ADJUSTING THE ECONOMIC RELATIONSHIP OF LANDLORD AND TENANT — RENT ALTERATION REMEDIES

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Today, thousands of low-income tenants inhabit dwellings that are either substandard or rapidly deteriorating.[1] Lack of heat, dangerous electrical systems, missing floor boards, rodent infestation, and faulty plumbing are conditions familiar to many of these tenants. The plight of low-income tenants continues to be frustrating as government programs, private development, and local code enforcement programs have failed to bring about substantial improvement.[2] Continued abandonment by landlords who are unwilling or unable to control the deterioration of their properties further aggravates the situation.

Most responses to the situation have been long term proposals designed to increase the supply of new housing.[3] Low-income tenants, however, are more concerned with alternatives which will help them maintain or improve their present living conditions. Lawmakers

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1. "Approximately 60 million people in the U.S. — some 13 million households — are victims of housing deprivation." Hirshen & LeGates, *Neglected Dimensions in Low-Income Housing and Development Programs*, 9 URBAN L. ANN. 3 (1975), *citing* MIT-HARVARD JOINT CENTER FOR URBAN STUDIES, AMERICA'S HOUSING NEEDS: 1970 TO 1980, at 1-4 (1973).

2. *See id.* at 6:

> The grim realities, however, are that after 23 years of operation, the urban renewal program, which was intended to provide "a decent home and suitable living environment for every American family," has destroyed 300,000 more low-income housing units than it has produced, thus massively exacerbating the housing dilemma of the urban poor.

3. *See, e.g.*, Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 15, 20, 31, 40, 42, 49 U.S.C. (Supp. IV, 1974)). Congress stated the primary objective of this Act was to "provid[e] decent housing and a suitable living environment . . . principally for persons of low and moderate income." 42 U.S.C. § 5301(c) (Supp. IV, 1974). The Act proposes to achieve this objective by providing grants for long term development programs. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (adherence to the requirements of this case would increase the opportunities to develop low-income housing by insuring that all communities zoned for their "regional share" of multi-family dwellings); Daye, *Role of the Judiciary in Community Development and Housing: A Suggested Analytical Method*, 52 J. URBAN L. 689, 709-12 (1975), *citing* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968), *rev'g* 42 F.R.D. 617 (D.C. Conn. 1967) (indicating that courts may have the right to order the construction of low-income housing).

attempting to provide these short term solutions have the difficult task of reconciling the conflicting demands of tenants and landlords. Tenants need the legal right to demand habitable dwellings and effective remedies to enforce that right. This means a more equitable division of rights and obligations than the common law landlord-tenant relationship provides. Landlords require that the economic costs and legal constraints resulting from changes in the traditional relationship not overburden their capacity to profit from their low-income properties. If landlords find themselves over-burdened, most will resort to abandonment of the properties. Once abandoned, total deterioration is inevitable and the low-income housing stock is further diminished.

This Note will examine the evolution of one group of short term alternatives to the common law approach that attempts to strike an effective balance between the demand for increased rights and remedies for individual tenants and the need to protect the entire class of low-income tenants against landlord abandonment. These short term alternatives are termed "rent alteration remedies,"[4] because they permit the tenant to alter his traditional duty to pay rent to the landlord. By altering this duty in different ways, lawmakers have attempted either to give tenants sufficient coercive strength to compel landlords to make necessary repairs and improvements, or to provide tenants monetary compensation for living in substandard housing. By striking at the economic lifeline of the rental business, however, these rent alteration remedies increase the risk of landlord abandonment, and may cause a net reduction in the number of dwellings available to low-income tenants.

I. The Hardships of Rent Withholding at Common Law

Constructive eviction, the earliest common law remedy permitting

4. Rent alteration is a term the author has created to categorize a variety of remedies. Because of the common characteristic of all the remedies that provide for some change in the traditional rent payment obligation, it is useful to examine these remedies as a group. The following are only examples of the existing laws which provide for rent alteration. *See, e.g.*, Mass. Gen Laws Ann. ch. 239, § 8A (1974), *as amended*, (Supp. 1974) (authorizes total suspension of the duty to pay rent); N.Y. Mult. Dwell. Law § 302-a (McKinney 1974) (authorizes "rent strikes" for an entire building); N.Y. Soc. Welfare Law § 143-b (McKinney 1966) (welfare agency withholds rent of welfare tenants); Pa. Stat. Ann. tit. 35, § 1700-1 (Supp. 1975) (tenant pays rent into an escrow fund); Wash. Rev. Code Ann. § 59.18.100 (Supp. 1974) (tenant pays landlord a diminished rent). *See also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (upholding tenant's right to withhold rent); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968) (terminated tenant's duty to pay rent where lease was found to be an illegal contract).

tenants to withhold their rental payments,[5] has been rejected by an increasing number of courts and legislatures seeking to conform landlord-tenant law to the modern realities of the landlord-tenant relationship. Lawmakers have found that constructive eviction places unrealistic demands on tenants,[6] that it reflects considerations of landlord-tenant relationships which no longer exist in modern urban settings,[7] and that it worsens the housing problem of low-income tenants attempting to use the remedy.[8]

Under the common law the duty to pay rent was independent of any obligations of the landlord. Thus, the tenant's duty continued even if the premises were untenantable at the inception of the lease or became so later on.[9] The rent obligation could only be suspended if a tenant could

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5. In this country the doctrine of constructive eviction has been invoked since the early 1800's. Dyett v. Pendelton, 8 Cow. 722 (N.Y. Ct. of Err. 1826).

6. One New York court took judicial notice of this problem when it said,

> Implicit in these once benign enactments and decisions was the presumption that there was always available other premises to which the tenant could move. The grim realities of the acute housing shortage reduce this time-worn presumption to sheer naivete; a postulate exploded by the facts.

Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153, 157 (N.Y. City Mun. Ct. 1950). *See also* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970); N.J. STAT. ANN. § 2A:42-85 (1975); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

7. In Javins v. First Nat'l Realty Corp, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), Judge Skelly Wright, writing for the majority, presented an excellent discussion of this idea.

> Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life . . . .
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> The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agragian society; . . . . But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live . . . . When American city dwellers . . . seek "shelter" today, they seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light, ventilation, [and] serviceable plumbing facilities . . . .

Id. at 1074 (footnotes omitted). *See also id.* at 1077-80; Green v. Superior Court, 10 Cal. 3d 616, 622-25, 517 P.2d 1168, 1171-3, 111 Cal. Rptr. 704, 707-09 (1974).

8. Reliance on constructive eviction may have two detrimental impacts on the tenant. First, he may not be able to find replacement housing. Second, the tenant may have to absorb the cost of moving. The tenant may not always have to absorb the costs of eviction, however. Constructive eviction does raise an action for damages which may include the costs of moving. *See* Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69, 88 n.125 (1951) [hereinafter cited as Rapacz], *citing* Klien v. Lewis, 41 Cal. App. 463, 182 P. 789 (1919); Jennings v. Bond, 14 Ind. App. 282, 42 N.E. 97 (1895); Wave v. Herndl, 127 Wis. 544, 107 N.W. 4 (1906).

9. See Rapacz, *supra* note 8, at 71. *But see* Siegal, *Is the Modern Lease a Contract or a Conveyance? — A [sic] Historical Inquiry*, 52 J. URBAN L. 649, 663 (1975) (doctrine of independent obligations in landlord tenant law not based on property concepts but contract law of "mutually dependent promises").

prove that he was "constructively evicted" from the premises.[10] To successfully assert the defense of constructive eviction, the tenant had to prove three elements: 1) the landlord had acted or failed to act in a way which violated an obligation imposed upon him by law or covenant with the tenant;[11] 2) the nature of the landlord's act or omission constituted an interference with the tenant's quiet enjoyment of the premises[12] or indicated an intent to evict the tenant;[13] and 3) the tenant had abandoned the premises within a reasonable time.[14] If the tenant failed to prove all three elements, he was held liable for all rents due for the remainder of the lease term, regardless of his good faith belief that he was denied the quiet enjoyment of his dwelling unit[15] or the fact that his attempt to find replacement housing within a reasonable time had been unsuccessful.[16] These requirements validating rent withholding under

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10. *See, e.g.*, Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Duncan Dev. Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293, 112 A.2d 274 (Sup. Ct. 1955); Chelter Ave. Bldg. Corp. v. Mayer, 316 Pa. 228, 172 A. 675 (1934).

