act*, 54 NEB. L. REV. 603 (1975); Lonquist, *Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 CREIGHTON L. REV. 336 (1974); Stoebuck, *Law Between Landlord and Tenant in Washington*, 49 WASH. L. REV. 291, 363-71 (1974); Williams & Phillips, *Florida Residential Landlord and Tenant Act*, 1 FLA. ST. J.L. REV. 555 (1973); Note, *Reformation of the Landlord-Tenant Relation*, 4 CAPITAL U.L. REV. 258 (1975); Note, *Survey of the Virginia Law of Landlord and Tenant*, 8 U. RICH. L. REV. 459, 494-504, 520-25, 569-83 (1974); Comment, *Ohio Landlord-Tenant Act*, 8 AKRON L. REV. 519 (1975); Comment, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974); Comment, *Ohio Landlord and Tenant Reform Act of 1974*, 25 CASE-W. RES. L. REV. 876 (1975); Comment, *Kentucky Residential Landlord and Tenant Act: Tenants' New Lease on Life?*, 14 J. FAMILY L. 597 (1975); Comment, *Forcible Entry and Detainer Under the Uniform Residential Landlord and Tenant Act*, 63 KY. L.J. 1046 (1974); Comment, *Overview of Tennessee Residential Landlord and Tenant Act*, 7 MEMPHIS ST. L. REV. 109 (1976); Comment, *The Evolution of the Oregon Residential Landlord and Tenant Act*, 56 ORE. L. REV. 655 (1977).

For general discussion of the URLTA, see *Uniform Residential Landlord and Tenant Act: Some Suggestions for Improvement*, 9 REAL PROP. PROB. & TR. J. 402 (1974); Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976); Note, *Uniform Residential Landlord and Tenant Act: Facilitation of or Impediment to Reform Favorable to the Tenant*, 15 W. & M. L. REV. 845 (1974); Comment, *Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?*, 48 ST. JOHN'S L. REV. 546 (1974). See also Davison, *Uniform Residential Landlord and Tenant Act and its Potential Effects Upon Maryland Landlord-Tenant Law*, 5 U. BALT. L. REV. 247 (1976).

286. MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) [hereinafter cited as Model Code]. See Comment, *Tenant's Rights and Remedies Under Delaware's New Landlord-Tenant Code*, 78 DICK L. REV. 723 (1974).

287. See URLTA § 1.201; MODEL CODE § 1-104. URLTA § 1.202 lists the following exceptions to the URLTA's coverage:

1) residence at an institution, public or private, if incidental to detention or the

codes. The URLTA not only imposes on the landlord a duty to "comply with the requirements of applicable building and housing codes materially affecting health and safety," but also imposes a duty to "make all repairs . . . necessary to put and keep the premises in a fit and habitable condition, [to] keep all common areas of the premises in a clean and safe condition, [to] maintain in good and safe working order and condition all . . . facilities and appliances . . . supplied or required to be supplied by him," and to provide adequate waste disposal, water, and heat.²⁸⁸ The duties imposed on the landlord by the Model Code, apparently the basis for the new Delaware and Hawaii comprehensive landlord-tenant codes, are substantially the same as those imposed by the URLTA.²⁸⁹ Although the statutes based on the URLTA or the Model Code are quite similar, several states made changes in the section detailing the landlord's duties. The Washington statute is probably the most detailed.²⁹⁰

provision of medical, geriatric, educational, counseling, religious, or similar services;

2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;

3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

4) transient occupancy in a hotel, or motel [or lodgings [subject to state transient lodgings or room occupancy excise tax act]];

5) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises;

6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

VA. CODE § 55-248.5(10) (Supp. 1978) excludes any single-family residence whose landlord owns ten or more residences. ARIZ. REV. STAT. § 33-1308(7) (1974) and WASH. REV. CODE ANN. § 521-7(7) (1976) (15 years or more) and NEB. REV. STAT. § 76.1408(8) (1976) (five years or more) exclude long-term leases.

288. URLTA § 2.104.

289. MODEL CODE § 2-203.

290. WASH. REV. CODE ANN. § 59.18.060 (West Supp. 1977) provides as follows: The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:

1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;

2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and

It is clear that statutes based on the model codes impose substantially greater duties on landlords than do the statutes previously considered under "The Housing Code Approach," for they require the landlord to keep a rented dwelling unit habitable to a degree not necessarily mandated by any applicable housing code. Statutes based on the URLTA and the Model Act do not *expressly* require the landlord rent the dwelling unit in a "habitable" condition at the beginning of the tenancy. A careful reading of the provisions both as to the landlord's duties and the tenant's remedies makes it clear, however, that there is an immediate breach of the landlord's obligation if the dwelling unit is not in fact habitable at the beginning of the tenancy, although some remedies may not be utilized until a stated time after the tenant gives notice of the breach to the landlord, during which time the landlord has an opportunity to cure the breach.²⁹¹

It is also clear that the URLTA, the Model Code, and the statutes based on one or the other, do not distinguish between "latent" and "patent" defects in existence at the inception of the tenancy. There is nothing in the URLTA, the Model Code or the statutes that suggests that a tenant may not treat serious "latent" defects as causing an immediate breach of the statutory warranty of habitability, or that such

capable of resisting any and all formal forces and loads to which they may be subjected;

3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards or fire or accident;

4) Provide a reasonable program for the control of infestation by insects, rodents, and other pests at the initiation of the tenancy and, except in the case of a single-family residence, control infestation during tenancy except where such infestation is caused by the tenant;

5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy;

6) Provide reasonably adequate locks and furnish keys to the tenant;

7) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him in reasonably good working order;

8) Maintain the dwelling unit in reasonably weathertight condition;

9) Except in the case of a single-family residence, provide and maintain appropriate receptacles in common areas for the removal of ashes, rubbish, and garbage, incidental to the occupancy and arrange for the reasonable and regular removal of such waste;

10) Except where the building is not equipped for the purpose, provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant.

291. URLTA §§ 2.104, 4.101, 4.103, 4.104; MODEL CODE §§ 2-203 to 2-207.

defects are not subject to the landlord's statutory duty to make all repairs necessary to put and keep the premises in a fit and habitable condition.

The URLTA provides a wide variety of remedies if the landlord violates any of his statutory duties with respect to the condition of the premises. These remedies include termination of the lease if the breach materially affects health and safety,²⁹² recovery of damages,²⁹³ injunctive relief,²⁹⁴ the right to repair minor defects in the dwelling unit and to deduct the cost of repairs from the rent,²⁹⁵ where there is a wrongful failure to supply heat, water, or essential services, the right to "procure reasonable amounts" of the same "and deduct their actual and reasonable cost from the rent," or "procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of . . . noncompliance,"²⁹⁶ and use of a counterclaim for damages based on the landlord's breach of duty as a defense to any action by the landlord to evict the tenant or recover rent, subject to the court's power to "order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and . . . determine the amount due to each party" and to enter judgment for the tenant in an eviction action "[i]f no rent remains due after" the net amount owing from one to the other is paid.²⁹⁷ The last remedy implicitly authorizes the tenant to withhold rent when the landlord violates his statutory duties with respect to maintaining the leased premises in a

292. URLTA § 4.101(a) provides: "[T]he tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach [materially affecting health and safety] and that the rental agreement will terminate upon a date not less than [30] days after receipt of the notice if the breach is not remedied in [14] days, and the rental agreement shall terminate as provided in the notice" unless the breach is remedied "by repairs, the payment of damages or otherwise . . . before the date specified in the notice;" and "[i]f substantially the same act or omission . . . recurs within [6] months, the tenant may terminate the rental agreement upon at least [14 days'] written notice specifying the breach and the date of termination." In the latter case, the landlord is apparently not entitled to "cure" the breach. Restitution of any rent paid in advance and any security deposit is also clearly available to the tenant when he terminates the breach of the URLTA warranty of habitability, under "the principles of law and equity" whose application is preserved by URLTA § 1.103.

293. URLTA § 4.101(b).

294. *Id.*

295. *Id.* § 4.103.

296. *Id.* § 4.104.

297. *Id.* § 4.105.

habitable condition. There is no provision in the URLTA for use of withheld rents to make necessary repairs except through the tenant's "repair-and-deduct" option, and there is no provision for appointment of a receiver authorized to make necessary repairs.

It should be noted that none of the statutes based on the URLTA follows the URLTA in all respects. The most extensive modifications of the URLTA's provisions with respect to the tenant's right to a habitable dwelling and remedies for breach are found in the Virginia and Washington formulations.²⁹⁸

The tenant's remedies for breach of the landlord's duties under the Model Code²⁹⁹ are generally similar to those under the URLTA. Note, however, that the Model Code does not expressly authorize injunctive relief. Moreover, although the Model Code authorizes the tenant to interpose any legal or equitable defense, or counterclaim in a summary action by the landlord to evict,³⁰⁰ the Model Code, unlike the URLTA, does not expressly provide that in an action to evict for nonpayment of rent the court may order the tenant to pay rent into court and that, upon a determination that "no rent remains due, . . . judgment shall be entered for the tenant in the action for possession."³⁰¹ On the other hand, the Model Code³⁰² authorizes an action by any apartment building tenant for establishment of a receivership as a means of compelling major repairs in the building, independent

298. VA. CODE §§ 55-248.13, .21, .25-.30 (Supp. 1978); WASH. REV. CODE ANN. §§ 59.18.060 to 59.18.120 (Supp. 1977).

299. MODEL CODE §§ 2-204, 2-205, 2-206, 2-207. MODEL CODE §§ 2-204 and 2-205 contain more complicated "termination" provisions than URLTA § 4.101(a). MODEL CODE § 2-204 authorizes the tenant to terminate the rental agreement and vacate the premises at any time during the first week of occupancy, "on notice to the landlord," if the landlord "fails to conform exactly to the rental agreement, or if there is a material non-compliance with any code, statute, ordinance, or regulation governing the maintenance or operation of the premises," without giving the landlord an opportunity to "cure" the breach. § 2-205 authorizes the tenant to terminate at any time, upon giving written notice to the landlord of "any condition which deprives the tenant of a substantial part of the benefit and enjoyment of his bargain, . . . if the landlord does not remedy the situation within [one week];" and no notice need be given "when the condition renders the dwelling unit uninhabitable or poses an imminent threat to the health or safety of any occupant." For a case dealing with remedies under DEL. CODE tit. 25, § 5101 (1974), patterned after MODEL CODE, see *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. 1976).

300. MODEL CODE § 3-210.

301. URLTA § 4.105.

302. MODEL CODE §§ 3-301 to -307.

of any municipal agency action. URLTA contains no such authorization.

Neither the URLTA nor the Model Code allows the tenant to utilize any of the listed remedies where the code violation or other condition complained of is caused by the tenant, a member of his family, or any other person on the premises with his consent.³⁰³ Both the URLTA and the Model Code contain provisions designed to protect the tenant against retaliatory action by the landlord after the tenant has complained to a governmental agency about housing code violations, or has complained to the landlord about a breach of the landlord's statutory duties with respect to the condition of the premises, or has organized or become a member of a tenants' union.³⁰⁴

Most of the statutes modeled on the URLTA contain, in substance, the URLTA provision³⁰⁵ that no rental agreement may properly waive the tenant's rights or remedies under the Act, but this broad anti-waiver provision is qualified by the following exceptions:

(c) The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties . . . [with respect to providing facilities for waste removal and supplying running water, hot water, and heat] and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(d) The landlord and tenant of any dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if (1) the agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord and is set forth in a separate writing signed by the parties and supported by adequate consideration, (2) the work is not necessary to cure noncompliance with [the requirements of applicable building and housing codes materially affecting health and safety]; and (3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(e) The landlord may not treat performance of the separate agreement described in subsection (c) as a condition to any obligation or performance of any rental agreement.³⁰⁶

303. URLTA §§ 4.101(a)(3), 4.103(b), 4.104(d); MODEL CODE §§ 2-205(1).

304. URLTA § 5.101; MODEL CODE § 2-407.

305. URLTA § 1.403(a)(1) and (b).

306. *Id.* § 2.104.

Although paragraph (c) does not expressly prohibit the inclusion of the written agreement between the landlord and tenant of a single family dwelling in the lease itself, a separate written agreement is apparently required by the more general provision that any waiver clause prohibited by the URLTA that is included in a rental agreement is unenforceable.³⁰⁷ The general anti-waiver section of the URLTA also contains a curious additional provision that, "[i]f a landlord deliberately uses a rental agreement containing provisions known by him to be prohibited, the tenant may recover in addition to his actual damages an amount up to [3] month's periodic rent and reasonable attorney's fees."³⁰⁸ This seems a rather drastic penalty for use of a standard form lease that may impose on the tenant the duty to make repairs within his own dwelling unit. Presumably the penalty is only recoverable if "actual damages" resulting from inclusion of a prohibited provision can be proved. And, if the agreement shifting repair duties to the tenant is embodied in a separate written agreement that satisfies paragraphs (c) through (e), above,³⁰⁹ it would seem that no penalty would be imposed on the landlord merely because he also included the provisions of the separate written agreement in the lease itself.

There are significant variations from the URLTA waiver provisions in some of the states which have, in substance, adopted the URLTA—*e.g.*, Kentucky,³¹⁰ Oregon,³¹¹ and Washington.³¹² The

307. *Id.* § 1.403(b).

308. *Id.*

309. *Id.* § 2.104.

310. KY. REV. STAT. § 383.595 (Supp. 1976) does not include in para. (c) any authorization to shift to the tenant the duty of supplying facilities for waste removal, and omits paragraph (3) altogether.

311. OR. REV. STAT. § 91.770(2) (1977 Repl.), in lieu of paragraphs (c) through (e), includes the following provision:

The landlord and tenant may agree in writing that the tenant is to perform specified repairs, maintenance tasks and minor remodeling only if:

- a) The agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord;
- b) The agreement does not diminish the obligations of the landlord to other tenants in the premises; and
- c) The terms and conditions of the agreement are clearly and fairly disclosed and adequate consideration for the agreement is specifically stated.

312. WASH. REV. CODE ANN. § 59.18.230 (West Supp. 1977) allows agreements exempting the parties from the statute's protective provisions subject to the following limitations:

- 1) The agreement may not appear in a standard form lease or rental agreement;

statutes based on the Model Code are substantially like those based on the URLTA insofar as they generally purport to prohibit any effective waiver of the tenant's rights under the Code and then expressly provide for agreements that shift the burden of maintenance, to a limited extent, from the landlord to the tenant. The Delaware statute³¹³ follows the Model Code³¹⁴ in requiring the agreement to be embodied in a "conspicuous writing independent of the rental agreement" and to be "supported by adequate consideration apart from the rental agreement," but the Hawaii statute,³¹⁵ also based on the Model Code, omits these requirements for an effective waiver. The Wisconsin statute, not based on either the URLTA nor the Model Code, expressly allows a waiver of the statutory duty of the landlord by a "contrary provision in writing signed by the parties."³¹⁶ It is not clear whether or not the "writing" may simply be included in the lease.

Maryland has a new statute³¹⁷ which, although not part of a comprehensive new code of landlord-tenant law such as the URLTA or the Model Code, contains a very detailed statement of the landlord's obligation to maintain all residential dwelling units (except farm tenancies) in habitable condition, and also provides in detail for the ten-

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- 2) There is no substantial inequality in the bargaining position of the two parties;
 - 3) The exemption does not violate the public policy of this state in favor of the ensuring safe, and sanitary housing; and
 - 4) Either the local county prosecutor's office or the consumer protection division of the attorney general's office or the attorney for the tenant has approved in writing the application for exemption as complying with subsections (1) through (3) of this section.

This provision leaves a number of questions for future judicial decision. For example, whether the public policy mentioned in subsection (3) is violated by any violation of an applicable housing or building code, no matter how trivial, and by the existence of conditions that render the leased premises unsafe or unsanitary but are not violations of any applicable housing or building code; and whether the approval of a proposed waiver by the local prosecutor's office, consumer protection division of the attorney general's office, or the tenant's attorney is binding on the tenant. It would seem that the tenant should be estopped when the approval is given by his own attorney, but it is not so clear that he should be estopped when the approval is given by either of the other agencies mentioned in subsection (4).

313. DEL. CODE ANN. tit. 25, § 5109 (1974).

314. MODEL CODE § 2-203(2), (3).

315. HAW. REV. STAT. § 521-42 (1976).

316. WIS. STAT. ANN. § 704.07 (West Supp. 1977).

317. MD. REAL PROP. CODE ANN. § 8-211 (Supp. 1977). See also Davison, *Uniform Residential Landlord and Tenant Act and its Potential Effects upon Maryland Landlord-Tenant Law*, 5 U. BALT. L. REV. 247 (1976).

ant's remedies in the event of a breach of the landlord's obligation. The landlord's obligation is defined in the Maryland statute substantially as it is defined in the URLTA and the Model Act, though the wording differs. The tenant's remedy for breach under the Maryland statute is either to bring "an action for rent escrow" or to "refuse to pay rent and raise the existence of the asserted defects or conditions as an affirmative defense to an action for distress for rent or to any . . . proceeding brought by the landlord to recover rent or for possession of the leased premises."³¹⁸ In either case, the tenant must pay into court "the amount of rent required by the lease" unless the court orders the rent to "be abated and reduced in amount determined by the court to be fair and equitable to represent the existence of the conditions or defects found by the court to exist."³¹⁹ The court may order moneys paid into court by the tenant to be paid to the landlord, the tenant, "or any other appropriate person or agency for the purpose of making the necessary repairs" and, alternatively, may "appoint a special administrator who shall cause the repairs to be made . . . out of the moneys in the [court's] escrow account."³²⁰

IV. EXPANSION OF TENANTS' RIGHTS BY JUDICIAL DECISION

Two principal judicial approaches are discernible in the expansion of tenants' rights. Most courts have adopted the "implied warranty (or covenant) of habitability" approach, imposing by implication a duty on landlords to provide residential tenants with a habitable dwelling unit enforceable, in most jurisdictions, by a variety of remedies. A few courts have also given tenants the option of treating residential leases as "void" for "illegality" whenever the condition of the dwelling unit substantially violates an applicable housing or building code (the "illegal contract" approach).

A. *Historical Introduction*

1. The "Implied" Warranty of Habitability Approach

As early as 1931 the Minnesota Supreme Court held that there is an implied warranty of habitability in any lease of an apartment in a modern apartment building, whether furnished or not, and whether

318. MD. REAL PROP. CODE ANN. § 8-211 (Supp. 1977).

319. *Id.*

320. *Id.*

the lease is for a long or short term.³²¹ If this holding had been generally accepted and applied, the recent "revolution" in tenants' rights would have occurred in the 1930's instead of the 1960's and 1970's. But the holding was not followed, even in Minnesota, and the modern era of judicial activism in the expansion of tenants' rights began instead with *Pines v. Perssion* in 1961.³²²

In *Pines* the Wisconsin Supreme Court held that the traditional rule of caveat emptor should be rejected and that a warranty of habitability should be implied in every residential lease. The court stated that the traditional rule was "inconsistent with the current legislative policy concerning housing standards" as exemplified in "legislative and administrative rules, such as the safeplace statute, building codes and health regulations, [which] all impose certain duties on a property owner with respect to the condition of his premises."³²³ In reaching its conclusion, the court obviously relied on an unarticulated minor premise: that the traditional administrative modes of enforcement of housing codes had proved ineffective. In addition, the court held that the tenant's covenant to pay rent and the landlord's implied covenant to provide a habitable dwelling were mutually dependent, and thus a breach of the latter by the landlord relieved the tenant of any liability under the former, and their only liability was for "the reasonable value of the premises during the time of actual occupancy."³²⁴

Although *Pines v. Perssion* may have been overruled *sub silentio*³²⁵ and, in any case, has been at least partly displaced by later Wisconsin legislation, judicial decisions in at least ten other jurisdictions have adopted the implied warranty of habitability: California, the District of Columbia, Hawaii, Illinois, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey and Washington.³²⁶ In addition, lower courts have recognized the implied warranty of habitability in Indiana, Missouri, Ohio, New York, and Pennsylvania.³²⁷ As previously

321. *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

322. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

323. *Id.* at 595-96, 111 N.W.2d at 412-13.

324. *Id.* at 596, 111 N.W.2d at 413.

325. *See Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). For a discussion of *Posnanski*, see note 25 *supra*.

326. *See* notes 14-15 and accompanying text *supra*.

327. *See* note 15 *supra*.

indicated,³²⁸ however, the new common law implied warranty has been superseded in Hawaii, Kansas and Washington by provisions in new comprehensive landlord-tenant codes based, respectively, on the Model Code and the URLTA.³²⁹ In the District of Columbia and in New York, the new implied warranty has also been codified.³³⁰

Of the cases decided after *Pines v. Perssion*, the one most often cited is *Javins v. First National Realty Corporation*,³³¹ where the United States Court of Appeals for the District of Columbia Circuit held, in the alternative, that the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition,³³² and "in any event, . . . the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers."³³³ The court further held that breach of the implied warranty could be used as a defense in a summary action by the landlord to evict his tenants for nonpayment of rent, and that the trier of fact should, if it found that the breach existed during the period for which past due rent was claimed, determine "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach."³³⁴

Many of the arguments advanced in *Javins* as a basis for implying a warranty of habitability are not very persuasive. Since the conditions alleged to make the plaintiffs' housing uninhabitable were stipulated to have arisen *after* the inception of their tenancies, the court was on shaky ground in relying on a supposed analogy with the Uniform Commercial Code's warranties in the sale of goods³³⁵ in holding that the landlord has a continuing obligation to keep leased premises in repair.³³⁶ Perhaps more startling is the absence of any discussion of the decision's probable impact on the cost and supply of

328. See notes 16 and 21 and accompanying text *supra*.

329. HAW. REV. STAT. § 521-42 (1976) (Model Code); KAN. STAT. § 58-2553 (1976) (URLTA); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1977) (URLTA).

330. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS § 2902.2 (1970); N.Y. REAL PROP. ACTS. LAW § 235b (McKinney Supp. 1977).

331. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

332. *Id.* at 1077-80.

333. *Id.* at 1080.

334. *Id.* at 1082-83.

335. U.C.C. §§ 2-314 & 2-315.

336. See 428 F.2d at 1075, 1079. For a devastating critique of this argument, see Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 31-32 (1976).

housing in the District of Columbia. Moreover, even assuming *arguendo* that the conclusions reached in *Javins* are justifiable and desirable from a policy viewpoint with respect to the District of Columbia, it is remarkable that the *Javins* language has been repeated by so many other courts in support of decisions applying the new implied warranty of habitability to entire states.³³⁷ Of the later decisions that rely heavily on *Javins*, *Boston Housing Authority v. Hemingway*,³³⁸ *Green v. Superior Court*,³³⁹ and *Foisy v. Wyman*³⁴⁰ are especially noteworthy.