11. *See, e.g.*, Sweeting v. Reining, 235 Ill. App. 572, 582 (1924); Burnstine v. Mangulies, 18 N.J. Super. 259, 87 A.2d 37 (1952); 320 East 50th St. Corp. v. Sheinkopf, 211 N.Y.S.2d 856 (Sup. Ct. 1961).

12. *See, e.g.*, Texas Co. v. Christian, 177 F.2d 759, 761 (5th Cir. 1949); Ellis v. McDermott, 7 N.J. Misc. 757, 147 A. 236 (1929); Ben Har Holding Corp. v. Fox, 147 Misc. 300, 263 N.Y.S. 695 (N.Y. Mun. Ct. 1933).

13. Rapacz, *supra* note 8, at 75.

14. *See, e.g.*, Giddings v. Williams, 336 Ill. 482, 168 N.E. 514 (1929); Rome v. Johnson, 274 Mass. 444, 174 N.E. 716 (1931); Wood v. Gabler, 229 Mo. App. 1188, 70 S.W.2d 110 (1934).

15. The existence of certain physical conditions usually leads to a judicial finding that a tenant's quiet enjoyment has been substantially or permanently interfered with. Interference with the tenant's access to essential services is grounds for constructive eviction. *See, e.g.*, Auto Supply Corp. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N.W. 986 (1892); Germania Fire Ins. Co. v. Myers, 8 N.Y.S.R. 349 (N.Y. City Ct. 1887). The landlord's interference with the tenant's ingress or egress also justifies the tenant's abandonment. *See, e.g.*, Central Business College Co. v. Rutherford, 47 Colo. 277, 107 P. 279 (1910); Smith v. Tennyson, 219 Mass. 508, 107 N.E. 423 (1914); Edmison v. Lowry, 3 S.D. 77, 52 N.W. 583 (1892).

No standards, however, can cover all situations. Tenants acting on a good faith belief that the landlord's breach of a covenant to repair or to supply certain services constitutes constructive eviction may abandon their dwelling only to find that the court disagrees with them. *See, e.g.*, Robinson v. Great Atlantic & Pacific Tea Co., 139 Me. 194, 28 A.2d 468 (1942); Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938); Baldwin v. Cohen, 116 N.Y.S. 510, 132 App. Div. 87 (1909). A tenant's defense of constructive eviction will not be sustained if he has subsequently discovered a condition that existed prior to occupancy. Hatov Realty Corp. v. Altomare, 28 N.Y.S.2d 166 (Sup. Ct. 1941).

16. *See, e.g.*, Watters v. Shultz, 10 Ill. App. 2d 212, 134 N.E.2d 621 (1956); Robinson v. Great Atlantic & Pacific Tea Co., 139 Me. 194, 28 A.2d 468 (1942); 56-70 58th St. Holding

the constructive eviction theory are rigid and all too frequently lead to harsh and inequitable results.

The principal reason for these inequities is the common law's imposition of minimal obligations on a landlord. Since the landlord has hardly any obligations he is seldom found to have constructively evicted a tenant.[17] The duty to make repairs or maintain the premises was not imposed by the courts because under the traditional landlord-tenant relationship the tenant purchased only the right to use the land.[18] If a lease agreement did not specifically include provisions that bound the landlord to repair and maintain the premises, the courts would not imply those obligations.[19] Given the gross inequality in bargaining positions low-income tenants are almost never able to get the landlord to covenant for repairs. Thus, the tenant's sole recourse may be to undertake to pay for necessary repairs himself.[20] The rapid increase in the cost of such repairs, however, has put even this alternative beyond the reach of many tenants. Further, it is unreasonable to expect a tenant on a short-term or periodic tenancy to make repairs when he has no guarantee that he will be able to enjoy them.[21]

The requirement that tenants abandon their premises is another

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Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 159 N.E.2d 150, 186 N.Y.S.2d 583 (1959).

17. Rapacz, *supra* note 8, at 80.

18. Although the lease between the landlord and tenant is considered a contract between the parties, it is also a conveyance. Any conditions not contained therein will be gleaned from principles of property law. The effect of the lease at common law was to grant to the tenant exclusive control of the property for a given term of years, while absolving the landlord from *any* responsibility save to allow the tenant his quiet enjoyment. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 n.31 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); 49 AM. JUR. 2d *Landlord and Tenant* §§1, 2, 83-84 (1970). *But see* Siegal, *supra* note 9 (author argues that landlord-tenant law was originally based on contract doctrine, but shifted to property law in the nineteenth century).

19. Two examples will illustrate the harsh results which occur when the landlord is not required to maintain the premises. If the tenant's apartment is rendered uninhabitable by insect or rodent infestation, he acquires no right at common law to abandon, absent proof that the landlord had covenanted to remedy the condition. Hopkins v. Murphy, 233 Mass. 476, 124 N.E. 252 (1919); Jacobs v. Morand, 59 Misc. 200, 110 N.Y.S. 208 (Sup. Ct. 1908). Even if the building were completely destroyed by fire, the common law required the tenant to continue paying rent unless the fire could be attributed to the fault of the landlord. Pivnick v. Seaboard Supply Co., 30 N.J. Super. 605, 611, 105 A.2d 695, 698 (Essex County Ct. 1954); Graves v. Berdan, 26 N.Y. 498 (1863).

20. *Cf.* Shanahan v. Collins, ___Colo. ___, 539 P.2d 1261 (1975); Denver Tramway Corp. v. Rumry, 98 Colo. 24, 52 P.2d 396 (1935); Haskins v. Kelly, 192 Misc. 366, 78 N.Y.S.2d 912 (Sup. Ct. 1948); Platt v. City of Philadelphia, 183 Pa. Super. 486, 133 A.2d 860 (1957).

21. *See* Javins v. First Nat'l Realty Corp. 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

major reason for the lawmakers' rejection of constructive eviction. Retaining the abandonment requirement as a precondition to the defense of constructive eviction makes little, if any sense in light of present housing shortages. It is often impossible for the tenant to comply with the requirement that he abandon within a reasonable time after discovering the condition. Although the courts ostensibly decide what is a "reasonable time" on a case-by-case basis,[22] they often require abandonment within one month.[23] But on occasion courts have taken judicial notice of the tenant's relocation problem and have waived the requirement that he abandon before his rental obligation can be suspended.[24] These courts, although unwilling to change the property law bases of landlord-tenant law, have nevertheless provided some relief to the tenant from the hardship caused by the abandonment requirement.[25]

II. The Design and Legal Basis of Rent Alteration Remedies

Critics of the traditional landlord-tenant relationship argue that placing tenants in a stronger bargaining position through the use of rent alteration schemes will result in improved housing conditions and provide equitable compensation for tenants living under substandard conditions. Proponents have responded that rent alteration theories only take into account tenant problems, and fail to properly consider the

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22. *See, e.g.*, Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Palumbo v. Olympia Theatres, Inc., 276 Mass. 84, 176 N.E. 815 (1931); Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N.W. 986 (1892).

23. Giddings v. Williams, 336 Ill. 482, 168 N.E. 514 (1929).

24. In East Haven Associates, Inc. v. Gurian, 64 Misc. 2d 276, 313 N.Y.S.2d 927 (N.Y. City Cir. Ct. 1970), the court said,

> The very idea of requiring families to abandon their homes before they can defend against actions for rent is a baffling one in an era in which decent housing is so hard to get, particularly for those who are poor and without resources. It makes no sense at all to say that if part of an apartment has been rendered uninhabitable, a family must move from the entire dwelling before it can seek justice and fair dealing.

Id. at 280, 313 N.Y.S.2d at 931.

25. The doctrine of partial constructive eviction is employed to permit a tenant to remain in possession of that portion of the premises that is habitable while suspending his duty to pay rent. Total, rather than partial, rent suspension has been justified on the ground that the landlord should not be permitted to apportion his wrong. 49 Am. Jur. 2d *Landlord and Tenant* § 577 (1970). Although partial constructive eviction avoids the objectionable abandonment requirement, the remedy does not change the inequitable balance of landlord and tenant rights and obligations.

economic and social problems of the landlord.[26] They further argue that utilization of rent alteration will increase the very problems which these remedies are intended to cure by accelerating abandonment in low-income neighborhoods.

While many jurisdictions have refused to modify the traditional distribution of rights and obligations, courts in some states, and legislatures in others, have become more sensitive to the tenant's impotence at common law. Although there is some overlap in their concerns, legislatures have acted to improve or maintain housing conditions, while alternatively the courts have tended to provide monetary compensation. The following discussion will examine the different considerations and legal justifications emphasized by each.

A. *Rent Alterations to Improve or Maintain Housing Conditions — The Legislative Approach*

The legislative approach is characterized by an increase in the tenant's economic power. Statutes in various states increase tenant bargaining power by allowing for total or partial rent suspension, rent escrows, or by provisions that encourage tenant organization.[27] The most severe approach is total suspension of rental payments to the landlord to coerce him into making repairs required by the local housing code. Under laws adopting this approach,[28] the landlord's right to receive rent is suspended, and rental payments are lost, until the required work is completed.

Those favoring the total suspension remedy insist it will improve the

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26. *See* Note, *Rent Withholding Won't Work: The Need for a Realistic Rehabilitation Policy*, 7 LOYOLA U.L. REV. (L.A.) 66 (1974) [hereinafter cited as Note, *Rent Withholding Won't Work*]. This commentator presents an interesting economic account of the landlord's dilemma with regard to rent alteration in the low-income housing market.

27. *See, e.g.*, CONN. GEN. STAT. REV. §§ 19-347 (a)-(h) (1975); ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1976); IND. ANN. STAT. § 48-6144 (Burns Supp. 1974); ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 111, §§ 127 (A)-(H) (1975); *id.* ch. 239, § 8A (1974), *as amended*, (Supp. 1974); MICH. STAT. ANN. §§ 5.2891 (10)-(17) (1969); MO. REV. STAT. §§ 441.570-.630 (1969); N.J. STAT. ANN. §§ 2A:42-74 to-84 (Supp. 1975); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974); N.Y. REAL PROP. ACTIONS §§ 755, 769-82 (McKinney Supp. 1975); N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966); OHIO REV. CODE ANN. §§ 5321.01-.19 (Supp. 1974); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975); R. I. GEN. LAWS ANN. § 45-24.2-11 (1970); WASH. REV. CODE. ANN. § 59.18.100 (Supp. 1974).

28. MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974); N.Y. SOC. WELFARE LAW § 143-b(6) (McKinney 1966) (welfare agency has discretion to make payment of suspended rents after violations are corrected).

overall availability of decent housing, for "[i]f the buildings are properly maintained — as they presumably would be after the [rent-withholding] statute was passed — they should necessarily last longer, and fewer units would have to be removed from the housing market each year."[29] This argument assumes that the landlord has sufficient funds and incentive to make the initial repairs. As a practical matter, however, the landlord has an alternative to making the required repairs — he can abandon the premises.

In choosing whether to repair or abandon the landlord must consider whether further investment in the dwelling will be more lucrative than abandonment.[30] His decisions will be influenced by: the age and state of deterioration of the structure; the general character of the neighborhood; his own financial capabilities; the cost of maintenance, including taxes, mortgage and insurance rates; operational costs; the degree of social stigma attached to owning slum properties; and the degree of risk that he is either willing or able to undertake.[31] Attempts to assess the relative import of these operative factors have had little success.[32] Consequently, there is considerable disagreement regarding the impact of total rent suspension on the landlord's decision to abandon.[33]

Presently, only a few states have enacted statutes that permit total rent

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29. Note, *Rent Withholding for Minnesota: A Proposal*, 55 MINN. L. REV. 82, 106 (1970).

30. Comment, *Housing Market Operations and the Pennsylvania Rent Withholding Act — An Economic Analysis*, 17 VILL. L. REV. 886, 925 (1972).

31. *Id.*

32. *See* G. STERNLIEB, THE TENEMENT LANDLORD 2 (1966); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 YALE L.J. 1093 (1971); Comment, *Housing Market Operations, supra* note 30, at 895; Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368, 1374 (1968).

33. *See* Moscowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1503 (1974) [hereinafter cited as Moscowitz]. Nevertheless, critics still contend that rent suspension will increase abandonment. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972) (landlord claimed rent alteration would "wreck our way of life"); Note, *Rent Withholding Won't Work, supra* note 26, at 86-87 (increase in abandonment following adoption of a rent escrow program in Connecticut caused that state to terminate program); Report of the Comm. on Leases, Section on Real Property, Probate and Trust Law, American Bar Assoc., *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP. PROB. & TR. J. 550, 588 (1971); Comment, *Housing Market Operations, supra* note 30.

Even if rent suspension does not cause abandonment, it is questionable whether such remedies will bring about the desired rehabilitation of low-income housing. One estimate is that complete rehabilitation will average $9,000 for each typical low-income unit. Clearly the rental generated by such units does not produce revenues sufficient to make such an extensive investment a worthwhile undertaking for the owner. PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 101 (1968).

suspension.[34] Under Massachusetts law,[35] a state which has adopted such a law, the withholding period begins after a landlord is notified that an inspection has shown the premises to be below the prescribed standard of livability.[36] The landlord loses all rights to rent until the premises are restored. By comparison, the New York statute,[37] recognizing the severity of rent suspension to the landlord, requires that a "rent impairing violation" be on record with the housing department for six months before sanctions may be imposed.[38] After that time a tenant has no obligation to pay rent until the violation is corrected. Thus, the New York statute imposes a *threat* of economic reprisals instead of immediate suspension of rent.[39] The six month delay gives the landlord time to marshall his funds from other properties or arrange for outside financing to pay for needed repairs.

Another variation of this approach provides for rent suspension by welfare recipients only.[40] These selective rent suspension statutes effect large numbers of low-income tenants who are most susceptible to the tactics of "milking landlords."[41] Because the housing shortage and the cost of moving severely limit the welfare recipient's ability to relocate, tenant advocates argue that welfare tenants must be given maximum power to force the landlord to repair their present dwelling. One negative consequence of selective rent suspension may be the landlords' refusal to rent to welfare recipients.[42] Further, like other rent suspension

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34. *See* note 27 *supra.*

35. MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended,* (Supp. 1974).

36. The standard of livability under Massachusetts law is defined as "the standards of fitness for human habitation established under the state sanitary code or any ordinance, or by-law, rule or regulation . . . [which] may endanger or materially impair the health or safety of persons occupying the premises." *Id.*

37. N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

38. The statute requires that a list of "rent impairing violations" be promulgated by the housing department.

39. One might criticize these variations for disregarding the often desperate situation of the tenant who must wait six months to get relief. On the other hand, advocates of this law could argue that if the threat is successful, a landlord will make repairs prior to the period when rent suspension begins.

40. N.Y. SOC. WELFARE LAW § 143-6 (McKinney 1966). *See* ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1976).

41. *Cf.* Note, *Tenant Unions, supra* note 32. A "milking landlord" has been defined as one who makes a conscious decision to collect rents and allow the building to deteriorate rather than make a smaller profit and make repairs on an ongoing basis.

42. Note, *Rent Withholding and the Improvement of Substandard Housing,* 53 CALIF. L. REV. 304, 324 n.151 (1965); Comment, *Rent Withholding: A New Approach to*

statutes, no funds are made available for repair under this remedy.[43]

A common alternative to rent suspension remedies utilizes the escrow device. The escrow remedies are based on the belief that needed repairs can best be accomplished if rental payments are collected by courts or municipal agencies in some form of rent escrow account.[44] Unlike total rent suspension, rental payments are not forfeited under most variants of the escrow approach. For example, some statutes require the tenant to pay all his rent into an escrow account that will be released to the landlord after the required repairs have been made.[45] Tenants' rights advocates argue that such statutes do not expedite repairs because the landlord knows that the rent withheld will not be forfeited and thus he is under no economic pressure to make the repairs.[46] The Pennsylvania legislature responded to this problem by establishing a six month deadline for the completion of repairs.[47] If at the end of that period repairs have not been *completed,* the escrow funds are returned to tenant depositors. This six month period provides greater economic pressure than the mere threat raised by the New York statute,[48] but is not as severe on the landlord as the total suspension permitted in Massachusetts.

From the landlord's perspective, statutes that permit rental payments to be impounded by an escrow agent are too severe. Sources of funds to maintain, operate and repair low-income dwellings frequently are not available, and many landlords owning "marginally" profitable

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Landlord-Tenant Problems, 2 LOYOLA U.L. REV. (L.A.) 105, 110 (1969) [hereinafter cited as Comment, *Rent Withholding: A New Approach*].