A major question raised by *Boston Housing Authority v. Hemingway* is why the Massachusetts court believed it necessary or desirable to superimpose the new implied warranty of habitability on a large

337. Practically every subsequent decision cites and quotes at length from *Javins*, creating a kind of "snowball" effect. Most of the comment on the *Javins* case in the legal periodicals has been favorable, although some commentators have emphasized problems not considered in the *Javins* opinion. See, e.g., Daniel, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEORGETOWN L.J. 909, 930-43 (1971); Moskovitz, *Rent Withholding and the Implied Warranty of Habitability*, 4 CLEARINGHOUSE REV. 49, 63-66 (1970); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489, 495-501 (1971); Note, *Landlord's Violation of Housing Code During Lease Term is Breach of Implied Warranty of Habitability Constituting Partial or Total Defense to an Eviction Based on Nonpayment of Rent*, 84 HARV. L. REV. 729 (1971); Note, *Javins v. First National Realty Corp.—The Implied Warranty of Habitability & Rent Withholding in Urban Leases*, 66 NW. U.L. REV. 227 (1971); Comment, *New Power for Tenants: The Lessee's Right to a Livable Dwelling*, 6 HARV. C.R.-C.L. L. REV. 193 (1970); Comment, *A Contract Remedy for the Slum Dweller*, 1970 WASH. U.L.Q. 499 (1970); Comment, *Landlord-Tenant Law: Implied Warranty of Habitability in Residential Leases—A Defense to Landlord Eviction Actions*, 23 U. FLA. L. REV. 785 (1972); Comment, *Plotting the Long-Overdue Death of Caveat Emptor in Leased Housing*, 6 U. SAN FRANCISCO L. REV. 147, 169-71 (1971).

338. 363 Mass. 184, 293 N.E.2d 831 (1973). See Comment, *Plight of the Indigent Tenant in Massachusetts: An Attempt by the Law to Provide Relief*, 8 SUFF. L. REV. 106 (1973).

339. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). See Comment, *Balancing the California Landlord-Tenant Relationship*, 9 CAL. WEST. L. REV. 326 (1973); Comment, *Green v. Superior Court: A New Remedy for the California Tenant*, 5 GOLDEN GATE L. REV. 145 (1974); Comment, *Green v. Superior Court: The Implied Warranty of Habitability in California and Montana*, 36 MONT. L. REV. 129 (1975); Comment, *To Repair or Not to Repair: That Is No Longer the Question*, 14 SANTA CLARA LAW. 356 (1974); Comment, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976). See also Moreno, *The Warranty of Uninhabitability*, 7 SAN FERNANDO VALLEY L. REV. 67 (1978).

340. 83 Wash. 2d 22, 515 P.2d 160 (1973).

mass of recently enacted legislation³⁴¹ specifically designed to make the enforcement of state and local housing codes more effective. At the time of *Hemingway*, new statutory remedies, all capable of initiation by tenants, included rent withholding, full protection against eviction for non-payment of rent, application of withheld rents to repairs, and the appointment of a receiver to effect necessary repairs and improvements. Having so recently considered the problem of tenants' rights and remedies and having supplied such a broad range of new remedies, it might be supposed that the legislature at least by implication had rejected the argument that additional tenants' rights and remedies were needed. Yet the Massachusetts court sought to justify its adoption of the implied warranty of habitability by asserting that, "If we fail to repudiate the underlying common law concept of a lease which fostered the independent covenants rule, the landlord-tenant law in Massachusetts will remain in an illogical state because our statutory and common law will be based on different conceptual assumptions as to the essential nature and consequences of a lease."³⁴²

Having brought the "underlying common law concept of a lease" into conformity with the new Massachusetts statutory law by adopting the implied warranty of habitability, the *Hemingway* court went on to hold, however, that the tenant could obtain immunity from eviction for non-payment of rent only by following one of the *statutory* rent withholding procedures.³⁴³ Since the tenant in *Hemingway* did not follow either of the statutory rent withholding procedures, the court held that he could be evicted for non-payment of rent and that he could use the landlord's breach of the implied warranty of habitability only as "a total or partial defence to the landlord's claim for rent being withheld, depending on the extent of the breach."³⁴⁴

In *Green v. Superior Court*³⁴⁵ the California court, although conceding that "past cases have held that the Legislature intended the remedies [of repair-and-deduct or termination of tenancy] afforded by section 1942 [of the California Civil Code] to be the sole proce-

341. MASS. GEN. LAWS ANN. ch. 111, §§ 127C-127K & ch. 239, § 8A (West Supp. 1978). For a discussion of the Massachusetts tenants' rights legislation see notes 134-158 and accompanying text *supra*.

342. 363 Mass. at 199, 293 N.E.2d at 843.

343. *Id.* at 202, 293 N.E.2d at 845.

344. *Id.* at 203, 293 N.E.2d at 845.

345. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

ture for enforcing the statutory duty on landlords imposed by section 1941 [of the Civil Code],”³⁴⁶ nevertheless held that these statutory provisions did “not preclude the development of new common law principles in this area” and that “a warranty of habitability is implied by law in residential leases in California.”³⁴⁷ Thus California landlords are now simultaneously subject to an express statutory duty to put dwelling units into a condition fit for habitation and to “repair all subsequent dilapidations thereof,” with the tenant’s only remedies for breach being either to repair-and-deduct or to terminate the tenancy; and a completely separate common law implied warranty duty to do exactly the same things, but with a substantially different set of judicially created remedies for breach.

Judicial activism in the field of landlord-tenant law reached its apogee in *Foisy v. Wyman*.³⁴⁸ Although the Washington legislature had just enacted a modified version of the Uniform Residential Landlord and Tenant Act, effective July 16, 1973,³⁴⁹ the Washington Supreme Court on October 25, 1973, followed the *Javins* case and held that a warranty of habitability should be implied in a lease antedating the enactment of the statute. This holding would perhaps be understandable had the case before the court presented substantial equities on behalf of the tenant. But, in fact, it was conceded that the tenant knew of a substantial number of defects when he rented the premises and that he negotiated a reduction in the rent from \$87 per month to \$50 per month because he was willing to repair the defects himself.³⁵⁰

In jurisdictions where the new duty of the landlord to provide residential tenants with a “habitable” dwelling was created by judicial decisions recognizing an “implied” warranty of habitability, the

346. *Id.* at 629, 517 P.2d at 1177, 111 Cal. Rptr. at 713.

347. *Id.* at 631, 517 P.2d at 1178, 111 Cal. Rptr. at 714.

348. 83 Wash. 2d 22, 515 P.2d 160 (1973).

349. WASH. REV. CODE ANN. §§ 59.18.010 (Supp. 1977).

One commentator has suggested that although adoption of a new comprehensive statute based on the URLTA has made *Foisy v. Wyman* largely irrelevant with respect to the “residential” premises covered by the statute, *Foisy* does state new “common law” which will continue to apply to farm houses, seasonal farm laborers’ housing, and other housing supplied in connection with employment—categories of rental housing expressly excluded from the URLTA’s coverage. Stoebuck, *Law Between Landlord and Tenant in Washington*, 49 WASH. L. REV. 291, 345 (1974).

350. It is difficult to see any public policy reason for refusing to treat the *Foisy* case as involving an effective waiver of whatever right to a habitable dwelling the court might otherwise have wished to recognize. For a discussion of the “waiver” provisions of the Washington statute, see note 312 *supra*.

opinions are far from uniform as to the scope and application of the warranty.

2. The "Illegal Contract" Approach

In *Brown v. Southall*,³⁵¹ which preceded *Javins*, the District of Columbia Court of Appeals adopted the "illegal contract" rather than the "implied" warranty of habitability approach. In *Brown* the landlord was suing a tenant for unpaid rent after the tenant abandoned the premises. The tenant defended on the ground that the lease was illegal and therefore unenforceable because it was entered into in violation of a housing regulation prohibiting the renting of "any habitation . . . unless such habitation and its furnishings are in a clean, safe, and sanitary condition, in repair, and free from rodents and vermin."³⁵² In addition, the tenant relied on another regulation requiring all "premises accomodating one or more habitations" to "be maintained and kept in repair so as to provide decent living accomodations for occupants."³⁵³ This regulation expressly states that it is designed to require "more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."³⁵⁴ Brushing aside the contention that these regulations were not intended to make such a lease unenforceable, the court held the lease "void as an illegal contract," after noting that "the violations known by [the landlord] to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the 'habitation' unsafe and unsanitary," and clearly showed that it had not been "maintained or repaired to the degree contemplated by the regulations."³⁵⁵ It is noteworthy that the court in *Brown* did not rest its decision on the theory that the housing regulations gave rise to an implied warranty of habitability, the breach of which would justify the tenant in "rescinding." The landlord's obligation to have the leased premises in a "habitable" condition was based directly on the housing regulations.

The "illegal contract" theory has been recognized in a number of

351. 237 A.2d 834 (D.C. App. 1968).

352. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS § 2304 (1970).

353. *Id.* § 2501.

354. *Id.*

355. 237 A.2d at 836.

District of Columbia cases,³⁵⁶ and an expanded version of the "illegal contract" defense was added to the District of Columbia Landlord-Tenant Code in 1970.³⁵⁷ Elsewhere, however, the illegal contract theory has gained little recognition. In *King v. Moorehead*,³⁵⁸ the Kansas City (Missouri) Court of Appeals adopted both the *Brown* illegal contract theory and the *Javins* implied warranty of habitability doctrine, with an explicit holding that the tenant must elect between them. As the court said:

. . . The first defense asserts the unenforceability of the contract and the second that a breach of a term of that contract is enforceable and should yield damages. The proof of one defense necessarily disproves the other, so the defenses are inconsistent.³⁵⁹

In *Glyco v. Schultz*,³⁶⁰ the Municipal Court of Sylvania, Ohio, also accepted both the illegal contract theory and the implied warranty of habitability doctrine, but did not indicate that the tenant must elect between them—perhaps because the tenant's recovery was the same under either theory.

B. *Scope of the New "Implied" Warranty of Habitability*

1. What Rental Housing is Covered?

In jurisdictions where the new tenants' right to a habitable dwelling rests on judicial decision, it is not always clear what types of rental housing are covered by the implied warranty. In *Pines v. Persson*,³⁶¹ the court recognized an implied warranty of habitability in the lease of a house to students at the University of Wisconsin for a

356. *E.g.*, *Davis v. Slade*, 271 A.2d 412 (D.C. App. 1970); *Diamond Hous. Corp. v. Robinson*, 267 A.2d 833 (D.C. App. 1970); *Diamond Hous. Corp. v. Robinson*, 257 A.2d 492 (D.C. App. 1969). *See also* *Curry v. Dunbar House, Inc.*, 362 A.2d 686 (D.C. App. 1976); *Watson v. Kotler*, 264 A.2d 141 (D.C. App. 1970).

357. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS § 2902.1 (1970).

358. 495 S.W.2d 65 (Mo. App. 1973). *See* Case Note, *Landlord-Tenant: Implied Warranty of Habitability in Leases*, 39 MO. L. REV. 56 (1974). To date the implied warranty doctrine has not been adopted by the Missouri Supreme Court.

359. *Id.* at 79.

360. 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972).

The significance of *Glyco* has been exaggerated by commentators. It is, of course, only a municipal court decision; and, in any case, it has been practically superseded by Ohio's adoption of a modified version of the URLTA. *See* OHIO REV. CODE ANN. §§ 5321.01-5321.00 (Page Supp. 1977).

361. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

nine-month term. Although the court did not make the point clear, the new warranty was apparently thought to apply only to housing subject to state or local housing codes. Eight years after *Pines*, the Supreme Court of Hawaii, in the companion cases of *Lemle v. Breedon*³⁶² and *Lund v. McArthur*,³⁶³ adopted the implied warranty of habitability without any suggestion in either case that the warranty was limited to rental housing covered by a state or local housing code; nor was the implied warranty limited to dwellings leased for a relatively short term—unlike the new statutory right of Hawaiian tenants to a habitable dwelling.³⁶⁴

In *Javins v. First National Realty Corporation*³⁶⁵ the District of Columbia Court of Appeals held that “the District’s housing code requires that a warranty of habitability be implied in the leases of all housing that it covers,” and also suggested that, even without reference to the housing code, a “warranty of habitability [should] be implied into all contracts for urban dwellings” as a matter of common law.³⁶⁶ The latter suggestion really has no significance with respect to the coverage of the new implied warranty, however, since the District of Columbia housing code applies to “any habitation” in the District³⁶⁷ and all rental housing in the District is clearly “urban.” A later decision by a lower court interprets *Javins* as applying only to dwelling units covered by the District of Columbia housing code.³⁶⁸

Since *Javins*, the highest courts of California, Iowa, Massachusetts, New Jersey and Washington have held that the new warranty of habitability should be “implied” in all residential leases.³⁶⁹ In Illinois and New Hampshire, on the other hand, the implied warranty is lim-

362. 51 Haw. 426, 462 P.2d 470 (1969).

363. 51 Haw. 473, 462 P.2d 482 (1969).

364. *Id.* at 473, 462 P.2d at 482.

365. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

366. 428 F.2d at 1080.

367. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS §§ 2304, 2501 (1970).

368. *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976).

369. *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973). In Washington, adoption of a comprehensive landlord-tenant code based on the URLTA has presumably made the judicially declared implied warranty of habitability inapplicable, but WASH. REV. CODE ANN. § 59.18.040 (Supp. 1977) excludes no important kind of rental housing except public housing.

ited to multi-unit rental housing,³⁷⁰ and in Kansas it was limited to "urban residential property"³⁷¹ prior to adoption of the URLTA in Kansas.³⁷²

2. To What Extent is "Habitability" Defined by the Applicable Housing Code?

In jurisdictions where courts have created the new right of tenants to a habitable dwelling by way of an implied warranty, the cases are not uniform with respect to the relationship between the new implied warranty and housing code standards. In *Pines*,³⁷³ the Madison, Wisconsin, housing inspector found the leased premises to be "unfit for occupancy" because of the existence of several building code violations, which included inadequate electrical wiring, plumbing and heating systems in disrepair, a handrail on the stairs in disrepair, and lack of screens on windows and doors. On the basis of these facts the Wisconsin court held that there "clearly" was a breach of the newly discovered implied warranty of habitability. Although the court did not purport to limit proof of "uninhabitability" to cases where there were building code violations, it seems clear that the Wisconsin court would find a breach of the implied warranty of habitability wherever there are violations of the applicable housing or building code that have a substantial adverse effect on the tenant's safety or health.

Whatever the present status of *Pines* as authority in Wisconsin, other jurisdictions recognizing the implied warranty or covenant of habitability share the view that proof of housing code violations having a substantial adverse effect on health or safety is sufficient to establish a breach.³⁷⁴ On the other hand, most of the cases recognize

370. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

371. *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974).

372. KAN. STAT. § 58-2540 (1976), which applies to practically all rental housing in the state.

373. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

374. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168; 111 Cal. Rptr. 704 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Kline v. Byrns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Academy Spires v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (County Dist. Ct. 1970); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (City Mun. Ct. 1972); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. 1978); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (now

that minor housing code violations, standing alone, to not pose any substantial threat to the health or safety of the tenant and thus do not constitute a breach of the implied warranty of habitability.³⁷⁵ As the *Javins* court observed: "one or two minor violations standing alone which do not affect habitability are *de minimis*."³⁷⁶

Nonetheless, in *Steele v. Latimer*,³⁷⁷ the Kansas court seemingly held that *any* violation of the applicable housing code would constitute a breach of the landlord's implied warranty of habitability. Since the case involved multiple violations, however, it is not entirely clear whether the court would have found a breach of warranty had there been only a single code violation such as a defective electrical outlet. As previously noted, however, the implied warranty of habitability has been replaced in Kansas by the adoption of the URLTA, which requires only that the landlord "comply with the requirements of all applicable building and housing codes *materially affecting health and safety*."³⁷⁸

Assuming that most courts will not find a breach of the implied warranty of habitability on the basis of housing code violations unless the violations pose a threat to the health or safety of the tenant, the question remains whether a breach may be found where there is no code violation at all. It is not clear what position the *Javins* court would have taken on this question, but the District of Columbia

superseded by WASH. REV. CODE ANN. § 59.18.060 (Supp. 1977)); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

375. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lund v. McArthur*, 51 Hawaii 473, 462 P.2d 483 (1969); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. 1978); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (now superseded by WASH. REV. CODE ANN. § 59.18.060 (Supp. 1977)). URLTA is in accord with this view. See text accompanying note 358 *infra*.

376. 428 F.2d at 1082 n.63.

377. 214 Kan. 329, 521 P.2d 304 (1974).

378. URLTA § 2.104(a); KAN. STAT. ANN. § 58-2553 (1976). Cf. MICH. STAT. ANN. § 554.139 (Supp. 1977); MINN. STAT. ANN. § 504-18 (Supp. 1978); MODEL CODE § 2-203(1)(a) (1969), none of which expressly limits the duty of compliance with applicable housing code provisions to those that "materially affect health or safety." However, the tenant's remedy of termination "at any time" without notice to the landlord under MODEL CODE § 2-205 (1969) is limited to cases where "the condition renders the dwelling unit uninhabitable or poses an imminent threat to the health or safety of any occupant."

Court of Appeals subsequently interpreted *Javins* to hold that the implied warranty is measured solely "by the standards set out in the Housing Regulations" and has refused to "stray from nor expand upon that holding."³⁷⁹ In several other jurisdictions, however, the courts have defined the implied warranty of habitability broadly enough to include all cases where the leased premises are unfit for human habitation because of health or safety hazards, whether or not there is a violation of any housing code provision.³⁸⁰ Thus several courts have stated that whether defects are so substantial as to render the leased premises unsafe or unsanitary, and thus unfit for habitation, is a fact question to be determined in light of the circumstances of each case; that one such circumstance would be whether the alleged defect violates an applicable housing code; and that other factors to be considered are the nature of the defect, its effect on safety and sanitation, the length of time it has persisted, the age of the structure and the amount of rent.³⁸¹

Although many of the opinions focus on "defects" in the premises serious enough to pose a threat to the health or safety of the tenant, it seems clear that the implied warranty generally requires the provision of "essential" or "vital" services such as hot water and (in high-rise apartment buildings) elevators, even if these services are not strictly necessary to safeguard health or safety.³⁸² Of course, where a

379. *Winchester Management Corp. v. Staten*, 361 A.2d 187, 190 (D.C. App. 1976).

380. *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969) (no code violations mentioned); *Old Town Dev. Co. v. Langford*, — Ind. App. —, 349 N.E.2d 749 (1976); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1973); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) ("[T]he protection afforded by the implied warranty of habitability does not necessarily coincide with the Code's requirements. There may be instances where conditions not covered by the Code . . . render the apartment uninhabitable."); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (1975); *Pugh v. Holmes*, — Pa. Super Ct. —, 384 A.2d 1234 (1978); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 482 (1969); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). These cases are in accord with URLTA § 2.104(a), MODEL CODE § 2-203(1) and all current statutes based on one or the other in creating a standard of habitability not limited to the standards set out in an applicable housing code (if any).

381. *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1973); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

382. *Winchester Dev. Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976) (hot water,

housing code applies to the premises, it will usually require the provision of such services.³⁸³

The Restatement (Second) of Property's approach to the problems now under consideration is clearly set out in sections 5.1 and 5.5 and the comments appended thereto. Section 5.1 creates an implied warranty that property leased for residential purposes will be suitable for residential use at the beginning of the tenancy. The draftsman's comment states that the leased property "is unsuitable for residential purposes if it would be unsafe or unhealthy for the tenant to enter on the leased property and use it as a residence," and that "[a] significant violation of any controlling building or sanitary code, or similar public regulation, which has a substantial impact upon safety or health, is *conclusive* that the premises are unsafe or unhealthy, but other modes of proof are acceptable."³⁸⁴ Section 5.5 creates an obligation in the landlord to keep leased property in repair, which is broader than a simple duty to keep the premises in compliance with applicable housing code provisions, although the latter duty is specifically included.

Under the illegal contract theory, it is clear that the only relevant substantive standards of habitability are those contained in the applicable housing code.

3. "Latent" and "Patent" Defects and the Duty to Maintain "Habitability"

All the cases holding that a common law warranty of habitability

but not air conditioning, required by housing code, and thus by the implied warranty); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973) (facilities vital to the use of the premises for residential purposes); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (same); *Park Hill Terrace Associates v. Glennon*, 146 N.J. Super. 271, 369 A.2d 938 (App. Div. 1977) (defective central air conditioning is breach of implied warranty); *Academy Spires v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970) (garbage disposal, hot water, elevator service); *Pugh v. Holmes*, — Pa. Super. Ct. —, 384 A.2d 1234 (1978) (hot water); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (hot water). See also *Timber Ridge Town House v. Dietz*, 133 N.J. Super. 577, 338 A.2d 21 (L. Div. 1975) (inability to use outside area because of mud and water from retaining wall construction project was breach of implied warranty). In *Academy Spires* the court also said: "Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, at least of the magnitude presented here, go to what may be called 'amenities.' Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability." 111 N.J. Super. at 482, 268 A.2d at 559.

383. *E.g.*, *Winchester Dev. Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976).

384. RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (1977) (emphasis added).

must be implied in residential leases recognize that the warranty should protect the residential tenant against conditions existing at the beginning of the tenancy that makes the premises "uninhabitable." Indeed, most of the cases have involved defective conditions in existence at the beginning of the tenancy.³⁸⁵

To the extent that the landlord's obligation is to assure that the premises are habitable at the beginning of the tenancy, the further question may arise as to whether the obligation covers "patent" as well as "latent" defects. No statute imposing a duty on the landlord to provide a habitable dwelling and/or providing the tenant with specific remedies for the landlord's failure to do so contains any language suggesting that the "patent" character of defects existing at the beginning of the tenancy relieves the landlord of his duty or deprives the tenant of his remedies. But the picture is less clear when we turn to judicially created implied warranties of habitability.

In *Pines v. Perssion*³⁸⁶ many of the defects in the leased premises were "patent," but the Wisconsin court said nothing to suggest any distinction with respect to the warranty.³⁸⁷ In *Lemle v. Breedon*³⁸⁸

385. *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 482 (1969) (electrical defects); *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969) (rat infested); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (numerous code violations); *Old Town Dev. Co. v. Langford*, — Ind. App. —, 349 N.E.2d 744 (1976) (faulty heating system); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1973) (faulty bathroom ceiling and other defects); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974) (faulty windows, bathroom tile, kitchen counter); *McKenna v. Begin*, — Mass. App. —, 362 N.E.2d 548 (1977) (broken windows, inadequate means of egress, inadequate electrical system); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973) (fourteen specific conditions); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971) (nature of defects not specified); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973) (broken windows, heating defects, electrical system defects, defects in walls, floors, ceilings; sewage backup, vermin); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973) (heating, plumbing, numerous other defects); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (defective plumbing, heating, and wiring). It is not clear whether the defective conditions were in existence at the inception of the tenancy in *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973), although they probably were. In *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), though many of the defective conditions may have been present at the beginning of the tenancy, the tenants "offer of proof reached only violations [of the housing code] which had arisen since the term of the lease had commenced." 428 F.2d at 1073.

386. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

387. However, when the prospective tenants looked at the house in June "and found it in a filthy condition," there was testimony that the landlord "stated he would clean and fix up the house, paint it, provide the necessary furnishing and have the house in suitable condition by the start of the school year in the fall." 14 Wis. 2d at 591-92, 111 N.W.2d at 410. Although the court held that parol evidence was inadmis-

and *Lund v. McArthur*³⁸⁹ all the defects appear to have been "latent," but the Hawaii court said nothing to indicate that this was significant. In *Javins v. First National Realty Corporation*³⁹⁰ the tenants offered to prove some 1500 violations of the District of Columbia housing code, but they conceded that "this offer of proof reached only violations which had arisen since the term of the lease had commenced."³⁹¹ Thus the *Javins* court had no reason to discuss the question whether the implied warranty would cover patent defects existing at the inception of the tenancy. The opinion does contain dictum that the shortage of housing in the District of Columbia compels tenants to accept rental units notwithstanding observable defects,³⁹² and the court's emphasis on the need to give tenants new remedies to enforce their right to a habitable dwelling in substantial compliance with the housing code strongly suggests that the *Javins* court would draw no distinction between latent and patent defects.

In New Jersey, on the other hand, the court in *Marini v. Ireland*³⁹³ held that a residential letting impliedly covenants "that at the inception of the lease, there are no *latent* defects in facilities vital to the use of the premises for residential purposes because of original faulty construction or deterioration from age or normal usage."³⁹⁴ This language was later adopted by the New Hampshire court in *Kline v. Burns*,³⁹⁵ and by the Iowa court in *Mease v. Fox*.³⁹⁶ But the signifi-

sible to vary the terms of the written lease, which did not include any warranty of habitability, it is clear that the tenants agreed to lease the house in reliance on the landlord's statement and that the rent was fixed on the basis of the premises being put "in suitable condition by the start of the school year in the fall."

388. 51 Haw. 426, 462 P.2d 470 (1969).

389. 51 Haw. 473, 462 P.2d 482 (1969).

390. 428 F.2d 1071 (D.C. Cir. 1970).

391. *Id.* at 1073. *But cf.* the statement that "there is no allegation that appellants' apartments were in poor condition or in violation of the housing code," which suggests that the presence of such an allegation might have made a difference. *Id.* at 1079.

392. *Id.* at 1079 n.42.

393. 56 N.J. 130, 265 A.2d 526 (1970).

394. *Id.* at 144, 265 A.2d at 534 (emphasis added). The quoted language was repeated with approval in *Berzito v. Gambino*, 63 N.J. 460, 466, 308 A.2d 17, 20 (1973). *Berzito* actually involved an express rather than an implied warranty of habitability, and the only real issue was as to the scope of the remedies available for breach of such a warranty (whether express or implied).

395. 111 N.H. 87, 276 A.2d 248 (1971).

396. 200 N.W.2d 791 (Iowa 1973).

cance of the latent defect limitation is hard to determine since these three cases also held that the implied warranty includes a continuing duty to keep the premises in a habitable condition.³⁹⁷ It is possible that these courts would define this continuing duty as requiring only the repair of conditions traceable to latent defects, but this seems unlikely in view of the broad language in the opinions with respect to the continuing duty of maintenance. Moreover, although the Iowa and New Jersey courts have indicated a willingness to consider whether the tenant in a particular case voluntarily, knowingly and intelligently waived the defects,³⁹⁸ merely accepting possession while patent defects exist hardly seems to satisfy the requirement that any waiver be knowing and intelligent.³⁹⁹

In *Boston Housing Authority v. Hemingway*,⁴⁰⁰ the court relied on and quoted from *Kline v. Burns*,⁴⁰¹ but it changed the formula to read as follows: "At the inception of the rental there are no latent [or *pat-ent*] defects in facilities vital to the use of the premises for residential purposes," expressly rejecting any limitation of the implied warranty to latent defects.⁴⁰² Presumably the court wished to make clear that the tenant's entry into possession does not constitute a waiver of his right to insist that the leased premises be put and kept in a habitable

397. *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970) ("further it is a covenant that these facilities will remain in usable condition during the entire term of the lease . . . the landlord is required to maintain these facilities in a condition which renders the property livable . . . [and] to repair damage to vital facilities caused by ordinary wear and tear during said term"); *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971) ("these essential facilities will remain during the entire term in a condition which makes the property livable"); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1973) (same).

398. See generally *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Berzito v. Gambino*, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973) (quoting *Mease v. Fox*).

399. RESTATEMENT (SECOND) OF PROPERTY takes the position that the landlord should not be able to treat the tenant's entry as an implied waiver of the landlord's duty to provide a habitable dwelling unit, and that "the remedies available to the tenant before entry, because of the unsuitable condition of the leased property for the use contemplated by the parties, are available to him after entry if the landlord does not correct the situation within a reasonable period of time after being requested to do so . . ." *Id.* at § 5.3. The quoted language is subject to the proviso "[e]xcept to the extent the parties to the lease validly agree otherwise." *Id.* Comment c states: "The tenant as a matter of law is unable to waive any remedies available to him at the time of entry, if at the time of entry it would be unsafe or unhealthy to use the leased property in the manner contemplated by the parties." *Id.*

400. 363 Mass. 184, 293 N.E.2d 831 (1973).

401. 111 N.H. 87, 276 A.2d 248 (1971).

402. 363 Mass. at 199, 293 N.E.2d at 843.

condition. In the other states where the implied warranty of habitability has been recognized, judicial opinions suggest no limitation of the warranty to latent defects. Insofar as courts refuse to distinguish between patent and latent defects, it is clear that the implied warranty of habitability is not really a common law implied warranty at all, since generally the latter would not cover defects known to, or readily ascertainable by, the person claiming the benefit of the warranty.⁴⁰³ Since dwelling units are seldom rented without an inspection by the prospective tenant, patent defects in the unit will usually be known to him before he agrees to rent, and by hypothesis such defects are readily discoverable by him. Moreover, since—in the absence of an express covenant by the landlord to put and keep the premises in habitable condition—the existence of patent defects is ordinarily reflected in the rent agreed upon by the parties, it is clear that the tenant does not really bargain, or agree to pay for, a habitable dwelling—in the absence of such an express covenant—when serious patent defects exist at the beginning of the tenancy.

Since all courts agree that the implied warranty covers latent defects in existence at the inception of a tenancy, in the absence of an effective waiver of warranty protection, it is clear that the landlord has a duty to correct such defects when they manifest themselves during the course of the tenancy. The more difficult issues are whether the landlord has a duty to correct patent defects in existence at the beginning of the tenancy, and whether the landlord has a duty to carry out repairs made necessary by ordinary wear and tear on the leased dwelling unit and common facilities used in connection therewith.

The opinion in *Pines v. Perssion*,⁴⁰⁴ proclaiming the existence of an implied warranty that residential premises are habitable at the inception of a tenancy, contains no language indicating any continuing duty of the landlord to maintain the premises in a habitable condition, although the legislative policy embodied in housing codes ar-

403. For a statement of the common law rule on implied warranties in the sale of goods, see, e.g., *Reiny, Schmidt & Plessner v. Healy*, 161 Mich. 266, 268, 126 N.W. 202, 203 (1910) ("It is a settled rule that one who buys an article which is present and subject to his inspection cannot afterwards assert an implied warranty of fitness, quality, or condition, in the absence of fraud, except possibly where the seller is the manufacturer or grower, or the vendor of articles intended for consumption as food; 'caveat emptor is the invariable maxim.'"). *But cf.* U.C.C. §§ 2-314 to 2-317 (1976) (implied warranties in the sale of goods).

404. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

guably supports the view that there should be such a continuing duty running directly from landlord to tenant and enforceable by private tenant remedies. Even assuming that the subsequent decision of the Wisconsin court in *Posnanski v. Hood*⁴⁰⁵ did not completely overrule *Pines, Posnanski* at least rejected the idea that a landlord should be subject to a judicially created duty to repair defective conditions arising after the beginning of the tenancy. Thus Wisconsin tenants must rely on a new statute, effective only in mid-1971 though it was adopted in 1969,⁴⁰⁶ for establishment of the landlord's continuing obligation to maintain the premises in a tenantable condition.

Neither of the implied warranty of habitability cases from Hawaii contains any language suggesting that the new warranty includes a continuing duty of the landlord to maintain the premises in habitable condition.⁴⁰⁷ But the judicially declared implied warranty of habitability has been superseded in Hawaii by recent legislation based on the Model Code, which clearly imposes such a continuing duty on the landlord, and thus requires him to correct all defects existing at the inception of the tenancy *or* arising as a result of normal wear and tear during the term of the tenancy.⁴⁰⁸

In *Javins v. First National Realty Corp.*⁴⁰⁹ the only issue before the court, strictly speaking, was whether the landlord was subject to a duty to repair numerous defects (housing code violations) which the state of the record required the court to consider as having arisen since the term of the lease commenced. The court's affirmative answer is clearly not sustained by the supposed analogy to consumer protection cases relied on by Judge Wright,⁴¹⁰ but it is arguably sus-

405. 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

406. WIS. STAT. ANN. § 704.07 (West 1975).

407. *Lemle v. Breendon*, 51 Haw. 426, 462 P.2d 470 (1969); *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 483 (1969).

408. HAW. REV. STAT. §§ 521-542 (1976).

409. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

410. *Id.* at 1079.

If the warranty were limited to latent defects existing at the commencement of the tenancy, the analogy to consumer protection principles in the law of sales would be sound. But the warranty extends to patent defects and imposes an ongoing duty to repair on the landlord. Hence, the analogy breaks down. Under the Uniform Commercial Code (UCC) no implied warranty covers patent defects which "an examination ought in the circumstances to have revealed to [the buyer]." This limitation of warranty applied whenever the buyer has examined the goods "as fully as he desired" before entering into the contract. Because residential premises are seldom leased without an inspection by the prospective

tained by the policy of the District's housing code. Since *Javins*, although most of the cases have involved defective conditions in existence at the beginning of the tenancy, the courts have consistently said that the new implied warranty of habitability includes a broad continuing duty to maintain the dwelling unit in a habitable condition—*i.e.*, to make all repairs necessary to keep the premises habitable, whether the conditions requiring repairs existed when the tenancy began or only arose later.⁴¹¹ None of the opinions limits the landlord's duty of repair to latent conditions existing at the inception of the tenancy.⁴¹² All this makes it quite obvious that the implied warranty of habitability is not really a common law implied warranty and that the supposed analogy with consumer protection cases is specious.⁴¹³

Where the landlord's duty to make repairs is based upon a judi-

tenant, the UCC would suggest that he take subject to obvious defects, and the defects presumably would be reflected in the rent he agreed to pay. Additionally, the UCC provides no implied warranty that the seller will repair defects arising from ordinary deterioration of durable goods over time. Only when a defect latent at the time of sale later becomes patent does the implied warranty of merchantability afford the buyer a remedy.

. . . Under the UCC, a seller with reason to know that the goods are required for a particular purpose and that the buyer is relying on the seller to furnish suitable goods must furnish the goods with an implied warranty that they are fit for such purpose. Judge Wright's discussion of the sale-of-goods warranties indicated that landlords, by analogy, impliedly warrant habitability because they must know that habitation is the particular purpose for which the tenant seeks the premises. The problem is that the tenant's purpose is not a *particular purpose*, as the official comment to the UCC defines it; rather it is an ordinary purpose for which residential units are used. . . . "Particular purpose" under the UCC implied warranty differs from ordinary purpose in that it requires a use peculiar to the buyer's business.

Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 31-32 (1976). Abbott's overall critique of the *Javins* rationale is the best I have seen. See *id.* at 25-40.

411. *E.g.*, Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1973); Kline v. Burns, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971); Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970). See note 397 and accompanying text *supra* for further discussion of these three cases. *Accord*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972); Pugh v. Holmes, 384 A.2d 1234 (Pa. Super. Ct. 1978); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

412. See text accompanying notes 394-400 *supra*.

413. See notes 403 & 410 *supra*.

cially created implied warranty or covenant, it would seem that, at least where the defective conditions arise or become apparent only after the tenancy begins, the landlord should not be deemed in breach of his obligation unless he fails to make the necessary repairs within a reasonable time after receiving notice of the defective conditions. This is the applicable rule where the lease contains an express covenant by the landlord to make repairs.⁴¹⁴ The Massachusetts Appeals Court in *McKenna v. Begin*⁴¹⁵ said that the tenant was entitled to damages from "the time the landlord first knew or was notified of" any defective conditions "shown to have arisen during the tenancy." But this statement is only dictum insofar as it purports to deny the landlord any time to repair defects arising or only becoming apparent after the tenancy begins, since the evidence revealed "that the landlord knew of the conditions in the apartment at the inception of the tenancy."⁴¹⁶

All the cases recognize that the implied warranty of habitability does not cover conditions resulting from the deliberate or negligent conduct of the tenant or anyone for whose conduct the tenant is responsible.

The Restatement (Second) of Property approach to the problems now under consideration clearly differs from that in any of the decided cases. Sections 5.1 and 5.2 create an implied warranty, without using the term, that property leased for residential purposes will be suitable for residential use both when the lease is made and at the date when the tenant is entitled to possession. The draftsman's comment makes it clear that the property "is unsuitable for residential purposes if it would be unsafe or unhealthy for the tenant to enter on the leased property and use it for a residence" but that "[t]he premises may not be unsafe or unhealthy to occupy but may nevertheless be unsuitable for residential purposes."⁴¹⁷ Section 5.5 creates a sepa-

414. The rule is well-settled. *See, e.g.*, *Chambers v. Lindsey*, 171 Ala. 158, 55 So. 150 (1911); *Bowling v. Carroll*, 122 Ark. 23, 182 S.W. 514 (1916); *Woodbury Co. v. Tackaberry Co.*, 166 Iowa 642, 148 N.W. 639 (1914); *Brewington v. Loughran*, 183 N.C. 558, 112 S.E. 257 (1922); *Kennedy v. Supnick*, 82 Okla. 208, 200 P. 151 (1921).

415. 325 N.E.2d 587, 591 (Mass. App. 1975).

416. *Id.* at 589. Compare *McKenna* with URLTA §§ 4.401, 4.103 and MODEL CODE §§ 2-205 to 2-207, both of which allow the landlord time to "cure the breach" before giving the tenant stated remedies, but which seemingly allow recovery of damages from the date of the breach without allowing time for the making of the needed repairs.

417. RESTATEMENT (SECOND) OF PROPERTY § 5.1, Comment e (1977).

rate "obligation of landlord to keep leased property in repair," as follows:

(1) Except to the extent the parties to a lease validly agree otherwise, the landlord, under a lease of property for residential use, is obligated to the tenant to keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes, unless the failure to meet those requirements is the fault of the tenant or is the consequence of a sudden non-manmade force or the conduct of third persons.

(2) Except to the extent the parties to a lease validly agree otherwise, the landlord is obligated to the tenant to keep safe and in repair the areas remaining under this control that are maintained for the use and benefit of his tenants.

(3) The landlord is obligated to keep the leased property in repair to the extent he has expressly or impliedly agreed to do so.

The draftsman's comment⁴¹⁸ indicates that the duty imposed by paragraph (2) exists even if areas remaining under the landlord's control are damaged by one of the tenants (although he may be able to recover damages from the tenant) or the damage results from a non man-made force or the wrongful conduct of third persons. Moreover, in cases not covered by paragraphs (1) or (2), and where there is no express agreement by the landlord to repair, "a conclusion is justified that the landlord impliedly promised to make . . . major repairs [if] it would not be reasonable in the light of the term of the lease, the rent that is being paid, the purposes for which the leased property is used, and other circumstances, to expect the tenant to assume the cost of major repairs to the leased property that become necessary through no fault of the tenant;" and "[t]o the extent the implied warranty of habitability [created by § 5.1] goes beyond the requirements of subsection (1), it may be the basis of an implied promise to keep the leased property in repair after the tenant enters."⁴¹⁹

In *Saunders v. First National Realty Corp.*,⁴²⁰ the District of Columbia Court of Appeals refused to extend the *Brown*⁴²¹ illegal contract doctrine to a case where the alleged housing code violations were not proved to have been in existence at the beginning of the defendants' tenancies. Both the *Brown* illegal contract doctrine and

418. *Id.* § 5.5, Comment c.

419. *Id.* § 5.5, Comment f.

420. 245 A.2d 836 (D.C. App. 1968), *rev'd sub nom.* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

421. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968).

the *Javins*⁴²² implied warranty of habitability were later incorporated into the District of Columbia Landlord-Tenant Code.⁴²³ Although the Code rejects the *Saunders* limitation and allows tenants to elect between the two doctrines in any case, whether the code violations arise before or after the inception of the tenancy,⁴²⁴ a later District of Columbia case ignored the Code and refused to apply the illegal contract doctrine where violations of the housing code arise after commencement of the lease.⁴²⁵

4. Can the Protection of the Implied Warranty be Waived?

The courts of Iowa and New Jersey, in recognizing an implied warranty of habitability in leases, have also indicated a willingness to consider whether the tenant in a particular case voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of the breach,⁴²⁶ but the New Jersey court, on the facts, sustained the trial court's conclusion that "the scarcity in the Elizabeth area of available housing for low-income families with children" precluded an effective waiver where a tenant moved into substandard housing and paid the contract rent for nearly a year and a half.⁴²⁷ And in *Javins v. First National Realty Corp.*,⁴²⁸ the court refused to consider whether the tenant's express covenant to repair constituted a waiver of the just-invented implied warranty of habitability because the implied warranty of the landlord could not be excluded, and any private agreement to shift the burden of compliance with the housing code to the landlord would be illegal and unenforceable.⁴²⁹ Most of the other cases have followed *Javins* in stating that the implied warranty cannot be waived or excluded.⁴³⁰ None of the cases, however,

422. 428 F.2d 1071 (D.C. Cir. 1970).

423. DISTRICT OF COLUMBIA, LANDLORD-TENANT REGULATIONS §§ 2902.1 to 2902.2 (1970).

424. *Id.* § 2902.1.

425. *Winchester Management Corp. v. Staten*, 361 A.2d 187 (D.C. App. 1976).

426. *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Berzito v. Gambino*, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973) (quoting from *Mease v. Fox*).

427. 63 N.J. at 464, 308 A.2d at 19.

428. 428 F.2d 1091 (D.C. Cir. 1970).

429. *Id.* at 1080 n.49, 1082 n.58.

430. *Green v. Superior Court*, 10 Cal. 3d 616, 625 n.9, 517 P.2d 1168, 1173 n.9, 111 Cal. Rptr. 704, 709 n.9 (1974) ("landlords generally [should] not be permitted to use their superior bargaining power to negate the warranty of habitability rule"); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973)

dealt with a fact situation such as the URLTA envisages, where the parties enter into a separate written agreement, for an adequate consideration, to shift at least some maintenance duties from the landlord to the tenant.⁴³¹

In those states where the waiver issue has not yet been decided, it is likely that the Restatement (Second) of Property will influence future decisions.⁴³² Section 5.6 of the Restatement allows the parties by agreement "to increase or decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property and . . . to expand or contract what would otherwise be the remedies available to the tenant for the breach of those obligations," provided the agreement is not "unconscionable or significantly against public policy."⁴³³ Comment e of section 5.6 lists a number of factors that may be considered in determining whether an agreement in a lease is in whole or in part unenforceable because unconscionable or against public policy. Of those factors, the following would seem to be the most relevant to residential leases:

(1) Whether and to what extent the agreement will be counter to the policy underlying statutory or regulatory provisions, especially those relating to the public health and safety and those relating to the tenants of moderate income in multi-unit residential . . . properties;

(2) Whether the agreement . . . appears in a lease of . . . a substantial residence or estate designed for single family occupancy, . . . concerning which freedom of negotiation is usually permissible:

(3) Whether and to what extent the agreement . . . appears

("This warranty (in so far as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease"); *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973) ("this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty").

431. URLTA § 2.104(c), (d). In *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973), there was such an agreement reducing the rent from \$82 to \$50 per month, but it was not in a separate instrument. The *Foisy* court refused to give any effect to the agreement, although the opinion quoted from the recently adopted Washington statute (not yet in force when the *Foisy* lease was made), based on the URLTA, which expressly states that "[n]othing . . . shall prevent the tenant from agreeing with the landlord to undertake the results himself in return for . . . a reasonable reduction in rent." See WASH. REV. CODE ANN. § 59.18.100 (West Supp. 1977).

432. RESTATEMENT (SECOND) OF PROPERTY (1977).

433. *Id.* § 5.6.

to have been the result of conscious negotiations for the distribution of risks as part of the total bargain contained in the lease;

(4) Whether the provision appears to be part of an unduly harsh and unreasonable standard, "boilerplate" lease document;

(5) Whether and to what extent the parties or either of them, habitually (or on a discriminatory basis) disregard and do not enforce the agreement . . . in actual operations under the lease or, in the case of a landlord, under similar leases;

(6) Whether and to what extent the agreement . . . (especially if it relates to low or moderate income residential property) imposes unreasonable . . . burdens on persons who are financially ill-equipped to assume those burdens and who may have had significant inequality of bargaining power;

(7) Whether and to what extent the parties were each represented by counsel in the course of negotiating the lease.⁴³⁴

Moreover, in another Comment, the Restatement unequivocally states that "[t]he tenant as a matter of law is unable to waive any remedies available to him at the time of entry, if at the time of entry it would be unsafe or unhealthy to use the leased premises in the manner contemplated by the parties,"⁴³⁵ and further states, in a Reporter's Note, that "[t]he rule of this section does not allow waiver of housing code violations" because of "public policy considerations; i.e., forcing the landlord to place the premises in habitable condition as defined by the legislature, and not allowing his reliance on waiver by the tenant."⁴³⁶ The latter statement clearly goes beyond a refusal to recognize waiver where there are conditions hazardous to health or safety, since it is obvious that not all housing code violations endanger health or safety and many are quite trivial in nature.⁴³⁷

434. *Id.* § 5.6, Comment e.

435. *Id.* § 5.3, Comment c. Note, however, that Comment d provides: "The parties may expressly or impliedly agree that the landlord is to have a reasonable time after the tenant's entry to make the condition of the leased property suitable for the use contemplated by the parties. . . . In this situation the reasonable time is measured from the date of the tenant's entry." *Id.* § 5.3, Comment d.

436. *Id.* § 5.3, Reporter's Note 3.

437. Although RESTATEMENT (SECOND) OF PROPERTY § 5.1 creates an implied warranty of suitability for residential use that would not be broken by unsubstantial housing code violations, see Comment e following the § 5.1 blackletter, § 5.5 creates a continuing duty of the landlord "to keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes" not qualified by any language indicating that the duty is only to keep the property free from substantial code violations that affect health or safety. It thus appears that the draftsman's intent

C. *Tenant's Remedies for Landlord's Breach of Duty*

In jurisdictions where the implied warranty of habitability has been established either by judicial decision or by simple warranty of habitability statutes, it is generally accurate to say that the tenant's remedies for the landlord's breach of duty depend on whether the tenant chooses to terminate or to affirm the lease. If the tenant elects to terminate, he is free from liability for rent that would otherwise accrue under the lease, and he may also either obtain restitution of rent paid in excess of what he is legally obligated to pay or recover damages for the landlord's breach of duty. If the tenant elects to affirm the lease, however, he must then make additional decisions, in light of the particular circumstances of his case, as to the availability and comparative advantages of several quite different remedies.

1. Termination of the tenancy

Judicial recognition of an implied warranty or covenant of habitability has generally been accompanied by holdings or dicta that performance of the landlord's warranty obligations and performance of the tenant's obligations under the lease are mutually dependent and, consequently, that the landlord's breach of the implied warranty entitles the tenant to terminate the lease and avoid further rent liability.⁴³⁸ Presumably the breach of a statutory warranty or covenant of

was not to allow effective waiver of the tenant's right to have full compliance with all housing code requirements, however unsubstantial, or even trivial, in nature.

438. Termination—often called “rescission” in the cases—requires the tenant to vacate the premises and is, obviously, very similar to a traditional “constructive eviction” based on the landlord's failure to perform an express covenant to maintain the premises in a habitable condition, to keep it in repair, or to provide essential services. The termination remedy is recognized in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1971) (dictum: “all contract remedies” are extended); *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969); *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 482 (1969); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976) (dictum); *Steel v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); (dictum: “traditional remedies for breach of contract are available to the tenant”); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (dictum); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973) (dictum: “the basic remedies for contract law, including damages, reformation and rescission, are available to the tenant”); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971) (dictum: “basic contract remedies of damages, reformation, and rescission”); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (dictum); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (1975); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972) (dictum: “normal contract remedies”); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. Ct. 1978) (dictum: “the rent may be discharged if the tenant surrenders possession”); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Termina-

habitability will normally give the tenant the same right to terminate the lease and avoid further liability.⁴³⁹ In substance, the tenant now has the right to vacate the leased premises and treat the landlord's breach of the implied or statutory warranty as a constructive eviction, just as he could when there is a substantial breach of an express covenant to keep the premises in repair or to provide essential services. This is a self-help remedy not dependent on any court order to make it effective, and, as under the traditional constructive eviction doctrine, the tenant must vacate the leased premises (assuming he took possession before the breach occurred) in order to assure that the tenant will not be able to avoid payment of rent while retaining the benefits of possession under the lease.