43. *See* Schorr, *Only As Much As the Rents Will Bear,* 24 J. HOUSING 33, 36 (1967):

> Withholding the rents of welfare tenants and reducing the rents for others may serve as effective measures against the worst slum landlords, but this won't provide funds for needed repairs. What sense is there to withholding or reducing these funds from a court-appointed administrator who is mandated to use the rent monies to make repairs? The effects of these Alice-in-Wonderland Policies simply increase the discomfort of the tenants — the very people who are supposed to benefit from these actions.

44. *E.g.,* King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); PA STAT. ANN. tit. 35, § 1700-1 (Supp. 1975); R. I. GEN. LAWS ANN. § 45-24.2-11 (1971).

45. *E.g.,* N.Y. REAL PROP. ACTIONS § 776 (Supp. 1975); R. I. GEN. LAWS ANN. § 45-24.2-11 (1971); *cf.* MASS. GEN. LAWS ANN. ch. 111, § 127(F) (1975); MO. REV. STAT. § 441.570 (1969).

46. Note, *Rent Withholding for Minnesota, supra* note 29, at 109.

47. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975). *See also* ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1976). Under this statute if repairs are made within 90 days all withheld rents are returned to the landlord. After 90 days the welfare agency assesses a 20% "administrative penalty" for each subsequent 30 day period.

48. N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

buildings cannot afford total rent suspension for any period of time.[49] Critics of the Pennsylvania solution also complain that laws which require *full* compliance prior to release of escrow funds have led to unfair results for landlords who have made good faith efforts to repair.[50]

In light of such criticisms, it is not surprising that the escrow remedy most frequently adopted provides for the forced management of rental payments by the escrow agent. Laws of this type permit the escrow agent to release funds to the landlord so that he can make the necessary repairs, or to reimburse him for repairs already completed.[51] A few laws, particularly sensitive to the possibility of abandonment by landlords, also permit the release of funds for general operating expenses.[52] Other statutes permit the escrow agent to order that the repairs be made, or to contract for repairs using escrow funds when the landlord is uncooperative.[53]

A third legislative approach encourages the use of rent alteration as a tool for organized tenant associations. The presumption behind such statutes is that tenants will have the incentive and the ability to take concerted action to force the landlord into making needed repairs.[54] New York City's Spiegel Law[55] adopted this theory, sanctioning tenant rent strikes. Although not yet enacted in any state, proposals exist for Tenant Union Acts that empower legally recognized tenant groups to use various legal techniques, including rent withholding, to force major repairs. [56]

Several justifications are proposed in support of organized tenant activity. A tenant union armed with the legal right to withhold rent is in a bargaining position far superior to that of the lone tenant acting

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49. *Cf.* STERNLIEB, *supra* note 32, at 122.

50. *Cf.* Klein v. Allegheny County Health Dep't, 441 Pa. 1, 269 A.2d 647 (1970) (landlord who had invested $1700 for repairs was ultimately denied any portion of rents collected for a six month period where repairs were not completed in that time).

51. *See* note 44 *supra.*

52. OHIO REV. CODE ANN. § 5321.10 (Page Supp. 1974); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

53. *See* MICH. STAT. ANN. § 5.2891(14) (1969); N.J. STAT. ANN. § 2A:42-92 (Supp. 1975).

54. *See* F. Grad, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 145 (prepared for the Nat'l Comm'n on Urban Problems 1968); Moskowitz, *The Model Landlord-Tenant Code — An Unacceptable Compromise*, 3 URBAN LAW. 597, 599 (1971).

55. N.Y. REAL PROP. ACTIONS §§ 769-82 (McKinney Supp. 1975).

56. *See* Moscowitz and Honigsberg, *The Tenant Union-Landlord Relations Act: A Proposal*, 58 GEO. L.J. 1013 (1970).

merely on his sense of outrage or equity.[57] Some postulate that organized tenant groups will be able to force needed repairs and maintenance at the landlord's expense, preventing unreasonable rent increases that often follow individual tenant action.[58] In addition, tenant organizations are more likely to pursue tenant grievances throughout an entire neighborhood.[59] Finally, if retroactive rent abatement is included among the organized tenant union's bargaining tools,[60] they may be granted legal title to a building to make the needed repairs.[61] Nevertheless, organized tenant activity is not widespread and some critics call it "the most important single threat to the rental housing market today."[62]

B. *Compensatory Remedies — The Judicial Approach*

The courts were reluctant for many years to tamper with the tenant's rent obligation in the absence of a statutory or constitutional mandate.[63] Nevertheless, a number of courts have allowed the tenant to assert

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57. *Cf.* Note, *Tenant Unions: Their Law and Operation in the State and Nation*, 23 U. FLA. L. REV. 79, 88-92 (1970); Note, *Tenant Unions*, *supra* note 32, at 1083.

58. It has been suggested that while sporadic rent withholding may bring about sporadic repairs, it also permits rent increases. Where repairs are widespread the existing rental market in low-income neighborhoods will not support wholesale rent increases. *See* Ackerman, *supra* note 32, at 1096-97; Moscowitz, *supra* note 33, at 1504.

59. Ackerman, *supra* note 32, at 1196.

60. *See* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

61. Blumberg & Robbins, *Retroactive Rent Abatement: A Landmark Tenant Remedy*, 7 CLEARINGHOUSE REV. 323 (1973).

62. Note, *Tenant Unions: Their Law and Operation in the State and Nation*, *supra* note 57, at 111, *quoting* Straus, *Tenant Unions: Special Privilege Outside the Law*, 32 J. PROPERTY MANAGEMENT 129, 131 (1967).

63. Changes in the landlord-tenant relationship mean changing long standing common law doctrines. These doctrines hinge on the statute defining the relationship of the parties. The status of the legal relationship is normally a legislative determination and courts, adhering to the principles of stare decisis and legislative discretion, are reluctant to change them without legislative guidance. This guidance may be from a relatively small change in one incident of the relationship.

> The alteration of some of [the incidents of the landlord-tenant relationship possess] no importance beyond the change itself; the alteration of others, however, may call for a radical revision of the privileges or disabilities that have generally been attached to a particular status. The common-law incidents of status . . . must then give way before the new aims deducible from such a basic alteration.
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> Changes of this nature are commonly the product of legislation. The statutes that express them rarely directly make or alter a status as such; nor do the statutes often see the seamlessness of the pattern that they seek to change. The task of modifying the existing body of the law to fit the structural changes must of necessity be left to the courts with the hope that given an end they will mould substantive doctrine to make it effective.

defenses and to invoke remedies based on a contract instead of a conveyance theory of the landlord-tenant relationship.[64] The contract theory was first applied in conjunction with the enforcement of local housing code requirements. Courts view the housing codes as statutory obligations on the landlord to rent safe, clean and sanitary dwelling units. Leases which violate these laws may be deemed illegal contracts. This theory was first applied to residential property in *Brown v. Southall Realty Co.*,[65] where the court held that when a landlord leased his premises without first abating known code violations which rendered the premises uninhabitable, the lease was void.[66] Being void, neither party could acquire any rights under the lease and therefore the tenant had no obligation to continue to pay rent once she had abandoned.[67]

While the *Brown* holding provides a good defense to an action for rent, the protection it provides a low-income tenant is severely limited.

Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 222-23 (1934).

The United States Supreme Court determined there is no constitutional mandate to equalize landlord-tenant obligations. In rejection of the concept of rent withholding as a constitutional right the Court said:

> [T]he 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.

Lindsey v. Normet, 405 U.S. 56, 74 (1972).

64. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 624, 517 P.2d 1168, 1172-73, 111 Cal. Rptr. 704, 708-09 (1974); Hinson v. Delis, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972); Lemle v. Breeden, 51 Hawaii 426, 433, 462 P.2d 470, 474 (1969); Steele v. Latimer, 214 Kan. 329, ___, 521 P.2d 304, 308 (1974); Berzito v. Gambino, 63 N.J. 460, 468-69, 308 A.2d 17, 21 (1973); Marini v. Ireland, 56 N.J. 130, 143, 265 A.2d 526, 533 (1970); Foisy v. Wyman, 83 Wash. 2d 22, 27-28, 515 P.2d 160, 164 (1973).