The traditional rule is that a tenant cannot claim a constructive eviction and avoid liability for rent unless he has vacated the leased premises within a reasonable time after the landlord's breach of duty occurs.⁴⁴⁰ When termination for breach of the implied warranty of habitability is the basis of the tenant's defense, however, it may be that the "reasonable time" limitation will be relaxed or even eliminated, since most courts have held that a tenant may withhold rent because of a breach of the implied warranty without vacating the premises at all. Thus courts may decide that a tenant, faced with a breach of the implied warranty, may stay in possession and withhold rent for a very substantial period without forfeiting the right to terminate the lease and vacate the leased premises at a later time. In any case where there is a serious shortage of rental housing, even a rather long delay before terminating and vacating is likely to be held reasonable. But the tenant's right to terminate will probably depend upon his having taken reasonable steps to notify the landlord of his decision to terminate and the reason therefor, and upon the continu-

tion is authorized by RESTATEMENT (SECOND) OF PROPERTY §§ 5.1(1), 5.5(1), 5.4(1) and 5.5(4) (1970). Section 10.1 prescribes the procedure for termination.

439. As to the right of a tenant to terminate under URLTA § 4.101(a), see note 292 *supra*. As to such right under Model Code §§ 2-204, 2-205, see note 299 *supra*. Current state statutes based on the URLTA or Model Code, respectively, contain identical provisions for termination by the tenant. WIS. STAT. ANN. § 704.07 (West Supp. 1975) expressly provides for termination upon breach of the landlord's statutory duty. See text accompanying notes 262-64 *supra*. Some of the statutory provisions creating warranties or covenants of habitability do not, however, expressly provide for remedies at all. See, e.g., MICH. COMP. LAWS ANN. § 554.139 (Supp. 1977); MINN. STAT. ANN. § 504-18 (Supp. 1978); N.Y. REAL PROP. LAW § 235b (McKinney Supp. 1977).

440. *E.g.*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

ance of the landlord's default until the time specified for termination.⁴⁴¹

As previously indicated, the tenant cannot terminate or rescind the lease because of the landlord's breach of duty without vacating the premises. But the question whether the tenant was entitled to terminate is likely to be tested in an action by the landlord for recovery of unpaid rent. If the court finds that the tenant was not in fact entitled to terminate the lease—because either there was no breach of the landlord's duty, or the tenant failed to vacate within a reasonable time, the tenant failed to give notices required by statute, or the landlord cured the breach before the tenant vacated—the defense will be rejected and the tenant will remain liable for rent for the balance of the term even though he has vacated the leased premises and, perhaps, secured other housing.⁴⁴² Hence, if there is any doubt as to the effectiveness of the tenant's attempt to terminate the lease, it may be advisable for him to obtain a declaratory judgment as to his rights before vacating, as the tenant did in *Charles E. Burt, Inc. v. Seven Grand Corp.*⁴⁴³ Although none of the statutes authorizing termination expressly provides for a declaratory judgment, it seems clear that none of them would preclude it if declaratory judgments are otherwise available under the law of the jurisdiction.

2. Restitution of Amounts Paid by Tenant

Assuming that the tenant has effectively terminated the lease because of the landlord's breach of an implied warranty or covenant of habitability, or a statutory equivalent thereof, thus relieving himself of further rent liability under the lease, the tenant is also entitled to a

441. Compare "notice" requirements in URLTA § 4.101(a) and MODEL CODE §§ 2-204 to 2-205 (summarized in note 292 *supra*) with RESTATEMENT (SECOND) OF PROPERTY § 10.1(3) (1977). The Model Code does not require notice to the landlord if "the condition renders the dwelling unit uninhabitable or poses an imminent threat to the health or safety of any occupant." MODEL CODE § 2-205(1). The Restatement (Second) of Property, on the other hand, requires the tenant to vacate and to take "reasonable steps to assure that the landlord has knowledge of his decision to terminate the lease and the reason therefor." *Id.* § 10.1(3).

442. See, e.g., *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) (dictum); *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969).

443. 340 Mass. 124, 163 N.E.2d 4 (1959). "The trial judges could properly (1) declare that Seven Grand's material breach of the lease constituted, or would constitute, a constructive eviction upon Burt's abandonment of the premises, and that Burt, upon such abandonment, was or would be excused from further performance of the lease and (2) assess damages." *Id.* at 130, 163 N.E.2d at 7.

judgment either for restitution or for damages. If the tenant has paid rent in advance or made a security deposit and then terminates the lease before his right to possession accrues, he is clearly entitled to recover all the advance rent paid and any security deposit on either restitutionary or damage theories.⁴⁴⁴ In the more common situation where the tenant vacates the leased premises after having been in possession for a period of time, it was held in *Pines v. Perssion*⁴⁴⁵ that the landlord's duty to have the premises in habitable condition and the tenant's duty to pay the agreed rent are "mutually dependent," and therefore a breach of the landlord's duty—said to constitute a failure of consideration—relieved the tenants of *any* "liability for rent under the lease and their only liability is for the reasonable rental value of the premises during the time of actual occupancy."⁴⁴⁶ However, it is not clear whether the court thought the landlord's breach simply suspended the tenant's duty to pay rent, leaving the lease in all other respects still in force, or whether the court regarded the lease itself as void *ab initio* with the tenant assuming the status of a tenant at will or periodic tenant.⁴⁴⁷ Under either theory, of course, the tenant's duty to pay a reasonable rental value ends when the tenant vacates the premises.

In most of the cases from jurisdictions other than Wisconsin where the tenant vacated the premises and clearly indicated that he intended to terminate or "rescind" the lease, the courts have considered the tenant liable for the lease rent until he vacated, with an offsetting claim for damages for the landlord's breach of the implied warranty

444. In such a case, where the lease never becomes operative as a "conveyance," the tenant's right to recover back anything paid on the "lease contract" is clear, and if the tenant seeks nothing more, it is immaterial whether he relies on a restitutionary or a damage theory. The tenant may, of course, assert his claim either in an independent action or as a counterclaim in an action by the landlord for rent.

445. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In all the cases where breach of the implied warranty of habitability was the basis for the tenant's termination of the lease, the tenant was in possession for some period, however short. *E.g.*, *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969) (three days); *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 482 (1969) (six months); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (over four months); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973) (five months); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (1975) (one month); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (less than a week).

446. 14 Wis. 2d at 597, 111 N.W.2d at 413.

447. The "void *ab initio*" notion is consistent with the "illegal contract" theory, but not with the "breach of implied warranty" theory.

of habitability.⁴⁴⁸ But there has been a good deal of judicial disagreement as to the proper damage formula.

3. Damages for Breach

There appears to be unanimous agreement that a breach of the landlord's implied or statutory warranty or covenant of habitability entitles the tenant to recover damages, whether the tenant does or does not terminate the lease.⁴⁴⁹ As several courts have pointed out, the tenant may often prefer not to terminate the lease because that will require him to vacate the leased premises and find another place to live, which may be difficult in light of the "scarcity of adequate low cost housing in virtually every urban setting."⁴⁵⁰

When the tenant does elect to terminate the lease and vacate the leased premises the damage remedy may often be preferable to the restitutionary remedy, since the former may enable the tenant to recover any provable "expectancy" damages—*i.e.*, any excess of reasonable rental value of the lease over the agreed lease rent (reduced to present value)⁴⁵¹—and consequential damages—*e.g.*, any loss sus-

448. *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 482 (1969); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

449. *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974), seems to be the only appellate case where the tenant stayed in possession and sued for damages. Most of the cases allowing the tenant to sue or counterclaim for damages after vacating the leased premises indicate that the damage remedy would have been available whether or not the tenant chose to vacate (and thus terminate the lease) or stay in possession (and thus affirm the lease). See also *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 21-22 (1973). *Accord*, RESTATEMENT (SECOND) OF PROPERTY §§ 5.1, 5.2, 5.4, 5.5, 10.2 (1977).

It should be emphasized that the tenant, after terminating or rescinding the lease because of the landlord's breach of duty, may generally recover all the damages to which he is entitled either in an independent action or by counterclaim in an action by the landlord for unpaid rent. As a practical matter, the issue is likely to be raised only if the landlord elects to sue for unpaid rent, so the tenant's right to recover damages is most often asserted by way of counterclaim. See, *e.g.*, *Lemle v. Breedon*, 51 Haw. 426, 462 P.2d 470 (1969); *Lund v. McArthur*, 51 Haw. 473, 462 P.2d 482 (1969); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972). In comparison, see *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973), where the tenant sued to recover part of the rent paid and the landlord counterclaimed for the amount of rent remitted to the tenant in an earlier eviction proceeding. In *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), the tenants sued for recovery of their security deposit and the cost of labor performed by them on the leased premises.

450. *Green v. Superior Court*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173 (1974).

451. This is the generally accepted basic formula for damages for breach of con-

tained by the tenant as a result of reasonable pre-default expenditures in relation to the leased premises which the landlord could reasonably have foreseen the tenant would make, and any reasonable relocation costs of the tenant.⁴⁵² It should be noted, however, that the Maine statute, although it authorizes the tenant in the event of a breach of the statutory covenant and warranty of habitability, to rescind and recover a just proportion of the rent, in addition to "any remedies which may otherwise exist," expressly prohibits any award of "consequential damages for breach of the warranty."⁴⁵³

If the tenant elects to stay in possession and sue periodically for damages, he should presumably be subject to the same general rules as to measure of damages as he would if he elected to terminate the lease. Several decisions, however, indicate that this is not, in fact, the case. Broadly speaking, the courts have enunciated three different rules as to measure of damages for breach of the implied or statutory warranty of habitability in cases where the tenant elects to stay in possession: first, the familiar rule that the damages for breach of the warranty are "the difference between the agreed rent [paid by the tenant] and the fair rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary or unfit condition;"⁴⁵⁴ second, the rule that damages should be measured by "the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition;"⁴⁵⁵ and third, the rule that the agreed rent should be reduced

tract. It is the formula stated in RESTATEMENT (SECOND) OF PROPERTY § 10.2 (1977). See also *id.*, Comment b.

452. Such consequential damages are within the limits set by *Hadley v. Baxendale*, 156 Eng. Rep., 9 Exch. 341 (1854). Accord, RESTATEMENT (SECOND) OF PROPERTY §§ 10.2(2)-(3) (1977). See *id.*, Comments c & d.

453. ME. REV. STAT. ANN. tit. 14, § 6021 (West Supp. 1977).

454. *E.g.*, *Kline v. Burns*, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971) (tenant did not terminate, but was evicted by summary process; the only issue on appeal was the balance due the landlord for unpaid rent); *Glyco v. Schultz*, 35 Ohio Misc. 25, 34, 289 N.E.2d 919, 925 (Sylvania Mun. Ct. 1972). See also *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 ("tenant will be charged only with the reasonable rental value of the property in its imperfect condition during his period of occupancy"). The *Berzito* formula appears similar to that stated in *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

455. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704 (1974) (quoting *Mease v. Fox*, 200 N.W.2d 791, 791 (Iowa 1972)). See *Steele v. Latimer*, 214 Kan. 329, 339, 521 P.2d 304, 311 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 203, 293 N.E.2d 831, 845 (1973).

by a percentage equal to the percentage of the tenant's rightful use and enjoyment which has been lost to him because of the breach of warranty.⁴⁵⁶

The first damage formula above apparently assumes that the "agreed rent" is the fair value of the lease premises when in compliance with the warranty of habitability, and it produces the same result as the formula used in *Pines v. Perssion*⁴⁵⁷ if in fact this is true. But if, on the contrary, the "agreed rent" represents the value of the premises subject to defects that make them uninhabitable, this damage formula will necessarily produce a "no-damages" result. The second damage formula above does not assume that the agreed rent is "the fair rental value of the premises if they had been as warranted," but will obviously produce the same result as the first formula if, in fact, this is the case. The third damage formula, derived from the Model Code,⁴⁵⁸ is essentially a practical expedient adopted by some courts because of the difficulty in establishing damages under either of the other formulas.⁴⁵⁹

Added complications in damage determination have been intro-

456. The following cases actually involve an application of the "percentage diminution" approach in determining the rent abatement to be allowed when a tenant sets up the breach of warranty as a defense in a summary action to evict for nonpayment of rent: *Academy Spires, Inc. v. Brown*, 111 N.J. Super 477, 268 A.2d 556 (Essex County Ct. 1970) (25% reduction); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. N.Y. 1973) (50% reduction); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. N.Y. 1971) (20% reduction); *Glyco v. Schultz*, 35 Ohio Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972) (two-thirds reduction). See also *Cooks v. Fowler*, 455 F.2d 1281 (D.C. Cir. 1971) (one third reduction in determining amount tenant must deposit in court pending appeal from landlord's judgment for possession for nonpayment of rent).

457. 14 Wis. 2d 590, 111 N.W.2d 409 (1961). See text accompanying notes 445-46 *supra*.

458. MODEL CODE § 2-207 (Tent. Draft 1969) (tenant's remedies for landlord's failure to supply heat, water, or hot water).

459. These difficulties arise because of the expense involved in any attempt by a tenant to obtain expert testimony as to rental values, even where the premises were in good condition at the inception of the tenancy and deteriorated later, the problem of determining the rental value of a "patently uninhabitable" dwelling if the agreed rent cannot be considered evidence of such rental value, as is the case, *e.g.*, in Massachusetts, and the desire of courts to avoid concluding that the tenant has suffered no damages when the premises are "patently uninhabitable" at the beginning of the tenancy. For a discussion of the damage measurement problem, see Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 20-25 (1976).

duced in Iowa and Missouri. In *Mease v. Fox*⁴⁶⁰ the Iowa court held that the second formula applies with respect to the period of occupancy by the tenant—*i.e.*, “damages shall be measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition.”⁴⁶¹ But, “when tenant vacates he is then unaffected by the condition of the premises, and that factor loses relevance in the damage question. For the balance of the term, the tenant has lost the benefit of his bargain, assuming he had an advantageous lease. He is therefore entitled to recover at that time for the value of the lease for the unexpired term, that is, the then difference between the fair rental value of the premises if they had been as warranted and the promised rent, computed for that period.”⁴⁶² Thus, for the period after vacation of the premises, the Iowa court uses the expectancy damage formula applicable when the tenant terminates the lease before he becomes entitled to possession. In *King v. Moorehead*,⁴⁶³ however, the Missouri appellate court approved the expectancy damage formula for the period after the tenant vacates the premises, but reverted to the first formula mentioned above—the “difference between the agreed rent [paid by the tenant] and the fair rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary or unfit condition”—to determine damages for the period of occupancy by the tenant. The *King* formula would allow the tenant the benefit of his bargain for the period after vacation of the premises, if the lease is advantageous to the tenant—*i.e.*, if the fair value of the premises when in compliance with the warranty of habitability is greater than the agreed rent—but would not allow the benefit of the bargain to the tenant for the period he occupied after breach and prior to vacation.

Either the “difference between the agreed rent and the fair rental value of the premises as they were during occupancy” formula or the “difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy” formula is workable if the dwelling unit is in compliance with the implied warranty at the inception of the tenancy

460. 200 N.W.2d 791 (Iowa 1972).

461. *Id.* at 797.

462. *Id.*

463. 495 S.W.2d 65, 76 (Mo. App. 1973).

and later becomes uninhabitable. In such a case the agreed rent and the "fair rental value as warranted" are prima facie the same. But suppose that patent conditions rendering the premises uninhabitable exist at the inception of the tenancy, in which case the fair rental value of the premises "as they were during occupancy in the unsafe or unsanitary condition" may well be exactly equal to the contract rent. As Abbott has pointed out, "[t]his situation is common in the low income housing market, particularly with respect to the worst units and the neediest tenants."⁴⁶⁴ Under the first damage formula, the tenant will be unable to prove any damages, at least where the premises have not deteriorated further since the inception of the tenancy. Under the second damage formula, however, the tenant would be entitled to recover the excess of the fair rental value of the unit "as warranted" over the contract rent and the landlord would, in effect, have to pay the tenant for living in the unit!⁴⁶⁵

In *Boston Housing Authority v. Hemingway*,⁴⁶⁶ the Massachusetts Supreme Judicial Court adopted the second damage formula, "the difference between the value of each apartment as warranted and the rental value of each apartment in its defective condition."⁴⁶⁷ Some of the difficulties inherent in this damage formula are illustrated by the efforts of the Massachusetts intermediate court of appeals to apply the formula in a case where substantial patent defects existed at the beginning of the tenancy. On the first appeal in *McKenna v. Beggin*,⁴⁶⁸ the court illogically—but quite sensibly—rejected the possibility that the landlord might be required to pay the tenant for living in a patently defective dwelling although the court said that "it is possible, in a given instance, for substantial defects to reduce the fair rental value of the premises to zero,"⁴⁶⁹ and held that "[i]n any event the tenant shall not be awarded damages in excess of the rent actually paid by him during the period of his occupancy of the premises."⁴⁷⁰ The court further held, however, that the trial court erred in taking the rent agreed upon "as evidence of the value of the premises in a

464. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 21 (1976).

465. *Id.* at 22.

466. 363 Mass. 184, 293 N.E.2d 831 (1973).

467. *Id.* at 203, 293 N.E.2d at 845.

468. 325 N.E.2d 587 (Mass. App. 1975).

469. *Id.* at 591.

470. *Id.* at 592.

defective condition” because “[u]nder the formula applied by the judge, a rental of defective premises would be tantamount to a waiver of the statutory provisions for enforcement of the State Sanitary Code and the landlord’s implied obligation to let and maintain the premises in a habitable condition.”⁴⁷¹ But this is obviously incorrect. Taking the rent agreed upon as evidence of the value of the premises in a defective condition clearly does not preclude a finding that the value of the premises as habitable would be higher, so that the tenant would be entitled to the difference as damages for breach of the implied warranty of habitability.

The first *McKenna* opinion⁴⁷² placed the trial judge in a difficult position since it is difficult, if not impossible, to determine the rental value of a patently defective dwelling if the agreed rent cannot be considered as evidence of such rental value. On remand the trial judge “computed the damages by finding the fair rental value of the defective premises to be the agreed upon rent less the amortized cost of repairing the major code violations.”⁴⁷³ On the second *McKenna* appeal,⁴⁷⁴ this method of computing damages was held to be erroneous and the trial judge was ordered instead to “assess the major code violations and determine the percentage by which the use and enjoyment of the apartment has been diminished by the existence of those violations. . . . [a]nd then assess as damages that percentage of McKenna’s weekly rent for each of the weeks during which the defect remained unrepaired.”⁴⁷⁵ In adopting this solution to the troublesome damage problem, the *McKenna* court relied heavily on *Academy Spires, Inc. v. Brown*,⁴⁷⁶ which in turn relied primarily on the Model Code.⁴⁷⁷

Despite its essentially arbitrary results in practice, the Model Code’s “percentage diminution” approach to determination of damages for breach of the implied warranty of habitability has been adopted in several cases⁴⁷⁸ in addition to *Academy Spires* and *McK-*

471. *Id.* at 590.

472. 325 N.E.2d 587 (Mass. App. 1975).

473. *McKenna v. Begin*, 362 N.E.2d 548, 522 (Mass. App. 1977) (second appeal).

474. *Id.*

475. *Id.* at 553.

476. 111 N.J. Super. 477, 264 A.2d 556 (Essex County Ct. 1970).

477. MODEL CODE § 2-207 (Tent. Draft 1969).

478. *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. N.Y. 1973) (50% reduction); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. N.Y. 1971) (20% reduction); *Glyco v. Schultz*, 35 Ohio

enna. A careful reading of this group of cases clearly bears out Abbott's conclusion that with the percentage diminution approach, "the tenant's recovery really amounts to a civil fine levied on the landlord which recaptures some or all of the contract rent depending upon the court's judgment as to the condition of the [dwelling] unit."⁴⁷⁹

The Property Restatement, in the section dealing with damages, rather curiously fails to state any general measure of damages to be applied when the tenant does not terminate.⁴⁸⁰ A Reporter's Note states that such a measure of damages—generally said to be "the difference between the value of the lease without the default and with the default"—is no longer necessary because the Restatement "has adopted many other remedies, such as rent abatement and rent application, to compensate the tenant."⁴⁸¹ A comment to section 11.1, dealing with rent abatement, indicates, however:

If the tenant has paid the rent stipulated in the lease during a period of time when he was entitled to an abatement of the rent, he is entitled to sue for the excess he has paid to the landlord and the judicial proceeding will establish the proper amount of the abated rent for the period of the landlord's default.⁴⁸²

This appears to be a rather tortured way of saying that when the tenant remains in possession he may sue for damages for breach of the implied warranty of habitability as well as using the breach of warranty as a defense in an eviction action. The Restatement adopts

Misc. 25, 289 N.E.2d 919 (Sylvania Mun. Ct. 1972) (two thirds reduction). See also text accompanying note 456 *supra*.

479. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 24 (1976).

It can also be argued that the percentage diminution approach really rests on a tort rationale—*i.e.*, the tenant should be compensated for discomfort and annoyance. See Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1470-73 (1974). But the difficulty of monetizing discomfort and annoyance will tend to lead the fact finder to set a damage recovery designed to induce the landlord to provide a habitable dwelling in the future. Thus damages for discomfort and annoyance will also tend to amount, in substance, to a civil fine intended to influence the conduct of landlords. Cf. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967), suggesting that deterrence and punishment should be an objective and that the damages should depend (in part) on the landlord's wealth. *Id.* at 887-89 & 913. See also Blum & Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH. L. REV. 451 (1968); Sax, *Slumlordism as a Tort—A Brief Response*, 66 MICH. L. REV. 465 (1968).

480. RESTATEMENT (SECOND) OF PROPERTY § 10.2 (1977).

481. *Id.*, Reporter's Note 3 at 352.

482. *Id.* § 11.1, Comment b at 352.

the second damage formula discussed above, in modified form, as the measure of rent abatement when the tenant remains in possession.⁴⁸³

In addition to the damages for breach of the implied or statutory warranty of habitability discussed above, in cases where the tenant elects to remain in possession it would seem clear that consequential damages should be recoverable unless a statute expressly bars this.⁴⁸⁴

4. Equitable Relief Against Breach

In *Lemle* the court said that breach of the landlord's implied warranty of habitability makes available to the tenant "the basis contract remedies of damages, reformation and rescission."⁴⁸⁵ This language has been repeated in most of the subsequent cases in which an implied warranty of habitability was recognized by the court.⁴⁸⁶ Rescission, accompanied by vacation of the leased premises, really amounts to termination or constructive eviction. It is not immediately apparent how the remedy of reformation can aid the tenant in the event of a breach of the implied warranty of habitability, and the statement from *Lemle* quoted above should probably be dismissed as judicial hyperbole. More significant, perhaps, is the statement in *Javins* that, "[I]n extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability."⁴⁸⁷

In *Steele v. Latimer*,⁴⁸⁸ the tenant sought both damages and specific performance, *i.e.*, an injunction, against continued violation of the housing code, but most of the court's opinion dealt with the question whether an implied warranty of habitability should be recog-

483. If the tenant is entitled to an abatement of the rent, the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event. Abatement is allowed until the default is eliminated or the lease terminates, whichever first occurs.

Id. § 11.1.

484. See notes 464 & 465 *supra*. Accord, RESTATEMENT (SECOND) OF PROPERTY §§ 10.2(2), (4), (6) (1977).

485. 51 Haw. 426, 436, 462 P.2d 470, 475 (1969).

486. *E.g.*, Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 761 (Ind. App. 1976); *Steele v. Latimer*, 214 Kan. 329, 336, 521 P.2d 304, 310 (1974); *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971).

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

488. 214 Kan. 329, 521 P.2d 304 (1974).

nized. Nothing explicit was said as to the claim for specific performance, although the court stated that "traditional remedies for breach of contract are available to the tenant, including the recovery of damages."⁴⁸⁹ No other appellate case has been found where specific performance was sought by a tenant because of the breach of an implied or statutory warranty of habitability, although there is some authority for permitting a tenant to have specific performance of an express covenant by the landlord to keep the premises in repair.⁴⁹⁰

Certainly specific performance (mandatory injunction) could be an extremely valuable remedy in cases where the tenant wishes neither to terminate the lease because of the landlord's breach of the implied or statutory warranty of habitability nor to wait for the landlord to sue him for rent and/or for possession. In view of the disadvantages involved in the use of any of the tenant's legal remedies—*e.g.*, the difficulty of finding alternative housing if he vacates the leased premises, and the likelihood of involvement in continuing litigation without necessarily getting the landlord to put the premises in habitable condition if the tenant remains in possession and relies on his damage or rent abatement remedies—it is strongly arguable that all the tenant's legal remedies are inadequate and that he is entitled to the equitable remedy of specific performance. A court order requiring the landlord to perform his warranty obligation or face punishment for contempt might well be more effective than the traditional techniques used by local administrative agencies to enforce local housing codes. But specific performance is obviously no panacea, and in many cases might prove ineffective.⁴⁹¹

489. *Id.* at 336, 521 P.2d at 310.

490. *Jones v. Parker*, 163 Mass. 564, 40 N.E. 1044 (1895). *See Darnall v. Day*, 240 Iowa 665, 37 N.W.2d 277 (1949) (relief refused because inequitable under the circumstances). *Contra Beck v. Allison*, 56 N.Y. 366 (1874) (equity will not enforce specific performance of an agreement contained in a lease, upon the part of the lessor, to repair damages caused by fire).

491. Some of the factors that make traditional code enforcement methods ineffective in practice may also make specific performance ineffective as a private remedy—*e.g.*, the landlord's abandonment of the building under the circumstances that make it impossible to locate him. Moreover, "judicial reluctance to supervise the abatement of multiple violations might, as a practical matter, limit the remedy to cases involving a single, severe condition." Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 64 (1976). Abbott concludes, despite the potential difficulties involved in reliance on mandatory injunctions, that it should be the *only* private tenant remedy in cases where the leased premises are not subject to latent defects at the inception of the tenancy and where the landlord fails to

5. Self-help: Repair-and-Deduct

Although the "repair-and-deduct" remedy has more commonly been made available to tenants by statute,⁴⁹² in *Pines v. Perssion*⁴⁹³ the tenants were held entitled to the return of their security deposit plus the cost of materials and labor expended in making repairs on the premises, less the reasonable rental during their actual occupancy of the premises. Subsequently the repair-and-deduct remedy was also allowed in New Jersey and in New York.⁴⁹⁴

In both *Marini v. Ireland*⁴⁹⁵ and *Jackson v. Rivers*⁴⁹⁶ the repairs had in fact been completed and the respective courts did not discuss the question whether the elimination of the defective condition is a prerequisite for deduction of the repair costs. It would seem that this should generally be a prerequisite for deduction, and that the landlord should be given appropriate evidence of the completion of the repairs and their cost, as required by many of the repair-and-deduct statutes.⁴⁹⁷ In *Marini* the court did not consider the question whether the tenant must present such evidence, but in fact the tenant had

make repairs necessary to keep the premises in compliance with minimum housing code standards (as redefined by the author). *Id.* at 135-36.

492. *E.g.*, CAL. CIV. CODE § 1942 (Deering 1972); URLTA § 4.103 (1972); MODEL CODE § 2-206 (1969).

493. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

494. *See* notes 495 & 496 *infra*. *Accord*, RESTATEMENT (SECOND) OF PROPERTY § 11.2 (1977).

495. 56 N.J. 130, 265 A.2d 526 (1970).

If, therefore, a landlord fails to make repairs and replacements of vital facilities necessary to maintain the premises in a livable condition for a period of time adequate to accomplish such repair and replacements, the tenant may cause the same to be done and deduct the cost thereof from future rents. The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make the necessary replacement or repair. If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace.

Id. at 146, 265 A.2d at 535.

Although the *Marini* court said that breach of the implied warranty of habitability gives the tenant "only the alternative remedies of making the repairs or removing from the premises," 56 N.J. at 147, 265 A.2d at 535, the New Jersey Supreme Court later rejected this restrictive reading of *Marini* and held that other contract remedies are available to the tenant. *Berzito v. Gambino*, 63 N.J. 460, 468-69, 308 A.2d 17, 21-22 (1973).

496. 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. N.Y. 1971).

497. "Since the tenant must present evidence that the sum deducted from the rent has been applied to the elimination of the landlord's default, generally he may not begin making deductions until the default has been eliminated and may not deduct

presented the landlord with a receipt for the repair work done.⁴⁹⁸ And in *Jackson* the court permitted the tenant to deduct for repair of a toilet but also stated: "I find that the tenant failed to sustain her burden of proof that she had contributed a certain sum toward the purchase of a new front door and had been required to expend another sum for repairing a window not broken by her."⁴⁹⁹

It is clear that the defective condition giving rise to a tenant's right to repair-and-deduct must be one that the tenant can eliminate at a cost not exceeding the amount of rent that will be available to apply against that cost.⁵⁰⁰ But in the absence of a statutory limit⁵⁰¹ the courts should not arbitrarily limit the amount deductible by the tenant to one month's rent, or to any particular dollar amount. It is arguable that the tenant should not be allowed to deduct from rents already in arrears when he eliminates the defective condition, but, after giving adequate assurance that the work will be completed, it seems clear that the tenant should at least be allowed to make appropriate deductions from the rent in arrears during the progress of the work in special situations—*e.g.*, where the work involves emergency repairs and the tenant has no readily available funds other than the rent money.⁵⁰²

Where the landlord's breach of the implied warranty of habitability can be eliminated by the tenant through an exercise of his right to repair-and-deduct without unreasonable inconvenience and at comparatively little expense compared with the damages that would accrue if the breach went uncured, the tenant should be required to exercise his right to repair-and-deduct or have his damages limited to the repair cost. In such cases, the normal obligation of the injured party to mitigate the damages resulting from the other party's breach of duty should be applied. Except for situations where the obligation to mitigate damages arises, however, a tenant may, when there is a

from rents which are already in arrears when he eliminates the default." RESTATEMENT (SECOND) OF PROPERTY § 11.2, Comment b at 368 (1977).

498. 56 N.J. at 134-35, 265 A.2d at 538.

499. 65 Misc. 2d at 471, 318 N.Y.S.2d at 11.

500. See RESTATEMENT (SECOND) OF PROPERTY § 11.2, Comment c at 368 (1977).

501. *E.g.*, CAL. CIV. CODE § 1942 (Deering 1972) (one month's rent); URLTA § 4.103 (1972) (\$100 or one-half the periodic rent); MODEL CODE § 2-206 (1969) (under varying circumstances, \$50 or one month's rent).

502. See RESTATEMENT (SECOND) OF PROPERTY § 11.2, Comment b at 368 (1977).

breach of the implied warranty of habitability, elect among the various remedies available to him when he decides not to terminate the lease—recovery of damages, exercise of his right to repair-and-deduct, or rent withholding and rent abatement.

6. Rent Withholding and Rent Abatement

Except when there was a breach of the landlord's express or implied covenant of quiet enjoyment, the traditional common law doctrine that lease covenants are independent deprived the tenant of any remedy for the landlord's breach of covenant except an action or counterclaim for damages.⁵⁰³ Although the doctrine of constructive eviction authorized the tenant to vacate the premises and treat the landlord's failure to perform an obligation to keep the leased premises habitable as a breach of the covenant of quiet enjoyment, the tenant had no right to remain in possession and withhold rent because of the landlord's breach.⁵⁰⁴ Because the landlord could always summarily evict the tenant for nonpayment of rent despite his own breach, even where the landlord failed to perform an express covenant to put and keep the premises in habitable condition the tenant was often faced with a dilemma: he must either "continue to pay rent and endure the conditions of untenability or abandon the premises and hope to find another dwelling which, in these times of severe housing shortage, is likely to be as uninhabitable as the last."⁵⁰⁵ In recent years, however, many courts have not only recognized the new implied warranty of habitability but have also held that the tenant may plead the breach of the implied warranty as a defense in a sum-

503. *See, e.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1172 (1974) ("a lessee's covenant to pay rent was considered at common law as independent of the lessor's covenants"); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 188, 293 N.E.2d 831, 837 (1973) (under the doctrine of "independent covenants between the landlord and the tenant . . . even where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, . . . the tenant has no right . . . to refuse to pay the rent according to his covenant, but his own remedy is by action for damages").

504. *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65, 76 (Mo. App. 1973) ("Abandonment was required to maintain the fiction of an eviction and thus the breach of the dependent covenant of quiet enjoyment. The effect of the abandonment requirement was to prevent a tenant from remaining in possession without paying rent"); *Two Rector Street Corp. v. Bein*, 226 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929) ("tenant cannot claim uninhabitability and at the same time continue to inhabit").

505. *King v. Moorehead*, 495 S.W.2d 65, 76-77 (Mo. App. 1973).

mary eviction action for nonpayment of rent.⁵⁰⁶ This, in effect, gives the tenant the right to withhold rent, remain in possession of the leased premises, and obtain a judicially determined abatement of the agreed rent because of the landlord's breach.⁵⁰⁷

New case law authorizing rent withholding seems to be based primarily on two propositions: the landlord's warranty of habitability, implied or statutory, and the tenant's covenant to pay rent are mutually dependent rather than independent,⁵⁰⁸ and breach of the land-

506. *Cooks v. Fowler*, 455 F.2d 1281 (D.C. Cir. 1971); *Bell v. Tsintolles Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (but only if statutory withholding procedure is followed); *Rowe v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972) (statutory warranty); *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973) (statutory warranty); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973) (dictum); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Park Hill Terrace Assocs. v. Glennon*, 146 N.J. Super. 271, 369 A.2d 938 (App. Div. 1977); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970).

507. In *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970), the defense was based on use of the withheld rent to repair the defective conditions; but later cases, *e.g.*, *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973), make clear that the withheld rent need not be used for repairs in New Jersey.

RESTATEMENT (SECOND) OF PROPERTY §§ 11.1, 11.3 (1977) provide, respectively, for the remedies of "rent abatement" and "rent withholding." *Id.* § 11.1, Comment b at 358, states:

Frequently the rent abatement will be accomplished in a judicial proceeding brought by the landlord to evict the tenant for the failure to pay the rent. In this proceeding, if the tenant is entitled to abate the rent, he is entitled to defend against eviction by establishing his right to abate the rent and paying to the landlord the amount of the abated rent as judicially determined in the proceeding.

As indicated in the text, this really gives the tenant a right to withhold all the rent until a judicial determination has been made. The term "rent withholding" is given a different meaning in § 11.3, however:

If the tenant is entitled to withhold the rent, the tenant, after proper notice to the landlord, may place in escrow the rent thereafter becoming due until the default is eliminated or the least terminates, whichever first occurs. Whenever there has been a proper abatement of the rent, only the abated rent is placed in escrow.

Id. § 11.3. A comment to § 11.3 explains:

If the tenant is entitled [to] an abatement of the rent but does not elect to do so initially, the entire rent may be withheld. Later if there is an abatement in the rent, the rent in escrow is treated as a prior overpayment of rent and the excess payments in escrow may be recovered by the tenant from the escrow fund.

Id. § 11.3, Comment c at 376.

508. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168

lord's warranty is germane to the purpose of the summary eviction action.⁵⁰⁹ The first case to recognize the tenant's right to withhold rent because of the landlord's breach of the warranty of habitability was *Javins v. First National Realty Corp.*,⁵¹⁰ where the court reasoned that, "[i]n order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty."⁵¹¹ The *Javins* court then concluded as follows:

At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail.

The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord. In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.⁵¹²

The court's reference to "suspension" or "extinguishment" of the tenant's obligation to pay rent is rather puzzling. When the court speaks of suspension of "part of the tenant's rental obligation" or extinguishment of "the entire rental obligation," the court may simply have meant that the damages for breach of the implied warranty of habitability are to be set off against the rent due to the landlord,

(1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. Ct. 1978).

509. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973). However, most of the cases allowing the defense simply assume the point.

510. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

511. *Id.* at 1082.

512. *Id.* at 1082-83. The quoted language was repeated essentially verbatim in *Pugh v. Holmes*, 384 A.2d 1234, 1241 (Pa. Super. Ct. 1978).

and that the jury may find either that there is still a difference in favor of the landlord or that the damages are equal to or in excess of the rent claim. If this is all the court means, however, it is hard to see the relevance of the court's prefatory statement that, "Under contract principles, . . . the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition."⁵¹³ Certainly the adoption of the theory of mutual dependency of lease covenants is not required in order to justify a set-off of damages for breach of warranty against the lease rent claimed; only a decision that such a set-off is "germane" to the purpose of a summary eviction action is required in order to permit the set-off as a defense in such an action.

The *Javins* language as to dependency of lease covenants is drawn from *Pines v. Persson*, and it is possible that the *Javins* court meant—as the *Pines* court stated⁵¹⁴—that the breach of the implied warranty completely relieved the tenant of his obligation to pay the lease rent and left him with only a quasi-contractual obligation to pay the reasonable rental value of his use and occupation. But that is certainly not what the *Javins* court said. Moreover, the *Pines* case was one where the breach of the implied warranty occurred at the inception of the tenancy, which enabled the tenants to avoid the lease *ab initio*.⁵¹⁵ But in *Javins* the breach was assumed to have occurred

513. 428 F.2d at 1082.

514. 14 Wis. 2d 590, 597, 111 N.W.2d 409, 413 (1961).

515. It is not clear in *Pines* whether the court thought the tenants were relieved from any obligation to pay the lease rent only because the tenants elected to terminate, or whether the court thought that in any case a breach of the implied warranty of habitability would "suspend" the tenants' obligation to pay rent and leave them with only a quasi-contractual obligation to pay the reasonable value of their use and occupation for whatever period they might elect to remain in possession. The latter view might be sustained on the theory that the landlord's breach of the implied warranty resulted in "partial nonperformance" of his obligations under the lease which would privilege the tenant, as the injured party, to "refuse to render any performance if he can and does return to the wrongdoer the part performance received or its value in money." See 3A CORBIN, CONTRACTS § 660, at 164 (1960). Payment of the reasonable value of the tenants' use and occupation would constitute a "return to the wrongdoer" (the landlord) of the "value in money" of the "part performance received." But the *Javins* language allowing the trier of fact to find that only *part* of the tenant's rental obligation has been "suspended" is not consistent with the theory now under consideration, since the landlord's "partial nonperformance" would either suspend the entire contractual obligation to pay rent or leave it in full force under that theory.

The *Javins* court's language as to suspension of "part of the tenant's rental obligation" or extinguishment of "the entire rental obligation may simply indicate the

after the tenancy began, which made it impossible for the tenants to avoid the lease *ab initio*.

The most likely explanation of the language in *Javins* as to "suspension" or "extinguishment" of the tenant's rental obligation is that the *Javins* court viewed the breach of the implied warranty of habitability as operating directly to reduce or—in unusual circumstances—extinguish entirely the tenant's obligation to pay rent during any period when the leased premises were uninhabitable. The court may have thought this approach more easily justified recognition of a breach of implied warranty as a defense in the summary eviction action, since the trial court would be able to determine simply that less than the agreed rent was due rather than finding that there was a valid counterclaim for damages that might be deducted from the agreed rent. It is perhaps easier to argue that proof of a breach of duty by the landlord that directly reduces the rent due is germane to the purpose of a summary eviction action than it is to argue that proof of a breach of duty giving rise to an independent cause of action for damages is germane. At least where the tenant does not try to prove consequential damages the result should be same whether the end result—a partial or complete abatement of the rent—is based in theory on a set-off of contract damages against the contract rent or on a direct reduction or extinguishment of the rental obligation of the tenant. If the latter theory is adopted, however, it would be difficult to take consequential damages into account.

The *Javins* opinion is unfortunately devoid of any standards for determination of "what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach." The court thus left open the question whether trial courts should apply the "dif-

court's recognition of the fact that payment of the full lease rent after breach of the implied warranty of habitability would build up a credit in favor of the tenant which could be set off against the unpaid rent accruing after the tenant began to withhold rent. This credit, added to the damages for the period of rent withholding might, in some cases, equal or exceed the net rent due to the landlord.

The *Javins* court's reference to "the landlord's total breach" is also puzzling. If the court was referring to a breach of the implied warranty of habitability, it is clear that every breach is a total breach since the leased premises must be found either habitable or uninhabitable. As the *Javins* court noted, "one or two minor violations [of the housing code] standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent." The court may have used the term total breach to describe cases where the reasonable value of use and occupation is zero (a case hard to imagine) or where the damages are equal to or in excess of the accrued unpaid rent.

ference between the agreed rent and the fair rental value of the premises as they were during occupancy” formula, the “difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy” formula, or the “percentage diminution” formula in making the required determination.⁵¹⁶

Under the first formula, the trial court could presumably find that “the entire rental obligation has been extinguished by the landlord’s total breach” only where the premises were uninhabitable for a period longer than that during which the rent was unpaid, so that the rent paid by the tenant was equal to or in excess of the fair rental value of the premises—or, if the *Javins* formula allows consequential damages to be taken into account, where the tenant received no net benefit from possession of the leased premises because the consequential damages were in excess of the fair rental value of the leased premises. It does not appear that the first formula would authorize a finding that “the entire rental obligation has been extinguished” where the tenant received some net benefit from possession of the uninhabitable premises.

Under the second formula, which is designed to give the tenant the benefit of his bargain, it would obviously be much easier for the trial court to find that “the entire rental obligation has been extinguished by the landlord’s total breach.” Under the third (percentage diminution) formula, as under the first, it would seem that the trial court could only find that “the entire rental obligation has been extinguished by the landlord’s total breach” where the premises were uninhabitable for a period longer than that during which the rent was unpaid or where the tenant received no net benefit from possession of the premises because the consequential damages were in excess of the fair rental value of the premises.

The United States Court of Appeals for the District of Columbia Circuit adopted a kind of percentage diminution approach in deciding the amount to be deposited in court by the tenant under a protective order pending an appeal from the trial court’s judgment awarding possession to the landlord for nonpayment of rent.⁵¹⁷

516. For a discussion of these formulas in connection with the fixing of damages for breach of the implied or statutory warranty of habitability, see text accompanying notes 471-79 *supra*. As previously indicated, RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1974) adopts a modified version of the second of these formulas. See note 483 and accompanying text *supra*.

517. *Cooks v. Fowler*, 455 F.2d 1281 (D.C. Cir. 1971). Since no evidence as to the

However, the court made it clear that it was not making a final decision as to abatement of rent, and that its approach to determination of the amount to be paid into court under a protective order would not necessarily be applied in a final determination of the amount by which rent should be abated because of a breach of the implied warranty of habitability.⁵¹⁸ The percentage diminution approach was also adopted by trial courts in a number of reported cases for the purpose of determining the amount of the rent abatement when breach of implied warranty was asserted in a summary eviction action.⁵¹⁹

Among the post-*Javins* cases recognizing an implied warranty of habitability and allowing the tenant to set up a breach of the war-

rental value of the premises "as is," with substantial violations of the housing code, was introduced at the trial, the court adopted the following "interim formulation affording the landlord reasonable protection pending the tenant's appeal":

We start by accepting the rent contracted for—\$72.50 per month—as evidence of the occupancy value of the apartment if it fully complied with applicable housing regulations. As a rough division, . . . we take one-third of that value as representing shelter in the narrowest sense, and the remaining two-thirds as reflecting the qualitative improvements and facilities required by the regulations. By that yardstick, the apartment in "as-is" condition seems worth the first third since it does in fact shelter appellant and her children. It is, however, in determining the value of the qualitative two-thirds that the conditions disclosed by appellant's presentation exact their toll. The substantial imbalance between affirmative and negative qualitative factors persuades us to include in the amount of the monthly security deposits only one-half of the qualitative two-thirds. . . . Our protective order will require deposits consisting of \$24.17 for shelter and \$24.17 for qualitative factors above bare shelter, or \$48.34 in the aggregate . . .

Id. at 1282-83.

The court's initial assumption that the lease rent was "evidence of the occupancy value of the apartment if it fully complied with applicable housing regulations" is questionable. It is more likely that it was evidence of the value of the apartment "as is," since the housing code violations were apparently patent and were in existence at the inception of the tenancy.

See also *Cooks v. Fowler*, 459 F.2d 1269 (D.C. Cir. 1971) (second appeal).

518. 455 F.2d at 1282.

519. *See* cases cited note 456 *supra*. In Ann Arbor, Michigan, the trial courts have generally used the percentage diminution approach when tenants have defended summary eviction actions by setting up the landlord's breach of the statutory warranty of habitability. Since none of the cases was appealed, the views of the Michigan appellate courts on the propriety of this approach are still unknown. The applicable summary eviction statute, MICH. COMP. LAWS § 600.5741 (Supp. 1977), simply provides that in an action to evict for nonpayment of rent, "the jury or judge shall deduct any portion of the rent which the jury or judge finds to be excused by the plaintiff's breach of the lease or by his breach of one or more statutory covenants." (The covenant of habitability is statutory in Michigan.)

ranty as a defense in a summary action to evict for nonpayment of rent, *Jack Spring, Inc. v. Little*⁵²⁰ is especially interesting. The landlord's breach of warranty was held to be germane to the distinctive purpose of the summary action because a 1937 amendment of the Illinois Forcible Entry and Detainer Act authorized a judgment for the landlord for unpaid rent in such an action.⁵²¹ And the court clearly regarded the landlord's breach of the implied warranty as giving the tenant a claim for damages that could be set off against the landlord's rent claim in the summary action, not as directly reducing the rent due under the lease.⁵²²

It seems generally to have been assumed that *Jack Spring* adopts the *Javins* rule⁵²³ that if the tenant is found to owe some, but not all, of the rent claimed by the landlord, the court should give the tenant a short grace period to pay the amount found due and that eviction should be ordered only if the tenant fails to pay within the time allowed. But a careful reading of the *Jack Spring* opinion does not bear out this assumption. The Illinois court, in substance, says only that the tenant should be "permitted to prove that damages suffered as a result of the plaintiff's breach of warranty equalled or exceeded

520. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

521. ILL. ANN. STAT. ch. 57, § 5 (Smith-Hurd 1972). The court's rationale was as follows:

. . . To hold that a landlord, at his option, may expand the issues in a proceeding brought under the statute and the tenant may not is violative of common sense and accepted rules of statutory interpretation In these cases there is no question that . . . unless, as claimed by plaintiffs, rent is due and remains unpaid, possession is not "unlawfully withheld." It is apparent, therefore, that even though the plaintiffs do not seek to recover rent in these actions, the question of whether rent is due and owing is not only germane, but in these cases where the right to possession is asserted solely by reason of nonpayment, is the crucial and decisive issue for determination. . . . It would be paradoxical, indeed, to hold that if these were actions to recover sums owed for rent the defendants would be permitted to prove that damages suffered as the result of the plaintiffs' breach of warranty equalled or exceeded the rent claimed to be due, and therefore, no rent was owed, and at the same time hold that because the plaintiffs seek possession of the premises, to which admittedly they are not entitled unless rent is due and unpaid after demand, the defendants are precluded from proving that because of the breach of warranty no rent is in fact owed. The argument that the landlord's claim is for rent and the tenant's for damages should not be permitted to obfuscate the sole and decisive issue, which simply stated is whether the tenants owe the landlords rent which is due and remains unpaid.