65. 237 A.2d 834 (D.C. Ct. App. 1968). The illegal contract theory was previously applied to commercial property. Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130 (1913); Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960). *See also* Longenecker v. Hardin, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970); Glyco v. Schultz, 35 Ohio Misc. 25, 289 N.E.2d 919, 62 Ohio Op. 2d 459 (Sylvania, Ohio Mun. Ct. 1972). *Contra*, Riley v. Nelson, 256 S.C. 545, 183 S.E.2d 328 (1971).

66. 237 A.2d at 836-37.

67. *Id.* This case can be cited as an important step toward the tenant's right to habitable premises. Under common law constructive eviction a tenant had no right to abandon the premises and suspend rental payments because of a condition existing at the inception of the lease. The tenant was bound under the doctrine of caveat emptor. In *Brown* the tenant's right to abandon was upheld because the condition existed at the inception of the lease.

One shortcoming of the illegal contract theory is that the violation must exist when the lease is executed. A tenant relying on the *Brown* holding could be evicted for improperly withholding his rent if the violations occurred after the lease was signed.[68] In addition, if the landlord has no knowledge of a code violation at the time he leases the premises, the *Brown* defense does not apply.[69] Another drawback for the tenant is that once a lease is declared void, his interest becomes a tenancy at will,[70] and he may then be evicted upon proper notice.[71] Thus the illegal contract theory, by destroying the rights of both landlord and tenant under the lease, may have undesirable results for a tenant wishing to remain in possession. This result can be avoided in those jurisdictions that adopt the theory that a warranty of habitability is incorporated into every lease.

By treating the lease as a contract, some courts have imposed new obligations, including a warranty of habitability on the landlord.[72] Under a warranty theory the landlord's obligations are no longer considered independent of the tenant's duty to pay rent. If the landlord fails to provide or maintain a habitable dwelling, the court may alter the tenant's duty without voiding the lease.[73] Courts have justified

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68. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968), *rev'd sub nom.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The reversal of the *Saunders* decision, however, does not correct the shortcoming of the illegal contract theory. A violation discovered after the commencement of the lease does not void the lease. On appeal the tenants prevailed because the *Javins* court rejected the illegal contract theory and applied a warranty of habitability.

69. *Cf.* 237 A.2d at 836. In *Brown* the landlord was on notice from the District of Columbia Housing Department that the premises violated the housing code. Several years later another court in King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973), did away with the knowledge requirement. In doing away with the knowledge requirement the *King* court applied a widely accepted contract principle to landlord-tenant relations, namely that where parties who are charged with knowledge of the law undertake to enter into a contract in violation thereof, they will be left in the position in which they put themselves. Hall v. Bucher, 227 S.W.2d 96, 98 (Mo. App. 1950). This rule against enforcing illegal contracts is applied to protect the public and not necessarily for the benefit of the parties.

70. King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973).

71. In most cases proper notice is a period of time equal to that of rental payments.

72. With new obligations imposed on the landlords one of the restrictive elements of constructive eviction is eliminated. Where the landlord becomes obligated to make repairs and maintain the premises, the tenant's right to use constructive eviction may become more practical. Under traditional notions of constructive eviction, the tenant must abandon. If courts are willing to adopt a partial constructive eviction theory, however, tenants could seek relief on this basis.

73. Moscowitz points out this defense is particularly suited to the landlord-tenant field. He notes the advantages of this development.

> Despite the similarity between the results obtained through use of the illegal

imposing these obligations in two ways. First, the leasing of the dwelling unit is viewed as a transfer of a commodity. The landlord, as vendor of a commodity, is required to warrant its habitability.[74] Second, to enforce codes and statutes that mandate a minimum quality of housing, courts have held that the obligation to maintain and repair a dwelling must be imposed on the landlord. Following the lead of most modern statutes,[75] some courts have held this obligation to be a nonwaivable provision of every residential lease.[76]

Rent alteration remedies are a natural consequence of a landlord-tenant relationship based on contract rights and obligations.[77] These

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contract theory and those achieved by using the implied warranty doctrine, there are reasons why implied warranty should nonetheless be preferred. The development of the law concerning tenant's rights of habitable premises has been confused and perhaps retarded by courts' attempts to apply various legal theories not specially suited to the problem. Since the implied warranty theory has been accepted, however, the courts have been able to put aside as judicial fictions such theories as constructive eviction and partial actual eviction for they are unnecessary when the implied warranty doctrine is available. Because use of the illegal contract theory may cause similar problems, without any apparent offsetting benefits, it too should be put aside, making way for the development of a doctrine whose parameters are difficult enough to set without the added complexities caused by a competing legal theory.

Moscowitz, *supra* note 33, at 1454.

74. Early warranties to protect consumers of food were built on various legal fictions. *See* Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 152-55 (1958) (author found twenty-nine fictions by which the court found a manufacturer of food liable to the consumer). By 1963, however, the warranty had been developed and was applied not as a part of any contract but as a matter of public policy. *See* W. PROSSER, TORTS § 97, at 644-55 & nn.32-37 (4th ed. 1971) (warranty has been applied to consumer products including food, cosmetics, automobiles, tires, water heaters, etc.). Today most states have adopted the Uniform Commercial Code which requires a warranty of fitness be part of all contracts for goods bought and sold. UNIFORM COMMERCIAL CODE § 2-315.

75. *See, e.g.*, MO. REV. STAT. § 441.500 (1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1974). *But see* CONN. GEN. STAT. REV. § 47-24 (1975); MONT. REV. CODES ANN. § 42-201 (1961); N.D. CENT. CODE § 47-16-12, -13 (1960); S.D. COMP. LAWS ANN. §§ 43-32-8 to -9 (1967). *See also* [1971-72] S.D. ATT'Y GEN. REP. OP. No. 71-27, at 107.

76. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). There is ample precedent that requires certain provisions be unwaivable for public policy reasons. The *Javins* court cited the industrial safety statutes for precedent. *Id.* at 1082 n.58; *cf.* W. PROSSER, TORTS § 80, at 530-32 (4th ed. 1971) (workmen's compensation statutes); Friedman, *The Usury Laws of Wisconsin: A Study in Legal and Social History*, 1963 WIS. L. REV. 515 (usury law another example of a restrictive covenant imposed on contracting parties for public policy reasons). *See generally* Comment, *Rent Withholding and the Improvement of Substandard Housing*, *supra* note 42, at 312; Comment, *Rent Withholding: A New Approach*, *supra* note 42, at 110; 10 J. FAMILY LAW 481, 493 (1971).

77. Explicit judicial language exists that appears to extend contractual remedies in the landlord-tenant context to include the remedy of specific performance, but no court has as

remedies generally have been used to compensate the tenant for the landlord's breach of an obligation to repair a defective dwelling, rather than to coerce the landlord to make repairs. Although various mechanisms have been adopted,[78] the remedy generally ordered by the courts[79] is a reduction in the tenant's rent proportionate to the diminished value of the premises due to its substandard condition. The diminution of value is simply the traditional measure of damages awarded for any breach of a warranty.[80]

Tenants' rights advocates complain that a diminution of value remedy does not do enough to bring about needed repairs. For example, in states where the diminished rent is to be paid directly to the landlord, these advocates complain that there is insufficient pressure put on the landlord, thereby creating a "freeze for free."[81] One solution is to require tenants to pay their diminished rent into an escrow account.[82] Another solution is to permit the tenant to make the repairs and deduct the entire cost from his future rents.[83]

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yet ordered a landlord to make repairs under this remedy. Javins v. First Nat'l Realty, Corp., 428 F.2d 1071, 1082 n.61 (D.C. Cir.) *cert. denied*, 400 U.S. 925 (1970); *accord*, Robinson v. Diamond Housing Corp., 463 F.2d 853, 869 (D.C. Cir. 1972).

78. Diminished rent may be paid to the landlord, WASH. REV. CODE ANN. § 59.18.110 (Supp. 1974), paid into an escrow account, King v. Moorehead, 495 S.W.2d 65, 77 (Mo. App. 1973); N.J. STAT. ANN. § 2A:42-92 (Supp. 1975). The remedy may be imposed by a court, King v. Moorehead, *supra*, or by an arbitrator, WASH. REV. CODE ANN. § 59.18.110 (Supp. 1974).

79. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Kline v. Burns, 111 N.H. 87, 93-94, 276 A.2d 248, 252 (1971). For a discussion on the various ways "diminished rent" is calculated, see Moscowitz, *supra* note 33, at 1464-73; 84 HARV. L. REV. 729, 736 (1971).