50 Ill. 2d at 358-59, 280 N.E.2d at 213.

522. 50 Ill. 2d at 358-59, 280 N.E.2d at 213.

523. 428 F.2d at 1083.

the rent claimed to be due, and therefore, no rent was owed"; and that "the sole and decisive issue . . . is whether the tenants owe the landlords rent which is due and remains unpaid."⁵²⁴ This language has been literally construed by the trial courts in Chicago to mean that, even though the breach of warranty is proved by the tenant, he cannot escape eviction for nonpayment of rent unless he satisfies the trier of fact that the damages equal or exceed the rent claimed to be due so that *no* rent "is due and remains unpaid."⁵²⁵ Such a rule seems inconsistent with settled doctrines as to equitable relief against forfeiture and, as a practical matter, makes rent withholding a risky venture for the tenant.

The New Jersey court has clearly adopted the view that the landlord's breach of the implied warranty of habitability gives the tenant a damage claim that may be asserted by way of defense and set-off in a summary eviction action and that since equitable as well as legal defenses are available in such actions the tenant may avoid eviction by showing "absolution from payment in whole *or in part* . . . in a dispossess action."⁵²⁶ This presumably means that, if the tenant shows the landlord is entitled to less than he claims because of the set-off for breach of warranty damages, the tenant may retain his right to possession by paying the amount found to be "due, unpaid and *owing*" within whatever time the court specifies. This is essentially the *Javins* rule.

In *Foisy v. Wyman*,⁵²⁷ the Washington court also substantially adopted the *Javins* approach in holding that the landlord's breach of the implied warranty of habitability could be asserted as a defense in a summary eviction action and that the action must fail if it was determined "that the entire rental obligation is extinguished by the landlord's total breach"⁵²⁸—a phrase taken verbatim from *Javins*.⁵²⁹ However, in dealing with the possibility that the trial court might determine "that the premises are partially habitable, and the tenant failed to tender to the plaintiff a sufficient amount to pay rent due for

524. 50 Ill. 2d at 359, 280 N.E.2d at 213.

525. This information is derived from conversations with a member of the clinical law faculty of the University of Chicago Law School.

526. *Marini v. Ireland*, 56 N.J. 130, 140, 265 A.2d 526, 531 (1970) (emphasis added).

527. 83 Wash. 2d 22, 515 P.2d 160 (1973).

528. *Id.* at 34, 515 P.2d at 168.

529. 428 F.2d at 1083.

the partially habitable premises," the court said that judgment should be entered in accordance with the summary eviction statute,⁵³⁰ which allows the tenant to avoid eviction by paying the amount found to be owing within five days. The result in that case would be substantially the same as under *Javins* or the New Jersey decisions, but the grace period in Washington is expressly provided by statute rather than by judicial application of equitable principles.

Although Washington enacted a version of the URLTA⁵³¹ before the decision in *Foisy*, the new statute was not applicable to the lease involved in that case. The new statute expressly provides that its general requirement that the tenant "shall be current in the payment of rent before exercising any of the remedies accorded him" under the statute "shall not be construed as limiting the tenant's right in an unlawful detainer proceeding to raise the defense that there is *no* rent due and owing."⁵³² It will be interesting to see whether the Washington court will construe this to allow a tenant who establishes that the premises are only partially habitable and that only part of the rent claimed is owing to escape eviction by paying the amount within five days, as would be the case under *Foisy*.

Massachusetts, like Washington, has both case law recognizing an implied warranty of habitability in residential leases and legislation authorizing rent withholding where the landlord fails to keep the leased premises in habitable condition. In *Boston Housing Authority v. Hemingway*,⁵³³ although holding that the landlord's implied warranty and the tenant's obligation to pay rent should be deemed to "constitute interdependent and mutual considerations,"⁵³⁴ the court nevertheless held that because he failed to follow the statutory rent withholding procedure, the tenant could not use the landlord's breach of the implied warranty as a defense against summary eviction.⁵³⁵ The statutory procedure required a written notice to the landlord of the tenant's intention to withhold rent.⁵³⁶

530. 83 Wash. 2d at 34, 515 P.2d at 168, citing WASH. REV. CODE ANN. § 59.12.170 (West 1961).

531. WASH. REV. CODE ANN. §§ 59.18.010-59.18.900 (West Supp. 1977).

532. *Id.* § 59.18.080 (emphasis added).

533. 363 Mass. 184, 293 N.E.2d 831 (1973).

534. *Id.* at 198, 293 N.E.2d at 842.

535. *Id.* at 203, 293 N.E.2d at 845.

536. MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op 1973) (prior to amendment). The written notice requirement was eliminated by a 1975 amendment. *See* MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op 1975 & Supp. 1978).

It is possible that, in some cases, the tenant's claim for damages for breach of the implied warranty of habitability may exceed the landlord's claim for unpaid rent. If the local summary eviction statute allows the landlord to obtain a judgment for the unpaid rent in the summary eviction action, it is possible that the tenant could interpose a counterclaim for breach of the implied warranty and, if successful, obtain a money judgment for the excess of the damages over the unpaid rent. In any case where recovery of the excess is impossible, the tenant may apparently use his claim for rent abatement or counterclaim for damages to defeat the summary eviction action, and then bring an independent suit for the balance of his damages.

Although there is clearly a trend toward admitting the landlord's breach of an implied warranty of habitability as a defense in summary eviction actions, it is now clear that the United States Constitution does not compel state courts to do so. In *Lindsay v. Normet*,⁵³⁷ the United States Supreme Court rejected a tenant's contention that an Oregon summary eviction statute violates both the equal protection and due process clauses of the Fourteenth Amendment because, as judicially construed in Oregon, it precluded consideration of defenses based on the landlord's breach of a duty to maintain the premises. The Court said that "the Constitution has not federalized the substantive law of landlord-tenant relations, . . . and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants."⁵³⁸

Under the new doctrine giving tenants a right to set up the land-

537. 405 U.S. 56 (1972).

538. *Id.* at 68. In addition, the court said:

. . . [T]he Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated. . . .

We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative not judicial functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Id. at 68, 74.

lord's breach of the implied or statutory warranty of habitability as a defense in summary actions to evict for nonpayment of rent,⁵³⁹ tenants are in substance judicially authorized to withhold all the rent otherwise due whenever a breach of the warranty occurs, subject to a duty to pay whatever is found owing within such time as may be provided by statute or by direction of the court. However, as noted earlier, determination of the fair rental value of leased premises, either "as warranted" or "as is," is often likely to be difficult; and if the tenant is withholding all the rent, the landlord runs the risk that the tenant may ultimately be unwilling or unable to pay the amount found owing by the court. Thus the court may, in appropriate cases, enter a protective order requiring the tenant to pay all or part of the agreed rent into court until it is determined whether there is a breach of the implied warranty and, if so, how large an abatement of rent should be granted. In discussing recently enacted statutory warranties of habitability, we have already noted the rationale for entry of a protective order as stated by the Minnesota court in *Fritz v. Warthen*.⁵⁴⁰ Even before *Fritz* the United States Court of Appeals for the District of Columbia Circuit had recognized the need for such orders, albeit with considerably less concern for the landlord's interest and considerably more concern for the tenant's.⁵⁴¹ Protective or-

539. See cases cited note 506 *supra*.

540. 298 Minn. 54, 213 N.W.2d 339 (1973). See the quotation from *Fritz* in text accompanying note 277 *supra*.

541. In *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970), the court said:

Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective measure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only factual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid. *Id.* at 1083 n.67. However, in *Bell v. Twintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970), the same court said:

We favor . . . granting a protective order only when the tenant has either asked for a jury trial or asserted a defense based on violations of the housing code, and only upon motion of the landlord and after notice and opportunity for oral argument by both parties. We feel the protective purpose of the rent payment requirement ordinarily will be well served simply by requiring only future

ders have also been held necessary or proper in California⁵⁴² and Missouri.⁵⁴³

payments falling due after the date the order is issued to be paid into the court registry.

. . . .
In making a determination of need, the trial court may properly consider the amount of rent alleged to be due, the number of months the landlord has not received even a partial rental payment, the reasonableness of the rent for the premises, the amount of the landlord's monthly obligations for the premises, whether the tenant has been allowed to proceed *in forma pauperis*, and whether the landlord faces a substantial threat of foreclosure.

Even if the landlord has adequately demonstrated his need for a protective order, the trial judge must compare that need with the apparent merits of the defense based on housing code violations. Relevant considerations would be whether the housing code violations alleged are *de minimis* or substantial, whether the landlord has been notified of the existence of the defects and, if so, his response to that notice, and the date, if known, of the last repair or renovation relating to the alleged defect.

. . . [I]n the ordinary course of events, if prepayment or rent is required, the tenant will be called upon to pay into the court registry each month the amount which he originally contracted to pay as rent. However, there are circumstances likely to arise which . . . require that the trial court consider imposition of a lesser amount. Certainly a lesser amount would be desirable when the tenant makes a very strong showing that the condition of the dwelling is in violation of Housing Regulations norms. . . . Similarly, he may demonstrate that some portion of potential payment of rent was instead expended on repairs to the premises. We are concerned also that a change in the tenant's financial condition may render the original burden so heavy as to preclude litigation of meritorious defenses. . . . we suggest that in such a case the court investigate the possibility of providing the landlord the protection of reasonable interim rent short of the agreed upon rent. For instance, with mortgaged property the court may impose a payment requirement less than the agreed upon rent but equivalent in amount to the cost of the premises to the landlord of principal, interest, taxes, and whatever proportion of the utilities payments the landlord has assumed, or make every effort to find some mutually tolerable amount.

Id. at 483-85. See also *Cooks v. Fowler*, 455 F.2d 1281 (D.C. Cir. 1971) (ordering the tenant to pay two-thirds of the lease rent during pendency of an appeal from a judgment for the landlord in a summary action for possession).

542. *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (protective order proper); *Hinson v. Delis*, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666 (protective order proper).

543. *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. App. 1973):

A tenant who retains possession, however, shall be required to deposit the rent as it becomes due, in *custodia legis* pending the litigation This procedure assures that those rents adjudicated for distribution to him will be available to correct the defects in habitability, and will also encourage the landlord to minimize the tenant's damages by making tenantable repairs at the earliest time. Also, for good cause and in a manner consistent with the ultimate right between the parties, a trial court will have discretion to make partial distribution to the

The rent withholding remedy provided by the Restatement of Property allows the tenant to elect initially (without a court order) to withhold all the rent and place it "in a private escrow account at the time when the rent would normally be due" and requires the tenant in such case to send "a copy of the receipt from the holder in escrow . . . to the landlord."⁵⁴⁴ If the amount of abatement to which the tenant is entitled is later determined in a judicial proceeding, "the rent in escrow is treated as a prior overpayment of rent and the excess payments in escrow may be recovered by the tenant from the escrow fund."⁵⁴⁵ There is no apparent advantage to the tenant in adopting the rent withholding remedy, however, since he can always simply withhold all the rent without paying any of it into escrow and thus force the landlord to take the initiative by bringing a suit for unpaid rent and/or to evict for nonpayment of rent.⁵⁴⁶

V. PROTECTION OF TENANTS AGAINST RETALIATORY LANDLORD ACTION

It is likely that many landlords will seek to retaliate against tenants who report housing code violations to enforcement agencies, exercise their rights to repair-and-deduct, withhold rent, participate in "rent strikes," or take other action to exercise new legal remedies designed to protect the right of residential tenants to a habitable dwelling. Such retaliatory action may take the form of terminating a periodic tenancy by notice, refusing to renew an expired tenancy for a definite term, increasing rent as an alternative to ending a periodic tenancy or as a condition to renewal of a tenancy for a definite term, or decreasing services provided to tenants. To forestall such conduct on the part of landlords, several states have included in their recent tenants' rights legislation specific prohibitions against retaliatory action by landlords, and several state courts have developed a new "common law" doctrine that precludes retaliatory use of the landlord's traditional right to terminate periodic tenancies by notice without cause.

landlord before final adjudication when to deny it would result in irreparable loss to him.

544. RESTATEMENT (SECOND) OF PROPERTY § 11.3, Comment e (1977).

545. *Id.*, Comment c at 376.

546. *Id.* § 11.1, Comment b at 358.

A. *Recent Legislation*

1. The Uniform Residential Landlord and Tenant Act

The URLTA contains a detailed section on retaliatory conduct, which provides that, as a general rule, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:

- (1) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or
- (2) the tenant has complained to the landlord of a violation under Section 2.104 [imposing on the landlord a duty to maintain fit premises]; or
- (3) the tenant has organized or become a member of a tenant's union or similar organization.⁵⁴⁷

Whenever the landlord is shown to have acted with a retaliatory motive, the tenant "has a defense in any action against him for possession." Furthermore, in any action by or against the tenant, "evidence of a complaint within [1] year prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation, [unless] the tenant made the complaint after notice of a proposed rent increase or diminution of services." In any case, however, a landlord may bring an action for possession if code violations were caused primarily by lack of reasonable care by the tenant or others on the premises with his consent, the tenant is in default in rent or compliance with the applicable housing or building code requires alteration or demolition of the building "which would effectively deprive the tenant of the use of the dwelling unit."⁵⁴⁸ Like the Model Code,⁵⁴⁹ the URLTA gives protection against retaliatory action to a tenant whose term has expired as well as to a periodic tenant whose tenancy could under traditional common law rules be terminated by notice without cause.

The recently enacted statutes modeled on the URLTA exhibit some substantial variations from the URLTA provisions against retaliatory action by landlords. Thus, *e.g.*, Nebraska⁵⁵⁰ and New Mex-

547. URLTA § 5.101 (1972).

548. *Id.*

549. MODEL CODE § 2-407 (Tent. Draft 1969).

550. NEB. REV. STAT. § 76.1439 (1976).

ico⁵⁵¹ do not include tenant complaints to the landlord about the latter's failure to "maintain fit premises" among the events that may invoke the tenant's right to protection against retaliatory action, while Washington fails to include the tenant's involvement with a tenants' union among such events. On the other hand, Alaska⁵⁵² adds to the list of triggering events any attempt by the tenant to avail himself of self-help rights and remedies given by the URLTA; and both Alaska⁵⁵³ and Arizona⁵⁵⁴ "protect" a tenant's complaint to any government agency enforcing wage, price or rent controls.

The Alaska,⁵⁵⁵ Nebraska,⁵⁵⁶ New Mexico,⁵⁵⁷ Ohio,⁵⁵⁸ and Virginia⁵⁵⁹ statutes completely omit any provision for a presumption that the landlord's actions are retaliatory when they occur within a stated time after a triggering event. The Arizona⁵⁶⁰ and Oregon⁵⁶¹ statutes include the URLTA's provision for such a presumption, but they reduce the period from one year to six months. The Washington statute reduces the "presumption period" to ninety days, and also provides that there shall be no presumption that a rent increase is retaliatory if the landlord specifies reasonable grounds for the increase, including a "substantial increase in market value due to remedial action under" the statute, and that the presumption that the bringing of an action for possession is retaliatory may be rebutted by proof that "it is not practicable to make necessary repairs while the tenant remains in occupancy."⁵⁶²

The Alaska statute,⁵⁶³ although it is generally modeled on the URLTA, adopts most of the Model Act's justifications for the bringing of an action for possession, and also adopts the Act's three justifi-

551. N.M. STAT. ANN. § 70-7-39 (Supp. 1975).

552. ALASKA STAT. § 4303.310 (1975).

553. *Id.*

554. ARIZ. REV. STAT. ANN. § 33-1381 (1974).

555. ALASKA STAT. § 4303.310 (1975).

556. NEB. REV. STAT. § 76.1439 (1976).

557. N.M. STAT. ANN. § 70-7-39 (Supp. 1975).

558. OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1977).

559. VA. CODE § 55-248.39 (Supp. 1978).

560. ARIZ. REV. STAT. ANN. § 33-1381 (1974).

561. ORE. REV. STAT. § 91.865 (1977).

562. WASH. REV. CODE ANN. §§ 59.18.240 to 59.18.250 (Supp. 1977).

563. ALASKA STAT. § 4303.310 (1975).

cations for rent increases.⁵⁶⁴ The Arizona statute limits the justifications for the bringing of an action for possession—that the housing code violation complained of by the tenant “was caused primarily by lack of reasonable care by the tenant or other person . . . upon the premises with his consent;” and that “the tenant is in default in rent.”⁵⁶⁵ Ohio,⁵⁶⁶ on the other hand, adds a fourth justification to the three stated in the URLTA—that the tenant “is holding over his term.” Virginia⁵⁶⁷ adds, as its fourth justification, that the tenant is in default on any lease provision “materially affecting the health and safety of himself or others.” The Nebraska⁵⁶⁸ and New Mexico⁵⁶⁹ statutes expressly allow reasonable rent increases or changes in service notwithstanding events that will trigger the tenant’s right to protection against retaliatory action, and the Virginia statute expressly allows the landlord to increase the rent “to that charged on similar market rentals” and to decrease services provided they are decreased “equally to all tenants.”⁵⁷⁰

Although most of the statutes modeled on the URLTA include among the forbidden retaliatory actions “increasing rent or decreasing services or . . . bringing or threatening to bring an action for possession” after a triggering event occurs, the Washington statute⁵⁷¹ also includes “increasing the obligations of the tenant.” The Florida statute⁵⁷² is *sui generis* in that it entirely omits the URLTA provisions dealing with retaliatory action by landlords.

2. The Model Residential Landlord-Tenant Code

The Model Code, substantially adopted in Delaware⁵⁷³ and Hawaii,⁵⁷⁴ is similar to the URLTA in the protection it provides the

564. See MODEL CODE § 2-407 (Tent. Draft 1969), discussed in text accompanying notes 573-79 *infra*.

565. ARIZ. REV. STAT. ANN. § 33-1381 (1974).

566. OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1977).

567. VA. CODE § 55-248.39 (Supp. 1978).

568. NEB. REV. STAT. § 76.1439 (1976).

569. N.M. STAT. ANN. § 70-7-39 (Supp. 1975).

570. VA. CODE § 55-248.39 (Supp. 1978).

571. WASH. REV. CODE ANN. §§ 59.18.240-59.18.250 (Supp. 1977).

572. FLA. STAT. ANN. §§ 83.40-83.63 (West Supp. 1978). *But see* Bowles v. Blue Lake Dev. Corp., 504 F.2d 1094 (5th Cir. 1974) (“retaliatory eviction is now a criminal offense under Florida law”).

573. DEL. CODE ANN. tit. 25, §§ 5101-5517 (1974 & Supp. 1977).

574. HAW. REV. STAT. §§ 521-577 (1976).

residential tenant against retaliatory action by the landlord.⁵⁷⁵ But the Model Code strikes a somewhat more even balance between landlord and tenant by listing more justifications for the bringing of an action for possession and for increasing the rent in cases where retaliatory action by the landlord is established.⁵⁷⁶ Moreover, the Model Code authorizes recovery, by any tenant from whom possession has been recovered or who has been otherwise involuntarily dispossessed in violation of the Model Code's protective provisions, of "three months' rent or threefold the damages sustained by him, whichever is the greater, and the cost of suit, including a reasonable attorney's fee."⁵⁷⁷ The Hawaii version of the Model Code, however, omits the provision for recovery of three months' rent or treble damages and gives the tenant a right to recover only his actual damages plus "the cost of suit, including reasonable attorney's fees."⁵⁷⁸ The Delaware version, on the other hand, retains the provision for three months' rent or treble damages, but omits any reference to attorney's fees.⁵⁷⁹ Since a tenant who can establish that the landlord's action for possession is retaliatory has a complete defense thereto, the allowance of three months' rent and treble damages under the Model Code and the Delaware statute appears to be designed simply to punish the landlord in cases where the action for possession is defeated by invocation of the retaliatory eviction defense. It is not clear whether the damage provision is further intended to allow recovery by the tenant in cases where, although he had a valid retaliatory eviction defense, he fails to plead it and is therefore evicted by legal process. If the landlord "otherwise causes the tenant to quit the dwelling unit involuntarily"—presumably by self-help—the damage remedy granted by the Model Code is in addition to the tenant's right to recover possession by action.

Although the Model Code provisions summarized above are primarily designed to protect periodic tenants from retaliatory action by their landlords, these provisions also apply when the tenant's rental agreement has expired, "so long as the tenant continues to tender the usual rent to the landlord or proceeds to tender receipts for rent law-

575. MODEL CODE § 2-407 (Tent. Draft 1969).

576. *Id.*

577. *Id.*

578. HAW. REV. STAT. § 521-74 (1976).

579. DEL. CODE ANN. tit. 25, § 5516 (1974 & Supp. 1977).

fully withheld.”⁵⁸⁰ The effect of this clearly precludes the landlord from recovering possession at the expiration of a lease for a definite term, if the tenant tenders “the usual rent” or “receipts for rent lawfully withheld.” This reference to “receipts” is rather confusing since the Model Code contains no general authorization for rent withholding by a tenant because of the landlord’s breach of his duty to provide a habitable dwelling. Apparently the reference is to rent “withheld” under section 2-206 of the Model Code, which provides a repair-and-deduct remedy when the landlord fails to repair, maintain, keep in sanitary condition, or otherwise perform his statutory or contractual duty to keep the rented premises in a habitable condition, provided the tenant submits to the landlord “copies of his receipts [for the cost of repairs] covering at least the sum deducted” from the rent.

3. Other Legislation

California, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Pennsylvania, and Rhode Island all have legislation to protect residential tenants against retaliatory action by landlords.⁵⁸¹ There is considerable variation, however, as to what conduct of the tenant is required to set the stage for a charge of retaliatory landlord action, what landlord actions are proscribed if found to be retaliatory, and the effect of the passage of varying periods of time between the relevant tenant conduct and the proscribed landlord action.

All of the statutes now under consideration treat a tenant’s complaint to a housing code enforcement authority about the condition of leased premises as conduct which may trigger a charge of retaliatory landlord action. The California statute, for example, specifies the filing of a written complaint “with an appropriate governmental agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability,” or “an inspection or issuance of a citation, resulting from [such] a written complaint.”⁵⁸² The Massachusetts legislation adds two other forms of ten-

580. MODEL CODE § 2-407 (Tent. Draft 1969).

581. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978); ILL. REV. STAT. ch. 80, § 71 (1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1978); MASS. ANN. LAWS ch. 186, § 18 & ch. 239, § 2A (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1978); MINN. STAT. ANN. § 566.03 (West Supp. 1978); N.J. STAT. ANN. §§ 2A:42-10.10 to 2A:42-10.14 (West Supp. 1978); PA. STAT. ANN. tit. 35, §§ 1700-1701 (Purdon Supp. 1977); R.I. GEN. LAWS §§ 34-20-10 to 34-20-11 (1970).

582. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978).

ant conduct:⁵⁸³ exercise of the tenant's right to pay the amount due when a gas or electric company gives notice that it will cut off service for nonpayment of charges for which the landlord is responsible, and to deduct the amount so paid from the rent or obtain reimbursement from the landlord and organizing or joining a tenant's union. The Minnesota statute is broader, specifying the tenant's "good faith attempt to secure or enforce rights under a lease . . . or under the laws of the state, any of its . . . subdivisions, or the United States," and a tenant's "good faith report to a governmental authority of the . . . [landlord's] violation of any health, safety, housing or building codes or ordinances."⁵⁸⁴ The Michigan statute⁵⁸⁵ is still broader as it specifies the same tenant actions as the Minnesota statute plus "any other lawful act arising out of the tenancy" or the tenant's failure to "perform . . . additional obligations" imposed by the landlord because of any such lawful acts. The New Jersey statute⁵⁸⁶ is substantially the same as the Michigan statute on this point.

All the statutes under consideration bar the entry of judgment for the landlord in any summary eviction action based on a retaliatory termination of a periodic tenancy. Some of the statutes contain very broad language⁵⁸⁷ which precludes (or seems to preclude) recovery of possession by a landlord, even at the expiration of a term of years or because of the tenant's failure to pay rent, within a stated time after the tenant conduct which may trigger a charge of retaliatory eviction. The Illinois statute states that it is "against the public policy of the State for a landlord to terminate or *refuse to renew a lease or tenancy of property* used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health, ordinance, or similar regula-

583. MASS. ANN. LAWS ch. 186, § 18 & ch. 239 § 2A (Michie/Law. Co-op Supp. 1978). The right to pay and deduct gas and electric charges, etc., is created by MASS. ANN. LAWS ch. 164, § 1240 (Supp. 1978).

584. MINN. STAT. ANN. § 566.03 (West Supp. 1978). See *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976).

585. MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1978).

586. N.J. STAT. ANN. § 2A:42-10.10 (West Supp. 1978).

587. *E.g.*, CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978); ILL. REV. STAT. ch. 80, § 71 (1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1978); MASS. ANN. LAWS ch. 239, § 2A (Michie/Law. Co-op Supp. 1978). *Cf.* MASS. ANN. LAWS ch. 186, § 18 (Michie/Law. Co-op Supp. 1978) (eviction allowed if based on termination of lease for nonpayment of rent).

tion.”⁵⁸⁸ The effect of such statutory provisions seemingly creates a new form of tenancy for a definite term as a kind of civil penalty for retaliatory action by the landlord, despite the fact that the original tenancy has expired or nonpayment of rent has given the landlord the right to terminate for cause. On the other hand, Minnesota expressly preserves the landlord’s right to terminate “for a violation by the tenant of a lawful, material provision of a lease,”⁵⁸⁹ and the California statute expressly preserves the landlord’s right to “cause the lessee to quit involuntarily, increase the rent, or decrease the services for any lawful purpose,” provided the lessor states such lawful purpose “in the notice of termination, rent increase, or other act.”⁵⁹⁰

As indicated in the last paragraph, some of the statutes now under consideration proscribe retaliatory rent increases and any retaliatory decreases in the services provided by the landlord. The New Jersey statute⁵⁹¹ goes further and proscribes any substantial alteration of the original terms of the tenancy by the landlord. Presumably the proscription of rent increases is intended to be implemented by judicial refusal to give judgment for the increased rent and by refusal to authorize eviction of the tenant for failure to pay the increased rent. Implementation of the prohibition on decreases in service would presumably take the form of awarding damages or specific performance to the tenant and refusal to authorize eviction of the tenant for withholding rent because of the diminished services. The Massachusetts legislation expressly authorizes the award to the tenant of “damages which shall not be less than one month’s rent or more than three month’s rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of suit, including a reasonable attorney’s fee,” when the landlord engages in proscribed retaliatory conduct.⁵⁹² The New Jersey statute provides for the award of damages, injunctive relief, and other equitable relief.⁵⁹³

The time that has elapsed between the triggering conduct of the tenant and the alleged retaliatory action of the landlord is highly rel-

588. ILL. REV. STAT. ch. 80, § 71 (1966). See *Clore v. Fredman*, 59 Ill. 2d 20, 310 N.E.2d 18 (1974); *Bradley v. Gallagher*, 14 Ill. App. 3d 652, 303 N.E.2d 251 (1973).

589. MINN. STAT. ANN. § 566.03 (West Supp. 1978).

590. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978).

591. N.J. STAT. ANN. § 2A:42-10.10 (West Supp. 1978). See *PMS Realty Co. v. Guarino*, 126 N.J. Super. 134, 312 A.2d 898 (Essex County Ct. 1973).

592. MASS. ANN. LAWS ch. 186, § 18 & ch. 239, § 2A (Michie/Law. Co-op Supp. 1978).

593. N.J. STAT. ANN. § 2A:42-10.10 (West Supp. 1978).

evant under all the statutes. The California statute⁵⁹⁴ protects the tenant if the period is sixty days or less, provided "the lessor has as his dominant purpose retaliation against the lessee because of the exercise by the lessee of his right" to complain of housing code violations. Apparently the California tenant has the burden of proving that retaliation was the landlord's dominant purpose. The Maine and Massachusetts legislation creates a rebuttable presumption that the landlord's purpose is retaliation if he brings a summary eviction action within six months after the tenant has complained of housing code violations,⁵⁹⁵ while the Michigan and Minnesota statutes create a similar rebuttable presumption if the period is ninety days or less.⁵⁹⁶ But the Michigan and Minnesota statutes⁵⁹⁷ further provide that, if such period is more than ninety days, there is a presumption that the landlord's action was not retaliatory and the tenant has the burden of proving the contrary. Under the Rhode Island statute,⁵⁹⁸ the tenant must prove the landlord's retaliatory purpose by a preponderance of the evidence in all cases, and there is no presumption of such purposes when the termination of a tenancy occurs shortly after the triggering conduct of the tenant. The California statute⁵⁹⁹ expressly provides that the tenant may not assert rights based on a finding of retaliatory purpose more than once in any twelve month period.

The Michigan and Rhode Island statutes give special protection to public housing tenants.⁶⁰⁰ Both statutes prohibit the termination of tenancies in public housing by the housing authorities "except for just cause," and the Michigan statute further provides that a public housing occupant may not be "deemed to be holding over after the time for which the premises were let, or contrary to the conditions or covenants of any agreement or lease [so as to subject him to summary eviction], unless the tenancy or agreement has been terminated for

594. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978).

595. ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1978); MASS. ANN. LAWS ch. 186, § 18 & ch. 239, § 2A (Michie/Law. Co-op Supp. 1978).

596. MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1978); MINN. STAT. ANN. § 566.03 (West Supp. 1978).

597. MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1978); MINN. STAT. ANN. § 566.03 (West Supp. 1978).

598. R.I. GEN. LAWS §§ 34-20-10 to 34-20-11 (1970).

599. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978).

600. MICH. COMP. LAWS ANN. §§ 125.694(a), 600.5714 (1976 & Supp. 1978); R.I. GEN. LAWS § 34-20-10 (1970).

just cause.”⁶⁰¹ The Rhode Island statute does not define “just cause,” but the Michigan statute defines it to include “a failure to comply with the obligations of the lease or the lawful rules and regulations of the housing commission; the use of any unit for any unlawful purpose; the maintenance of any unsafe, unsanitary or unhealthful condition in any dwelling unit or in any of the common areas; and ineligibility for continued occupancy by reason of over-income.”⁶⁰² Although the statutory language leaves something to be desired, these provisions were apparently intended to preclude retaliatory eviction after a public housing occupant has reported housing code violations, sued for breach of the statutory warranty of habitability, or lawfully withheld rent because of housing code violations or a breach of the statutory warranty.

B. *Recent Judicial Decisions*

In at least three jurisdictions the courts have developed without legislative assistance a rule precluding retaliatory evictions. The leading case is *Edwards v. Habib*,⁶⁰³ where the United States Court of Appeals for the District of Columbia Circuit said,

. . . [W]hile the landlord may evict for any legal reason or for no reason at all [when there is a periodic tenancy], 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.

. . . Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations. . . . To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington. . . .

This is not . . . to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity. If the illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury, and while such a determination is not easy, it is not significantly different from

601. MICH. COMP. LAWS ANN. § 600.5714 (Supp. 1978).

602. *Id.* § 125.694(a)(2) (1976).

603. 397 F.2d 687 (D.C. Cir. 1968).

problems with which the courts must deal in a host of other contexts, such as when they must decide whether the employer who discharges a worker has committed an unfair labor practice because he has done so on account of the employee's union activities.⁶⁰⁴

In *Robinson v. Diamond Housing Corp.*⁶⁰⁵ the same court reversed the judgment of the District of Columbia Court of Appeals,⁶⁰⁶ which had affirmed a judgment for the landlord in a summary eviction action after the landlord had terminated the periodic tenancy by notice. The landlord had originally sought to evict the tenant for nonpayment of rent, but had failed because the tenant established that the lease was illegal under the doctrine of *Brown v. Southall*⁶⁰⁷ by virtue of substantial housing code violations existing at the inception of the lease. This had converted the tenant into a tenant at sufferance, subject to eviction on thirty days' notice. But when the notice was given and a second eviction action was brought, the tenant defended on the ground that the landlord's purpose was retaliation. The United States Court of Appeals held that the rule of *Edwards v. Habib* was applicable, saying that an attempt to evict a tenant for withholding rent is as much against public policy as an eviction for reporting housing code violations.⁶⁰⁸ The landlord's affidavit that it wished to remove the property from the rental market was held not to preclude a finding that the purpose of the eviction was retaliation.⁶⁰⁹ The court said that an unexplained eviction following a successful assertion of a *Brown*⁶¹⁰ or *Javins*⁶¹¹ defense creates a presumption of retaliation, and that an expressed wish to take the property off the market does not rebut the presumption because it raises the further question why the landlord wishes to do so.⁶¹² Moreover, said the court, the landlord's unwillingness to make necessary repairs is not sufficient to rebut the presumption, nor is an asserted financial inability to make such repairs sufficient unless the jury finds that the land-

604. *Id.* at 699-703.

605. 463 F.2d 853 (D.C. Cir. 1972).

606. 257 A.2d 492 (D.C. 1969).

607. 237 A.2d 834 (D.C. 1968).

608. 463 F.2d at 862.

609. *Id.* at 859.

610. 237 A.2d 834 (D.C. 1968).

611. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

612. 463 F.2d at 865.

lord is in fact unable to do so.⁶¹³ Finally, even such a finding may not be sufficient to justify a judgment for the landlord, since the existence of a legitimate reason for the landlord's decision to evict will not aid him if the jury finds that he was in fact motivated by an illegitimate purpose.⁶¹⁴ Only if the landlord decides to get out of the housing business entirely will the jury be precluded from examining the landlord's motives!⁶¹⁵

The *Edwards* doctrine was adopted by the Wisconsin Supreme Court in *Dickhut v. Norton*,⁶¹⁶ where, however, the court said that "[t]o be successful in this defense, . . . [the tenant] must prove by evidence that is clear and convincing that a condition existed which in fact did violate the housing code, that the plaintiff-landlord knew the tenant reported the condition to the enforcement authorities, and that the landlord, for the sole purpose of retaliation, sought to terminate the tenancy."⁶¹⁷

Edwards was also adopted by the California Supreme Court in *Schweiger v. Superior Court*,⁶¹⁸ prior to the effective date of the 1970 amendment which added the statutory protection of tenants against retaliatory action discussed above.⁶¹⁹ Despite the adoption of that amendment, the *Schweiger* doctrine remains important in California because it is broader than the statute. Thus, *e.g.*, *Schweiger* was invoked in *S.P. Growers Association v. Rodriguez*⁶²⁰ to permit the retaliatory eviction defense where a farm labor contractor allegedly sought to evict farm worker tenants in retaliation for their filing of a suit in federal court charging him with violations of the Farm Labor Contractor Registration Act.

There are lower court decisions in New York recognizing that a claim that the landlord's motive is retaliatory may properly be advanced as an equitable defense to defeat the landlord's claim for possession if the tenant establishes the retaliatory motive by clear and

613. *Id.* at 867.

614. *Id.*

615. *Id.*

616. 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

617. *Id.* at 399, 173 N.W.2d at 302.

618. 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 724 (1970).

619. CAL. CIV. CODE ANN. § 1942.5 (Deering Supp. 1978), discussed in text accompanying notes 582 & 599 *supra*.

620. 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976).

convincing evidence.⁶²¹

VI. CONCLUSION: THE CONSEQUENCES OF RECOGNIZING THE RESIDENTIAL TENANT'S RIGHT TO A HABITABLE DWELLING

A. *Theories as to the Economic Consequences*

It is obvious that effective enforcement of the new right of the residential tenant to a habitable dwelling (through exercise of the new tenant remedies) will subject landlords to increased costs for maintenance and operation, taxes, insurance, and litigation. Depending on supply and demand conditions in the rental housing market, landlords may either absorb the increased costs and operate at a lower profit, pass on the increased costs (or part of them) in the form of higher rents, or abandon their rental properties. Legislators and courts generally have failed to consider the possibility that landlords may adopt one or both of the latter options, in response to enforcement of the new tenant's right to a habitable dwelling, thus harming the very class of persons primarily sought to be protected by legislatures and courts—low-income tenants. One of the few cases in which this possibility is mentioned is *Robinson v. Diamond Housing Corp.*,⁶²² where Judge Skelly Wright said:

. . . [I]f the housing market is structured in such a way that it is impossible for landlords to absorb the cost of bringing their units into compliance with the [housing] code, there may be nothing a court can do to prevent vigorous housing code enforcement from driving low cost housing off the market. But the most recent scholarship on the subject indicates this danger is largely imagined. In fact, it appears that vigorous code enforcement plays little or no role in the decrease in low cost housing stock. When code enforcement is seriously pursued, market forces generally prevent landlords from passing on their increased costs through rent increases.⁶²³

Unfortunately, the article cited by Judge Wright was entirely theo-

621. *Tom's Point Apts. v. Goudzward*, 72 Misc. 2d 629, 339 N.Y.2d 281 (Sup. Ct. 1972), *aff'd*, 79 Misc. 2d 206, 360 N.Y.S.2d 366 (App. Term 1973); 401 Boardwalk Corp. v. Gutzwiller, 82 Misc. 2d 84, 368 N.Y.S.2d 122 (Civ. Ct. N.Y. 1975). *See also* Scarpitta v. Glen Cove Hous. Auth., 48 App. Div. 2d 657, 367 N.Y.S.2d 542 (1975).

622. 463 F.2d 853 (D.C. Cir. 1972).

623. *Id.* at 860, citing Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

retical, lacking any empirical basis. Although the article did not explicitly consider the economic impact of widespread assertion of the new tenant's right to a habitable dwelling, Professor Ackerman's theoretical analysis of the economic consequences of effective housing code enforcement is clearly relevant to the issue here under consideration. For present purposes, Professor Ackerman's principal conclusions with respect to the economic effects of housing code enforcement can be summarized as follows:⁶²⁴

* If the supply of slum housing units is fixed and unresponsive to increased costs of production, and the demand is responsive to changes in rent, the increased costs imposed on landlords by effective code enforcement will not be passed on to tenants in the form of increased rent;

* The additional costs imposed on landlords by effective code enforcement will have little effect on investment in either low-income housing or housing in general, and therefore no substantial decrease in the supply of low-income rental housing will occur; and

* Improved housing will not cause any substantial immigration of

624. This summary is adapted from Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1177 (1973) [hereinafter cited as Komesar]. Professor Ackerman's article at 80 YALE L.J. 1093 (1971) deals, of course, with a great many other issues in addition to the impact of strict housing code enforcement on the cost and supply of low-income housing. Ackerman is primarily concerned with the relationship between housing codes, housing subsidies, and income redistribution policy. Professor Ackerman does, however, offer the following comment on private tenant remedies near the end of his article:

. . . [L]ocalized rent-withholding actions cannot be expected to be terribly successful in vindicating the "decent home" interest if they simply induce the isolated target landlord to improve his building. For in the medium run—if not the short run—the landlord will succeed in increasing his rent substantially as the residents of the surrounding slum find the improved apartments more desirable. Consequently, whatever virtue rent strikes may have in giving the poor a sense of self-respect, they will frequently be rather ineffective income redistribution devices. The same may be said for even more drastic remedies, like receiverships and the suggestion that slum-lordism be made a tort. If, however, rent withholding and similar actions are more than sporadic and isolated affairs, their value as a redistributive device holds greater promise . . . [I]f tenant organizations can achieve broad effectiveness throughout a particular Slumville, a properly drawn rent withholding statute may provide a mechanism by which tenant organizations may themselves take on the task of enforcing the code on a wide ranging basis. And, as we have shown, comprehensive code enforcement permits a significant possibility of substantial income redistribution in a wide range of situations.

Id. at 1095-96.

tenants into an area, and hence it is unlikely that rents will increase because of increased demand for improved housing.

Professor Ackerman's conclusions have been severely criticized by Professors Komesar,⁶²⁵ Posner,⁶²⁶ Hirsch *et al.*,⁶²⁷ and Abbott.⁶²⁸ Professor Komesar attacks Ackerman's seemingly unrealistic assumptions that the supply of low-income housing is fixed and unresponsive to increased costs of production and that the demand is responsive to changes in rent.⁶²⁹ Professor Posner concludes that effective housing code enforcement would in fact result in higher rents and a decrease in the housing supply for low-income tenants, and that assertion of the new tenant remedies for breach of a statutory or implied warranty would tend to produce these results.⁶³⁰ As Posner points out, in the absence of government subsidies all costs that result from housing code enforcement must come either out of "the rentals paid by tenants or the rent of the land obtained by the landlords."⁶³¹ Posner further concludes, without citing any empirical evidence, that "tenants forced to pay higher rentals to cover the cost of compliance . . . will be made worse off."⁶³²

Hirsch *et al.* assert that Ackerman's conclusions can be questioned

625. Komesar, note 624 *supra*.

626. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 259-63 (1972) [hereinafter cited as R. POSNER].

627. Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098 (1975) [hereinafter cited as *Regression Analysis*].

628. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 108-11 (1976).

629. Komesar, *supra* note 624, at 1186-93.

630. R. POSNER, *supra* note 626, at 260, 262.

631. *Id.* at 260.

Economic rent is an especially unpromising source of the funds necessary to comply with the housing code, because the use of land for slum housing generally does not generate substantial rent. In New York and Chicago, where the abandonment of slum dwellings by their owners has become a common phenomenon, the value of much land in slum areas, and hence its rent, must be at or near zero. Even if the land itself has some value, the rent from using it for slum housing may be zero, depending on the other uses to which the land might be put. . . . In any case, the result of housing code enforcement is quite likely to be a reduction in the stock of housing available to the poor, albeit the housing that is available will be of higher quality than before.

Id.

632. *Id.* at 260. However, Posner subsequently says more cautiously: There is no assurance that the poor will be on balance better off. Furthermore, the renters in this case who bear a part of the cost of compliance are likely to

on the ground that his abstract model may depart too far from reality, and that while his assumption of a perfectly inelastic supply of housing may be appropriate in the very short-run, it is contradicted both by empirical evidence and by theories as to the supply of low-income housing advanced by other economists.⁶³³ They further conclude, on the basis of an application of supply and demand concepts to the analysis of the effect of habitability laws, that except under the most unlikely circumstances, housing costs must increase if a law is enforced so as to impose additional costs on landlords; if tenants feel that they derive no benefit from the law, price increases will be less than the additional costs imposed on landlords, and if tenants place some positive value on the law, price increases will be larger—perhaps large enough to offset completely the additional costs associated with provision of the new, higher quality of housing.⁶³⁴ Hirsch *et al.* also recognize that even though tenants are forced to pay higher rents because of habitability laws this fact does not necessarily mean that tenants are worse off since the benefits received by tenants by virtue of such laws may exceed the rent increases.⁶³⁵ The authors suggest, however, that “habitability laws are unlikely to effect a redistribution of wealth in favor of indigent tenants.”⁶³⁶

Professor Abbott is critical of Ackerman’s analysis because he doubts that the conditions postulated for income redistribution from the landlord class to the generally poorer tenant class by means of effective housing code enforcement are likely to occur in any real-world housing market.⁶³⁷ Abbott’s analysis of the probable effect of strict code enforcement distinguishes between several different types of residential neighborhoods: (1) sound neighborhoods with stable or

include a number of almost-poor people for whom ownership of slum property represents a first step in the escape from poverty.

Id. at 260-61.

633. *Regression Analysis*, *supra* note 627, at 1116, 1117 n.74, citing M. REID, HOUSING AND INCOME (1962); de Leeuw, *The Demand for Housing: A Review of Cross-Section Evidence*, 53 REV. OF ECON. & STAT. 1 (1971); Lee, *Housing and Permanent Income: Tests Based on a Three-Year Re-interview Survey*, 50 REV. OF ECON. & STAT. 480 (1968); Muth, *The Demand for Uniform Housing*, in THE DEMAND FOR DURABLE GOODS 29 (A. Harberger ed. 1960).

634. *Regression Analysis*, *supra* note 627, at 1119.

635. *Id.* at 1133.

636. *Id.* at 1139.

637. Abbott, *supra* note 628, at 108-11.

rising property values; (2) deteriorated neighborhoods with rising property values; (3) sound neighborhoods with declining property values; and (4) deteriorated neighborhoods with stable or declining property values.⁶³⁸ He also deals with the problem on the alternative assumptions that the low-income housing market structure is competitive and monopolistic.⁶³⁹ His ultimate conclusion is that, "whatever it achieves, housing code enforcement is costly to the low income housing consumer who is most likely to occupy units generating substantial code compliance costs" because "[h]e is forced either to pay increased rents or to consume less housing, resulting in overcrowding"; and further, that "[e]ven when part or all of the cost is absorbed by the owner, the result may be withdrawal of units from the market, causing dislocation costs, increased crowding and higher prices for those consumers who remain."⁶⁴⁰

Professor Meyers recently addressed the problem of the economic impact of the implied warranty of habitability on the welfare of low-income tenants, but without considering the underlying justifications for adopting housing codes, since he was primarily concerned with presenting a case against adoption of the implied warranty of habitability in the Second Property Restatement.⁶⁴¹ Professor Meyers' conclusions are generally similar to those of Professor Abbott. Meyers distinguishes four categories of housing (rather than neighborhood types) that may be affected by the implied warranty: (1) dwellings which substantially comply with the housing code and hence will be relatively unaffected by the implied warranty; (2) dwellings which do not comply with the housing code and are considered unsuitable for residential use but which can be brought up to code standards by additional investment that can be recovered through higher rents; (3) dwellings which do not comply with the housing code and are considered unsuitable for residential use but which can be brought up to code standards by an expenditure that will reduce the landlord's rate of return (because rents cannot be raised enough to cover repair costs) but will not eliminate a positive return on "sunk capital"; (4) dwellings which do not comply with the housing code and are considered unsuitable for residential use, for which the costs of repair to

638. *Id.* at 67-83.

639. *Id.* at 67-83, 83-85.

640. *Id.* at 86.

641. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 *STAN. L. REV.* 879, 889-93 (1975).

meet code standards (together with other expenses) will result in a negative return on "sunk capital."⁶⁴² Professor Meyers' conclusions, briefly stated, are as follows:⁶⁴³ Housing in category two will be brought into compliance with the implied warranty, with the result that tenants will either have to pay higher rents or move elsewhere. Low-income tenants in category three housing will be benefited by the implied warranty in the short-run, for as long as the landlord recovers from rents all his out-of-pocket costs (including the cost of repairs plus interest on his investment in repairs) he is likely to make the repairs, at least while he has some equity in the property. But in the long-run the quantity of category three housing will decrease because the operating costs associated with increased building age will take their toll faster than normal and the housing will be forced into a deficit position and removed from the market prematurely; and no new category three property will be built since, while present owners need only cover their operating costs, potential owners must be able to cover their initial capital costs. Category four housing will be withdrawn from the rental market and low-income tenants as a class will be injured.⁶⁴⁴

Other commentators have reached similarly conflicting conclusions as to the allocation of the costs of effective housing code enforcement between landlords and tenants.⁶⁴⁵

642. *Id.* at 889.