Although diminution of value is the usual remedy allowed where a warranty of habitability exists, there have been variations. One court permitted the tenant to withhold the entire rent. Bonner v. Beechem, 2 C.C.H. POV. L. REP. § 11,098 (Colo. 1970) (court found that a substantial violation of the housing code revoked all consideration). Another court held that breach of the warranty entitles the tenant to a retroactive right to all rent paid above the diminished value since the defect occurred. Berzito v. Gambino, 63 N.J. 460, 469-70, 308 A.2d 17, 22 (1973).

80. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACT § 222, at 354 (1970).

81. 43 U. CINN. L. REV. 175, 180 & n.31 (1974).

82. *E.g.*, N.J. STAT. ANN. § 2A:42-92 (Supp. 1975); *see* King v. Moorehead, 495 S.W.2d 65, 77 (Mo. App. 1973):

> This procedure assu[r]es [*sic*] the landlord 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 [*sic*], repairs at the earliest time.

83. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). The use of repair and deduct is not unique by any means. This remedy has been adopted by several legislatures. Typically this

By applying the warranty of habitability theory courts are able to make significant adjustments in the landlord-tenant relationship. The parties' bargaining positions are more evenly balanced because these nonwaivable obligations continue beyond the initial leasing of the premises.[84] The tenant who desires to leave the premises has greater freedom to void the lease, but the tenant who wishes to remain may do so.[85] Further, although the economic severity of the sanctions on the landlord are not as great as certain legislative remedies, tenants may find the judicial remedies easier to invoke.[86]

Under the warranty doctrine the landlord is no longer allowed to leave the tenant to fend for himself. His obligations are mandatory, continuous and affect the essential elements of a safe and healthful environment. Landlords who took advantage of their dominant position under old common law relations will surely be disturbed by

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remedy is limited to minor repairs because tenants are statutorily limited in the amount of rent they can use for repairs. Generally tenants may deduct only one month's rent during a twelve month period. *See, e.g.*, CAL. CIV. CODE ANN. § 1942 (West 1972); MONT. REV. CODES ANN. § 42-202 (1961); WASH. REV. CODE ANN. § 59.18.100(2) (Supp. 1974).

The *Marini* case is unusual because no restrictions in time or dollar amount were placed on the tenant's right to make repairs. Landlords are quick to point out the dangers of abuse inherent in the remedy. Irresponsible tenants could spend excessive amounts of rent on needless repairs or pay excessive amounts for the work actually done. Tenants favor this type of remedy for the simplicity it offers in getting relief. Once a landlord has a reasonable time to make repairs following reasonable notice, the tenant is free to act to help himself. *Cf., e.g.*, Shanahan v. Collins, ___, Colo. ___, 539 P.2d 1261 (1975).

84. *See* Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973) (warranty of habitability protects tenants against both latent and patent defects); Note, *Rent Withholding Won't Work*, *supra* note 26, at 73 (lease does not terminate when the warranty of habitability is raised). *But see* Moscowitz, *supra* note 33, at 1450, noting that some courts might wish to limit the scope of the doctrine where premises are uninhabitable at the inception of the lease so that scheming tenants could not set up a landlord for rent withholding.

85. *See* Boston Housing Authority v. Hemmingway, 293 N.E.2d 831 (Mass. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Moscowitz, *supra* note 33, at 1188-90.

86. The warranty of habitability is a good defense to an action for possession for unpaid rent. Javins v. First Nat'l Realty Corp., 428 A.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972). A tenant who feels a court will find a material breach may choose to withhold rent and force the landlord to go to court to settle the dispute. The tenant may be required to pay withheld rent into court, but if the tenant is successful he will avoid eviction.

Although the *Javins* court held the landlord's breach raised a defense against eviction, a Massachusetts court held that where the legislature had provided a defense against eviction when the landlord failed to maintain the premises, a tenant who withheld rent but failed to follow the prescribed procedures had no defense against eviction based on a warranty theory. The court did allow the tenants a set-off against the landlord's claim for rent. Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973).

these changes. Whether the loss of this position will cause abandonment is a valid consideration. These changes, however, have not been accepted without some challenges to their validity.

C. *Legal Challenges to Rent Alteration Remedies*

1. The "Taking Issue" and Rent Alteration Remedies

Generally, rent alteration statutes are enacted under the police power.[87] The broad sweep of many of these legislative actions has led to constitutional challenges by landlords based on allegations of improper "taking" in violation of due process. In each instance the courts have upheld the statutes. For example, the Pennsylvania rent withholding statute[88] was challenged in *DePaul v. Kauffman*.[89] The court found that no unconstitutional taking had occurred, since the state's rent alteration scheme permitted the landlord to recover all rents due if repairs were made within a reasonable time.[90] The landlord's allegation that the Act was oppressive and unreasonable because a tenant could live for free was dismissed because under Pennsylvania law a tenant must pay rent into an escrow account to remain in possession.[91]

The provisions of the New York statute,[92] by contrast, do not require the welfare tenant to pay rent into an escrow account. Instead, the welfare department itself is empowered to terminate payments to landlords who do not maintain their premises at a prescribed level of fitness and habitability. Nevertheless, the court in *Milchman v. Rivera*[93] rejected the unconstitutional taking challenge.[94] The "taking" in the

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87. *See, e.g.*, Edgar A. Levy Leasing Co. v. Siegal, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967); Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S.2d 859 (N.Y. City Civ. Ct. 1963); DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971).

88. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1971).

89. 441 Pa. 386, 272 A.2d 500 (1971).

90. *Id.* at 395-99, 272 A.2d at 505-07.

91. *Id.* at 395, 272 A.2d at 505.

92. N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966).

93. 39 Misc. 2d 347, 240 N.Y.S.2d 859 (N.Y. City Civ. Ct. 1963).

94. Rent withholding laws that are solely for the benefit of welfare recipients have also encountered challenges based upon equal protection grounds. The equal protection challenge was firmly rejected in Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967):

> One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be

New York court's view was analogous to the " 'abatement of a nuisance or to the establishment of building restrictions, and . . . within the police power,' "[95] since the law applied only to dangerous and unsafe dwellings.

2. Landlord Challenges to "Triggering Standards" as Vague and Unreasonable

Rent alteration remedies are triggered when the condition of a dwelling falls below a prescribed level of livability. Various standards have been adopted to define this level with some degree of precision. None have been altogether successful and some have been challenged as vague and unreasonable.

One method is to list within the statute specific adverse conditions that justify rent alteration by threatening an immediate danger to the tenant's health and safety.[96] While specific listings lessen the need for subjective judgments, they cannot possibly cover all the conditions which may be considered unlivable. But as the list expands, so does the possibility of unreasonable interference with a landlord's right to profit from his premises.[97]

Another method derives standards from local housing codes.[98] The rent alteration remedy is triggered when a "substantial housing code violation" is found to exist. The need to determine "substantiality"

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provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis.

Id. at 491-92, 227 N.E.2d at 826-27, 281 N.Y.S.2d at 5, *quoting* People *ex rel.* Durham Realty Corp. v. LaFetra, 230 N.Y. 429, 130 N.E. 601 (1921). *But see id.* at 494, 227 N.E.2d at 828, 281 N.Y.S.2d at 7. The dissent could find no rational basis for welfare tenants as a separate class under the withholding statute. Neither could the dissent find a reasonable relation between the statute and its aid in the elimination of slums for which it was adopted. The dissent would require that rental payments be channeled into repairing the premises.

95. Milchman v. Rivera, 39 Misc. 2d 347, 357, 240 N.Y.S.2d 859, 870 (N.Y. City Civ. Ct. 1963), *quoting* People *ex rel.* Durham Realty Corp. v. LaFetra, 230 N.Y. 429, 442, 130 N.E. 601, 606 (1921).

96. The specific conditions generally include failure to provide heat, running water, light, adequate sewage facilities, or protection from rodent infestation. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971); N.J. STAT. ANN. § 2A:42-88 (Supp. 1975).

97. *See* note 156 *infra*.

98. *See, e.g.*, MICH. STAT. ANN. §§ 5.2949(1)-(31) (Supp. 1975); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

results in a lack of uniformity whether made by health or housing department officers[99] or by the tenant himself.[100] Housing codes generally list numerous kinds and types of conditions that violate prescribed standards. They do not, however, indicate how many or what combination of violations may be deemed "substantial."[101] In *Javins v. First National Realty Corp.*[102] the court took the view that more than "one or two minor violations" are necessary to withhold rent,[103] but gave no indication as to how many or what type of violations would be sufficient. Statutes have variously defined substantial violations as conditions sufficient to constitute a nuisance[104] or merely as a condition deemed dangerous to the tenant's health and safety by a local official.[105] The use of housing code standards also invites landlord challenges to the reasonableness of the code itself. For example, in *City of St. Louis v. Brune*[106] the court found that requiring a landlord to furnish either a shower or a bath for each dwelling unit regardless of the property involved was unreasonable as applied;[107] the court held that unreasonable standards violate due process because they would result in an improper taking.[108]

A common standard applied in lieu of the substantial code violation test depends upon finding a defect which renders the premises "unfit for human habitation."[109] Since a literal interpretation would necessitate

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99. *See* MICH. STAT. ANN. § 5.2891(3) (1969).

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

101. *See* 10 J. FAMILY L. 481, 489 (1971).

102. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

103. The appellants in *Javins* alleged 1500 housing code violations in one building. *Id.* at 1073. The court did not describe any specifically but said only, "[O]ne or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent." *Id.* at 1082 n.63.

104. *E.g.*, MO. REV. STAT. § 441.500 (1969), which defines nuisance as, "a violation of provisions of the housing code applying to the maintenance of the building or dwelling unit which if not promptly corrected will constitute a fire hazard or serious threat to the life, health or safety of the occupants thereof."

105. *E.g.*, MICH. STAT. ANN. § 5.2891 (1969).

106. 515 S.W.2d 471 (Mo. 1974); *see* 10 URBAN L. ANN. 335 (1975).

107. The buildings in question had no sale or loan value, were 70 years old, and would have cost $7800 per building to repair. 515 S.W.2d at 476.

108. *Id.* at 476-77; *see* 10 URBAN L. ANN. 335, 342 (1975).

109. *E.g.*, Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 843-44 (Mass. 1973); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

that the tenant vacate, the definition must be construed as a matter of degree.[110] The line between a building in major disrepair and one unfit for human habitation, however, is difficult to draw. Numerous tests have been devised to define the "unfit" standard. Pennsylvania law, for example, requires a determination by a housing official that a building is unfit in light of the applicable housing code.[111] A defect that affects a "vital facility" rather than a "mere amenity" has been used as a test to determine a dwelling's habitability.[112] Another test defines "unfit" as a condition that, in the eyes of a reasonable person, truly renders the premises uninhabitable.[113] Although none of these tests provide the degree of precision desired, the reasonable man test gives the tenant's good faith determination more weight in the court's deliberations than the other tests.

A due process challenge was based on the argument that the "unfit" standard of maintenance is too vague to provide sufficient guidelines or notice to landlords required to act. A Pennsylvania court found the "unfit" standard used in that state's law[114] to be adequate;[115] the court did so after taking judicial notice of the definition given the phrase in the Philadelphia Housing Code.[116] The dissent, however, vigorously argued that it was overly vague.[117]

Attempting to avoid the vagueness problems inherent in the standards described above, some jurisdictions have allowed the courts to make ad hoc determinations of whether the existing defects constitute a material

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110. *See* REVISED CODE OF ST. LOUIS §§ 392-010,-.070 (1960) (requiring any premises classified as "unfit for human habitation" to be placarded as unfit and vacated).

111. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

112. Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 482-83, 268 A.2d 556, 559 (Essex County Dist. Ct. 1970). The building in this case was a nine story apartment house. The court found that in such a dwelling elevator service and incinerators were vital facilities, but found that "water leaks" in the magnitude present were merely a deprivation of a desired "amenity." The difficulties of finding uniformity are well illustrated by this case, for one has to wonder what magnitude of water leak is considered unhealthy and at what height elevator service becomes a vital facility.

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

114. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975).

115. DePaul v. Kauffman, 441 Pa. 386, 391-95, 272 A.2d 500, 503-05 (1971).

116. *Id.* at 393, 272 A.2d at 504. Since Pennsylvania law does not require adoption of housing codes and there is no statewide code, the question of specificity might be raised by landlords from other areas.

117. *Id.* at 400, 272 A.2d at 507.

breach of the warranty of habitability.[118] Courts determine violations independent of housing codes or other stated tests.[119] Courts applying this standard generally weigh various factors and make their determination on a case by case basis.[120] These factors include the seriousness of the defect alleged, the length of time it has persisted, whether the landlord received notice of the condition, whether the premises can be made habitable within a reasonable time, and whether the defect was caused by the tenant. Such ad hoc determinations make it impossible, however, for either tenants or landlords to be certain what conditions constitute a material breach of the warranty of habitability.

3. Tenant Challenges to Protective Orders and Prepayment of Rent

A tenant who withholds rent prior to court authorization may be subject to eviction. In some jurisdictions tenants may successfully defeat such action by showing that the landlord has breached the warranty of habitability. In order to protect the landlord from bad faith withholding by the tenant, some jurisdictions require the tenant to deposit rent payments with the court as they become due.[121] Other jurisdictions require the tenant to deposit any rent previously withheld before he may raise any defenses based on the condition of his premises.[122]

The propriety and legality of these protective orders has been challenged. Protective orders have been defended as a necessary protection for the landlord, because tenants may otherwise withhold

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118. For an excellent discussion of the various conditions that constitute a material breach see Moscowitz, *supra* note 33, at 1455-1462.

119. *See* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973). The judicial expansion of housing standards has been criticized and needs support. *See* GRAD, *supra* note 54, at 146 (critical); Moscowitz, *supra* note 33, at 1157-58 (supporting).

The breach of warranty of habitability standard was criticized in the dissenting opinion in Boston Housing Authority v. Hemingway, 293 N.E.2d 831, 834 (Mass. 1973). In light of existing housing codes, the judge disagreed with the majority's requirement that an even higher standard of fitness be applied: "This deliberate creation of a presently undefined, indeterminable and uncharted area of potential rights and liabilities of landlords and tenants can serve only to vex them and to produce litigation otherwise avoidable." *Id.* at 852.

120. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 436 P.2d 470 (1969).

121. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); MO. REV .STAT. § 411.570 (1969).

122. *E.g.*, MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974).

rent for frivolous reasons.[123] Also, a tenant who withholds rent may request a jury trial to hear his defense,[124] and during the prolonged trial period the landlord would get nothing. It is argued this would put the landlord at a severe disadvantage, while rent payment by the tenant is neither unduly heavy nor unexpected.[125] Protective orders, however, are criticized as an unnecessary special privilege for the landlord. Critics claim they are out of line with procedures in other suits. For example, a plaintiff is generally not guaranteed a judgment proof defendant.[126] Also, prepayment of rents allegedly due would be inconsistent with the rights of a low-income tenant who has exercised his right to plead in forma pauperis.[127]

The prepayment of rents allegedly due has been challenged by tenants on due process grounds. A New York court invalidated such a provision on constitutional grounds.[128] Citing *Sniadach v. Family Finance Corp.*[129] as support for its holding, the court said: "By preventing the tenant from asserting the defense until he has deposited the money demanded, the New York Legislature has effectively deprived tenants of the use of their own money for indefinite periods of time without any prior opportunity to be heard."[130] Although courts in other jurisdictions

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123. *See* 84 HARV. L. REV. 729, 738 (1971).

124. Actions for possession were traditionally characterized by summary proceedings. A tenant making a timely request for jury trial may deny a landlord this speedy remedy. Bell v. Tsintolas Realty Co., 430 F.2d 474, 481 (D.C. Cir. 1970).

125. *Id.* at 482; *see* Moscowitz, *supra* note 33, at 1477, nn.145, 146.

126. *See* Bell v. Tsintolas Realty Co., 430 F.2d 474, 479 (D.C. Cir. 1970).

127. *Id.* at 480.

128. Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y. City Civ. Ct. 1971). *But see* Malek v. Cruz, 74 Misc. 2d 448, 454, 345 N.Y.S.2d 367, 373 (N.Y. City Civ. Ct. 1973).

129. 395 U.S. 337 (1969).