643. *Id.* at 889-92.

644. Since no one knows how the nation's substandard housing stock is divided among categories two, three and four, one can summarize even more concisely as follows: some proportion of the substandard rental housing stock would be upgraded and rents would be raised to cover the added costs; some proportion would be upgraded even though rents could not be raised, since landlords could still upgrade it without incurring a deficit; and some portion would be abandoned as soon as the owner determines that income will not cover the expenses of required repairs and concludes that this deficit is likely to persist. *Id.* at 893.

645. Lyman, *A Response to ULTRA—The Uniform Landlord Tenant Relationship Act*, 37 J. PROP. MANAGEMENT 149, 159 (1972) (increased costs will be passed on); Project, *Abandonment of Residential Property in an Urban Context*, 23 DE PAUL L. REV. 1186, 1196-97 (1974) ("code enforcement brings about the final completion of the abandonment process which was partially caused, ironically, by ineffective code enforcement during the previous ten or twenty years"); Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920, 928 (1968) (result will be abandonment, overcrowding, and reduction in supply of low-income housing); Note, *Landlord's Violation of Housing Code During Lease Term is Breach of Implied Warranty of Habitability Constituting Partial or Total Defense to an Eviction Action Based on Nonpayment of Rent*, 84 HARV. L. REV. 729, 733-36 (1971) (increased costs will be passed on to tenant); Comment, *An Assessment of the Impact*

B. *Empirical Studies*

There have been empirical studies of the effects of recognizing the residential tenant's right to a habitable dwelling as established in Pennsylvania,⁶⁴⁶ Massachusetts,⁶⁴⁷ Michigan,⁶⁴⁸ and California,⁶⁴⁹ as well as one study using data from all over the United States.⁶⁵⁰

A study of the Pennsylvania Rent Withholding Act⁶⁵¹ in Pittsburgh, two years after its enactment in 1968, showed that only 1340 dwelling units had been certified as eligible for rent withholding, al-

of an Implied Warranty of Habitability in New York State, 24 BUFFALO L. REV. 189, 201-04 (1974) ("the warranty would reduce the housing stock in lower-income markets by triggering some abandonment" but "the extent of this phenomenon would not be as drastic as some have feared"); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 320-22 n.83 (1965) (no rent increases because landlords are financially able to absorb the increased costs); Comment, *Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOY. L.A.L. REV. 66, 83 (1974) (warranty would reduce lower-income housing stock through abandonment but not as drastically as some have feared); Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act—An Economic Analysis*, 17 VILL. L. REV. 886, 914-21 (1972) (code enforcement simply hastens the abandonment and removal of units in which landlords do not believe further investment to be justified; and the externalities of disinvestment may be substantially greater than those of investment); P. Weitzman, *An Economic Analysis of the Impact of Repair and Deduct Legislation* (Nov. 1977) (unpublished article available from Nat. Soc. Sci. & Law Project, Inc., 1990 M St., N.W., Suite 610, Washington, D.C. 20036) (some housing improvement can be achieved without rent increases).

See also Cross, *Law Reform Meets the Slumlord*, 3 URB. LAW. 609, 617 (1971); Machbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 HOW. L.J. 3, 40 (1971). Both articles suggest that abandonment is exacerbated by strict code enforcement in the most-blighted areas.

646. Krumholz, *Rent Withholding as an Aid to Housing Code Enforcement*, 25 J. HOUSING 242 (1969); Comment, *Housing Market Operation and the Pennsylvania Rent Withholding Act—An Economic Analysis*, 17 VILL. L. REV. 821, 860-85 (1972).

647. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 62-64, 139-46 (1976).

648. Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. L.J. REF. 8 (1973) [hereinafter cited as Mosier & Soble]; Rose & Scott, "Street Talk" *Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967 (1975).

649. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37 (1978); Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976).

650. Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098, 1116-36 (1975).

651. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1977-78).

though Pittsburgh was estimated to have 28,000 substandard units. Of the tenants in these 1340 units, 573 opened escrow accounts, but only 351 were paying into them, and only 100 units, or less than eight percent of all units certified as eligible, had actually been brought into compliance with the housing code.⁶⁵² A later study of the operation of the Act in Philadelphia also seems to demonstrate the ineffectiveness of the rent withholding remedy.⁶⁵³ The Philadelphia study was based on an examination of some 1,100 escrow accounts of tenants living in two low-income, minority neighborhoods just north of the central business district. The study revealed that between July 1970 and February 1972 more than fifteen percent of the dwelling units in these neighborhoods were certified as unfit and therefore eligible for rent withholding. But compliance with the housing code was obtained in only 31.4% of cases where the escrow was closed and compliance was only forty-one percent for the entire period from enactment of the Act in 1968 through February 1972. Moreover, thirty-nine percent of all the units for which escrow accounts were established were vacant by February 1972. This strongly suggests that the rent withholding procedure forced substandard dwelling units off the market; and the low percentage of compliance suggests that many landlords were unable, rather than unwilling, to make repairs when rents were placed in escrow.⁶⁵⁴

Massachusetts adopted its rent withholding statutes in 1965.⁶⁵⁵ Abbott's study⁶⁵⁶ of the Boston Housing Court records for the period from May 1, 1973, through April 30, 1974, to determine the incidence of rent abatement defenses by tenants in landlord actions for possession and back rent indicates that tenant ignorance of the right to an abatement of rent is widespread. Abbott's summary is as follows:

The survey of the Boston Housing Court records revealed that only forty percent of the summary process cases were contested by tenants represented by counsel. Less than fifteen percent of the tenant-defendants even raised a rent abatement defense, al-

652. Krumholz, *Rent Withholding as an Aid to Housing Code Enforcement*, 25 J. HOUSING 242, 243-44 (1969).

653. Comment, *Housing Market Operation and the Pennsylvania Rent Withholding Act—An Economic Analysis*, 17 VILL. L. REV. 821, 882-84 (1972).

654. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1 (1976).

655. These statutes, as amended, are now MASS. ANN. LAWS ch. 111, §§ 127C-L & ch. 239, § 8A (Michie/Law. Co-op Supp. 1975).

656. Abbott, *supra* note 654, at 60.

though most of the cases involved low income tenants represented by legal service attorneys. Yet, within the group of contested cases in which the rent abatement defense was raised, landlords did not fare well. Less than twenty percent of the time did the landlord obtain the relief he sought—a judgment for possession and the rent alleged due. More often the landlord could obtain only possession and a substantially reduced rent. This lack of success for landlords once a tenant raises the rent abatement defense may account for the high percentage—nearly fifty percent—of the cases disposed of by informal settlement without any notation in the record. . . .

Clearly, the rent abatement remedy is not always utilized whenever a Boston tenant is entitled to it. The ease of filing a petition for rent reduction or of opposing a request for rent increase before the Boston Rent Control Administration—a tenant does not even need counsel to make an appearance—diminishes the need for rent abatement. The other tenant-initiated code enforcement remedies available under Massachusetts law also decrease the importance of rent abatement. Still, the defense is clearly effective in reducing the rent when it is employed. Thus, the threat to utilize rent abatement must carry weight with Boston landlords, and apparently will trigger repair and maintenance activity that would not otherwise be undertaken.⁶⁵⁷

A study of the 1968 Michigan tenants' rights legislation,⁶⁵⁸ based on the cases filed and tried in the Detroit Landlord-Tenant Court during 1970 and 1971, reached the "inescapable conclusion" that "[t]he reform legislation . . . was not meeting the goals that had been set for it in 1968."⁶⁵⁹

The new statutory defenses and warranties affected Detroit tenants, and thus landlords, very little. As before the legislation, landlords continued filing a large number of cases in Detroit Landlord-Tenant Court, and writs of eviction actually increased slightly. The court continued to serve the landlords as before, and the new defenses were only slightly utilized. In over 90 percent of the cases filed, the landlords did not have to contend with any tenant defenses, old or new; and in only approximately 3 percent of the cases filed did landlords have one of the new de-

657. *Id.* at 63-64.

658. Mosier & Soble, note 648 *supra*. The principal focus of the study was on the statutory warranty of habitability, codified in MICH. COMP. LAWS ANN. § 554.139 (Supp. 1978), and the use of the breach of warranty defense in summary actions to evict for nonpayment of rent.

659. Mosier & Soble, *supra* note 648, at 61.

fenses, either landlord breach or retaliation, raised against them. Even considering only the cases where the tenants appeared and contested the action (20 percent of cases filed), the landlords need not have expected many fierce legal battles: less than 35 percent of the tenants who appeared raised any defense, and less than 13 percent raised one of the new defenses.

The outcomes of the cases studied show even more clearly how miniscule was the effect of the new legislation. Of the cases started, 97 percent resulted in the landlord's obtaining all he sought, by voluntary dismissal, default, or taking judgment in a contested case. In contested cases, 85 percent resulted in complete victory for the landlord. So the study showed that neither the new defenses nor the old defenses significantly affected the outcome of court cases.⁶⁶⁰

The contrast between results of the Detroit study and results of the Boston study are striking indeed. Two new reforms were introduced in Detroit in 1972 in an effort to "address the complementary goals of right to effective notice of pending suit, right to counsel in civil cases, and improvement in housing quality"; a legal aid clinic was established on the same floor as the Detroit Landlord-Tenant Court, and "the mystifying legal jargon of the standard summons and other court forms" was replaced with new forms written in "more comprehensible 'street talk'" and including clear instructions on "how to get legal help."⁶⁶¹ A 1975 study of cases in the Detroit Landlord-Tenant Court concluded that the tenant default rate had declined following the 1972 reforms,⁶⁶² that the breach of warranty defense was more often raised,⁶⁶³ and that more tenants were represented by counsel,⁶⁶⁴ but that the actual outcome of the litigation remained "almost exclusively pro-landlord" although there was "a slight gain in tenant victories" in comparison with the 1971-72 period.⁶⁶⁵

Since *Green v. Superior Court*⁶⁶⁶ recognized the implied warranty of habitability in California, two studies of the impact of *Green* have

660. *Id.*

661. Rose & Scott, "Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step for Urban Tenants, 52 J. URB. L. 967, 986-91 (1975).

662. *Id.* at 993-97.

663. *Id.* at 998-99.

664. *Id.* at 999-1002.

665. *Id.* at 1002-09.

666. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

been carried out. The first of these studies⁶⁶⁷ was based upon docket searches of the San Francisco Municipal Court for the period January 17, 1974, through June 14, 1974; docket searches of the San Francisco Small Claims Court for the period between January 29, 1974, and June 14, 1974;⁶⁶⁸ and interviews with judges, landlords' attorneys, tenants' attorneys, and representatives of tenant organizations throughout the greater Bay Area.⁶⁶⁹ This study reached conclusions generally similar to those reached in the Pittsburgh, Philadelphia, Detroit, and Boston studies:

The implied warranty of habitability, established in California by *Green v. Superior Court*, is not being extensively used. Simply stated, the problem is that few low income tenants receive the legal advice necessary to make use of this innovation in landlord-tenant law. Rather, the majority of unlawful detainer actions are dropped or defaulted. *Green* appears to be a classic example of a "progressive" judicial move unknown and relatively unimportant to the very people it was intended to assist. Even when raised, the uninhabitability defense has had only a moderate impact on case outcomes. As a result, it is doubtful that *Green* has affected the housing market greatly. It is neither accomplishing its presumed goal of "decent housing" nor resulting in the massive dislocation of the housing market predicted by its critics.⁶⁷⁰

A later study conducted in southern California⁶⁷¹ indicates, however, that the implied warranty of habitability is beginning to have its intended consequences, although it continues to face formidable problems of implementation.⁶⁷² The study area encompassed about fifteen square miles and a population of 95,000, of whom 56% were white, 35% Spanish surnamed, 5% black, and 3% others, including Native Americans and Samoans. Some 3,800 of the 35,000 rental units in the area had been rated "unsound" by a municipal agency, but the standard used included items irrelevant to the implied warranty standard, such as overcrowding.⁶⁷³ As the authors point out,

667. Note, *The Great Green Hope: The Implied Warranty in Practice*, 28 STAN. L. REV. 729 (1976).

668. *Id.* at 735.

669. *Id.* at 736-37.

670. *Id.* at 776-77.

671. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37 (1978).

672. *Id.* at 59.

673. *Id.* at 41-42.

Examination of the housing occupied by the warranty tenants and the defendants in unlawful detainer actions, and a review of the complaints of the warranty tenants suggest that the California low-income housing situation differs markedly from the eastern image. Much of the California housing stock, including that in the study area, is dominated by structures smaller and in better condition than the infamous abandoned New York walk-up tenement. About half of the warranty clients and unlawful detainer defendants lived in buildings containing four units or fewer, and few lived in buildings of twenty units or more.⁶⁷⁴

The study produced the following conclusions (or "grounded hypotheses"):

- 1) *Green* is being employed more often and violations of the warranty occur less often than assumed.
- 2) Most of the California low-income housing stock is in decline and economically repairable as opposed to decayed and economically unreparable.
- 3) The use of the warranty does not affect the housing market.
- 4) The warranty is leading to the repair of property and could assist code enforcement if knowledge of it spreads.
- 5) Tenants who remain in possession do not have their rents substantially raised.
- 6) Few tenants who do not seek the aid of an attorney before the eviction process has begun remain in possession at the conclusion of the dispute.
- 7) While aggressive tenants act in ways consistent with the warranty and bring their cases to legal services, serious problems stand in the way of diffusing knowledge of the law.
- 8) Because of judicial hostility to warranty cases, tenants incur the social and economic cost of moving, landlords lose the partial rent envisioned in the *Green* decision and the ambiguity in the language of the decision is not being clarified.
- 9) Most tenants or their lawyers are not inclined to abuse the law.
- 10) While rent strikes are taking place, there is little movement toward tenant union formation.⁶⁷⁵

Hirsch, *et al.*⁶⁷⁶ applied multiple regression analytical techniques to data from a survey of 5,000 households undertaken in the period

674. *Id.* at 43-44.

675. *Id.* at 67.

676. Hirsch, Hirsch, & Margolis, *Regression Analysis of the Effects of Habitability*

1968-72 by the University of Michigan Survey Research Center.⁶⁷⁷ The Hirsch study selected for analysis all the low-income households occupying rented dwellings located in metropolitan areas with populations greater than 50,000 and that live within 30 miles of the central business district. The conclusions of Hirsch, *et al.*⁶⁷⁸ were that receivership laws were associated with statistically significant higher rents, and that there was a positive, but not statistically significant, relationship between rent levels and "other habitability laws"—*i.e.*, statutes or judicial decisions authorizing the "repair-and-deduct," rent withholding, and rent abatement remedies. With respect to the lack of a strong relationship between the availability of the repair-and-deduct, rent withholding, and rent abatement remedies and rent levels, the authors advance the following hypotheses:

. . . The most logical explanation, and the one most consistent with the sketchy empirical information which exists on the subject, is that repair and deduct and rent withholding remedies are not being used by tenants to any great extent. If these remedies are not widely used, no real costs would be imposed on landlords, and thus there would be no increased costs to be passed on to tenants.

If tenant-initiated code enforcement remedies are not widely used by tenants (or at least were not frequently used by tenants from 1968 to 1972, the years included in this study), the question then arises as to the reasons for their lack of use. Housing and legal services agencies often point to the lack of information and resources on the part of poor tenants. If costs are indeed passed on to low-income tenants, as suggested by the experience with receivership laws, a greater availability of information and resources for indigent tenants may result in higher rents being charged. Thus, if legal service organizations increase the probability that tenants will invoke habitability laws, such organizations may hurt, rather than help, their clients, at least to the extent of indirectly giving impetus to an increase in rent.

There is another possible explanation for the infrequent use of such remedies, however. Tenants may indeed know of the availability of such remedies and in addition perceive the potentially counterproductive consequences of invoking such remedies. Thus, the infrequent use of tenant-initiated code enforcement

Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate, 63 CAL. L. REV. 1098 (1975).

677. *Id.* at 1125.

678. *Id.* at 1130.

mechanisms may be a reflection of a foresighted perception of self-interest. This explanation . . . may be questioned on the ground that in the short run the tenant who invokes legal remedies may not be the one who suffers the effects of his actions. Retaliatory eviction laws may temporarily insulate the initiating tenant from economic responsibility for his actions. However, on an aggregate level, all low-income tenants in the immediate housing market will suffer the counterproductive effects of the initiating tenant's actions.

Despite the existence of these theoretical flaws, the above explanation has an undeniable intuitive appeal. Low-income tenants are undoubtedly deterred from exercising their rights when faced with the prospect of being forced, upon short notice, to find new accommodations in an extremely tight housing market. The uncertainty of the law itself may restrain the exercise of tenant rights. In addition, there is probably an unstated recognition on the part of tenants that the law can provide little protection against a hostile landlord. Tenants are acutely aware that a landlord can make a tenant's life extremely unpleasant despite the formal existence of retaliatory eviction laws. The costs of resorting to the law to vindicate one's rights as a tenant may become so burdensome as to make continued occupancy unpleasant even if a tenant's right to possession is formally sanctioned by the law.⁶⁷⁹

There is also some evidence suggesting that the decline in tenant use of New York's Spiegel Act⁶⁸⁰ (allowing the state welfare agency to withhold rental allowances from landlords until housing code violations are corrected) after 1966, and its almost complete disuse after 1969, "most likely" resulted from "a realization that such a withholding law worked to the detriment of indigent tenants."⁶⁸¹

In closing, Sternlieb's pioneering empirical studies of the behavior of slum landlords⁶⁸² should be mentioned. Sternlieb's major conclu-

679. *Id.* at 1130-31.

680. N.Y. SOC. SERV. LAW § 143-b (McKinney 1966).

681. Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098, 1135-36 n.106 (1975) (quoting Simmons, *Passion & Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 587 n.72 (1965), and citing I. LOWRY, J. GUERON & K. EISENSTADT, *WELFARE HOUSING IN NEW YORK CITY* 25 (1972)). Hirsch *et al.* also present statistical proof as to the decline in tenant use of the Spiegel Act. *Id.* 1135-36 n.106.

682. G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* (1973); G. STERNLIEB, *THE TENEMENT LANDLORD* (1966).

sions are as follows:

* "Actual abandonment of blighted neighborhoods by landlords has reached shockingly high levels."⁶⁸³

* The classic view of the rapacious slumlord who "milks" his rental properties is largely a myth.⁶⁸⁴

* Housing code enforcement is counterproductive.⁶⁸⁵

* Slum landlords do not believe that repairs to their rental properties can be justified on the basis of increased rentals or resale potential.⁶⁸⁶

As Professor Meyers has pointed out,

Abandonment figures alone do not prove much, but when combined with the reasons for abandonment, they forcefully

683. G. STERNLIEB & R. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* at xiii (1973). The book deals primarily with blighted areas in Newark, New Jersey, where the authors report a gross abandonment rate of 2% per year of the combined residential, commercial, and industrial building stock. *Id.* at 283. Referring to a study sample of 569 residential buildings first studied in 1964, the authors found that by late 1971, 84, or more than 15%, had been abandoned. *Id.* 284. In another Newark study sample, composed of 286 buildings, 20% had been abandoned between 1964 and 1971. *Id.* at 318. For the city as a whole, during the 1967-71 period, 2535 structures constituting 8% of the housing stock of Newark had been abandoned. *Id.* at 278. The authors also cite abandonment rates of 2% for New York City as a whole, 6% to 10% for Brooklyn (East New York section), 16% for the worst part of St. Louis, and 20% for Chicago (Woodlawn and Lawndale sections). *Id.* at 276. Reporting a study using a different definition of abandonment, the authors state that 4% of the St. Louis housing stock had been abandoned as of January 1, 1971, and that in North Lawndale, Chicago, 2.6% of the area's housing units were abandoned in a two-month period between September and November 1970. *Id.* at 276.

684. *Id.* at xvi-xvii: "The reality is that the white owner in an urban core area increasingly is unable to rent his mortgage-free structures to poor blacks and still derive the necessary income to meet expenses (prime among them are taxes) and turn the necessary profit to remain solvent. "It . . . does *not* appear to hold that succeeding waves of tenement landlords were milking parcels and from this deriving substantial income." (Emphasis in original.)

685. *Id.* at xvii, xix:

The pace of urban decay, exemplified by secondary industrial cities, has outrun all the remedies that have been applied . . . [Assigning blame to maladministration and corruption tends] to hide rather than typify the underlying reality, providing a false feeling of assurance that, given a better administration [of housing codes], or more comprehending funding agencies, or some magic inspiration of imagination, all could be made well.

. . . Code enforcement, . . . when private owners are fleeing the market, becomes self-defeating.

686. *Id.* at 65.

support the argument that increasing the repair costs of slum housing or, in the alternative, reducing rental income by allowing tenants to withhold rent, will raise the abandonment rate. . . .⁶⁸⁷

C. *Epilogue*

As indicated at the beginning of this article,⁶⁸⁸ the new rule that the landlord must provide a habitable dwelling for his tenants has now been adopted in at least thirty-one jurisdictions. In eleven of these jurisdictions, the new principle was originally established by judicial decision;⁶⁸⁹ in the others, by legislation.⁶⁹⁰ But in several jurisdictions the new judge-made implied warranty of habitability has been superseded by broader warranty of habitability legislation.⁶⁹¹ Fifteen states⁶⁹² have now enacted legislation based on the Model Code or the URLTA, both of which include a detailed specification of the landlord's "warranty" obligation and the tenant's remedies for breach of that obligation. If the trend toward recognition of the residential tenant's right to a habitable dwelling continues in the future, it seems probable that it will take the form of further adoptions (and adaptations) of the URLTA rather than new case law. But it is quite possible that the impetus for adoption of the new "habitability" principles, whether by legislation or by judicial decision, may be slowed by legislative and judicial doubts as to the likelihood that changing the law on the books will have much effect on the law of landlord and tenant in action, and the likelihood that the welfare of tenants will, in fact, be improved if the new habitability principles should prove to have substantial effect in the real world. It is interesting to note that the legislatures of Indiana, Pennsylvania, and Texas recently gave consideration to enactment of new landlord-tenant legislation including a warranty of habitability, and that the proposed legislation failed of passage in all three states.⁶⁹³

687. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 896 (1975).

688. See text accompanying notes 5-28 *supra*.

689. See text accompanying notes 14-15 *supra*.

690. See text accompanying notes 6-13 *supra*.

691. See text accompanying notes 20-25 *supra*.

692. See text accompanying notes 10-11 *supra*.

693. See Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 641-42 (1977) (URLTA rejected); Sohns & Fuller, *Texas Landlord-Tenant Law and the Sixty-Fifth Legislature*, 18 S. TEX. L.J. 497, 504-08 (1977) (signifi-

cant landlord-tenant legislation not passed); Comment, *Implied Warranty of Habitability in Pennsylvania*, 15 DUQ. L. REV. 459, 469-74 (1977), discussing pending legislation, and concluding:

[T]he Pennsylvania legislature will probably join the national trend and enact a warranty provision regardless of how it reconciles the differences between the versions [in different bills] regarding remedies. A review of recent literature concerning the warranty, however, suggests that the legislature might do well to take heed and evaluate the reasons why disillusionment with the warranty and its underlying assumptions has begun to appear.

Id. at 474-75.

Apparently the Pennsylvania legislature did "take heed."