130. 65 Misc. 2d at 23, 318 N.Y.S.2d at 20. The court goes on to list three factors which combined to make the protective orders wholly arbitrary and unreasonable. These factors are:

> First, the tenant is required to deposit the very amount claimed by the landlord, without any provision for a hearing to insure that the demand is accurate. . . .[T]he tenant's inability to deposit an exaggerated amount could preclude him from presenting an otherwise conclusive defense.
>
> Second, no time limit is fixed for the landlord to commence proceedings subject to the defense. A landlord may choose to wait many months or indeed years, putting the tenant under the burden of setting aside monthly reserves of money so that he might raise the defense when and if the proceeding were commenced.
>
> . . . [Finally,] the official records of the appropriate agency will establish, at least presumptively, the validity or invalidity of the defense.

Id. at 23-24, 318 N.Y.S.2d at 21.

have not found prepayment unconstitutional, several have required that its use be limited.[131] Prior to a decision on the merits a tenant would have to pay future rents only when the landlord has shown need.[132] Prepayment of back rent would never be required since it "would depart from the protective purpose . . . and would be in the nature of a penalty on the tenant."[133] Another court has suggested that in lieu of depositing money, a tenant should only be required to submit an official record establishing the violation and its duration.[134] As a practical matter protective orders substantially diminish the coercive impact of rent alteration remedies because the tenant loses control of disputed rental payments.[135]

III. Promoting the "Effective Utilization" of Rent Alteration Remedies

The goals of rent alteration will not be achieved if tenants are unable to utilize their new legal remedies or if landlords abandon their rental units when these remedies are used against them. In order to promote "effective utilization"[136] of these remedies courts and legislatures have attempted to balance the interest of landlords and tenants while in various ways acknowledging the limits of legal rent alteration as well as common law remedies.

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131. *See, e.g.*, Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971); Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). *But see* Uniform Residential Landlord Tenant Act § 4.105(a) (permitting the court to order the tenant to pay *all or part* of the rent accrued and thereafter accruing); Moscowitz, *supra* note 33, at 1474-75 n.130.

132. Bell v. Tsintolas Realty Co., 430 F.2d 474, 483-84 (D.C. Cir. 1970). In deciding on need, a court should 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." *Id.* at 484.

133. *Id.* at 483.

134. Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 24, 318 N.Y.S.2d 11, 21 (N.Y. City Civ. Ct. 1971).

135. *See* Moscowitz, *supra* note 33, at 1480 & n. 159 (author discusses landlord-tenant tactics using protective orders).

136. For the purpose of this Note "effective utilization" concerns the ease with which tenants are able to implement the remedies and the willingness of landlords to continue the operation of the rental units in spite of the rent alterations.

Given the economic realities of low-income housing, rent alteration remedies will not increase the supply of housing. Rather, they can at best only help to conserve the existing housing stock. If rent alteration can help slow down the deterioration of existing housing, hopefully other programs will produce the new low-income units needed to meet the demands for decent housing.

To effectively conserve the existing stock, however, rent alteration remedies require the landlord to obtain financing for repairs. If financing is not available or is available only at unacceptable costs, abandonment is inevitable. Yet neighborhood instability, deteriorating conditions, vandalism and limited rental values make financing difficult to obtain. Consequently, selective enforcement should be considered as a practical alternative to the imposition of total rent suspension or limited escrow funding if rent alteration schemes are to succeed.

Moreover, lawmakers ought to realize that remedies providing monetary compensation alone are ineffective. The need for tenant relief arises out of unsafe or unsanitary conditions and more compensation does nothing to lessen the danger. If the compensation is large enough, the tenant can make repairs. But this should not be the tenant's responsibility. Besides, diminution of value remedies are not based on the cost of repairs but on the rental value of the dwelling. It is therefore unlikely that the tenant's award would be sufficient to cover the costs of major repairs.

The impact that rent alteration has had, and will have, on living conditions is not certain. Localities should be urged to study their low-income housing market to discover the potential effects of these remedies. Where the housing market will bear it, rent alterations should be applied with full force to maintain decent conditions. Where, however, rent alterations are causing abandonment, the rent alteration scheme should be modified. Because there are many variations of the rent alteration concept, dissatisfaction with one approach should not require a reinstitution of common law doctrine. Revision and modification of the rent alteration theory to equalize the rights and obligations of landlords and tenants could take many forms. Each state should provide a range of tenant remedies. "Tenants should be able to select the appropriate remedy, and the court should have power to choose the sanction most appropriate under all circumstances to satisfy justifiable tenant demands without imposing undue hardship on the owner, or without imposing upon him impossible-to-fulfill demands

for immediate repairs."[137] Various doctrinal modifications can be used to strike this balance.

Wherever the balance is struck, the tenant should be encouraged to use available remedies. One way to do this is to reduce the need for judicial intervention. Many low-income tenants will be reluctant to initiate court proceedings because of fear, confusion, ignorance or the expense of legal action. Some statutes increase the problem by requiring the tenant to show detailed evidence of his dwelling's condition. The New Jersey statute, for example, requires the tenant to file a petition which includes estimates of the work to be done.[138] A low-income tenant may hesitate to go to court if he is liable for his landlord's attorney's fees, despite his good faith claim.[139] Tenants with extremely tight budgets may be unable to afford the initial expense of filing costs. These considerations have led some states to seek alternatives. The State of Washington has included provisions allowing for arbitration by either the court or an arbitrator in landlord-tenant disputes.[140] Illinois, Massachusetts and New York have eliminated the need for judicial authorization to legally withhold rent.[141] These states rely instead on local housing, health or welfare officials to initiate or authorize alterations.[142]

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137. GRAD, *supra* note 54, at 147.

138. N.J. STAT. ANN. § 2A:42-90(d) (Supp. 1975).

139. *Cf.* ORE. REV. STAT. § 91.755 (1973).

140. WASH. REV. CODE ANN. § 59.18.110 (Supp. 1974).

141. ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd 1968); MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974); N.Y. MULT. DWELL. LAW § 302-a(3)(a) (McKinney 1974).

142. Housing, health and welfare officials have a wide range of roles in the rent alteration process. A court may look for an official report or violations of officially established housing codes as evidence of the dwelling's condition. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); King v. Moorehead, 495 S.W.2d 67 (Mo. App. 1973); Foisy v. Wyman, 83 Wash. 2d 22, 515 P. 2d 160 (1973); Moscowitz, *supra* note 33, at 1462-63 & n.97. Some statutes require an official inspection report certifying that the dwelling is below required standards before alteration is authorized. *E.g.*, MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974); N.Y. MULT. DWELL. LAW § 302-a (McKinney 1974); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975). *See also* Comment, *Rent Withholding: A New Approach*, *supra* note 42 (model statute providing for appeal from the report by either landlord or tenant). In Massachusetts the housing inspector not only inspects, but replaces the court in authorizing withholding. MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974).

Remedies which require intervention by these agencies still have problems. In most major cities these departments are badly understaffed. This results in delays for the tenant in getting initial inspections to start his actions, and delays for the landlord in getting the dwelling recertified as fit to end the alteration. *See* Comment, *Rent Withholding for*

The effectiveness of the tenant's rent alteration remedies will be negligible if the tenant is afraid to use them[143] because a landlord is permitted to evict or take other reprisals in retaliation for the tenant's exercise of his rights. Therefore, deterring retaliatory action is vital to the effective utilization of rent alteration schemes. Most recent statutes prohibit retaliatory eviction.[144] Courts have accepted the defense of retaliation, recognizing that public policy requires that they not be made instruments for punishing tenants who have acted in good faith.[145] In *Robinson v. Diamond Housing Corp.*[146] the court required the landlord to show a "legitimate business purpose" before he could evict his tenant.[147] In defining this standard the court not only required a

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Welfare Recipients: An Empirical Study of the Illinois Statute, 37 U. CHI. L. REV. 798, 835 (1970) (study reporting that it took an average of 35 days to get an inspection); Comment, *Rent Withholding: A New Approach*, *supra* note 42, at 110.

The inspections, reinspections and numerous reports required to be filed result in an enormous amount of red tape, and may substantially lessen the effectiveness of the remedy. *See* Comment, *Rent Withholding for Welfare Recipients*, *supra*, at 835 (study demonstrating that it took nearly 6 months from the initiation of alteration procedures until alteration was authorized). *See also Recent Developments in Illinois Landlord-Tenant Law*, 1972 U. ILL. L.F. 589.

Some areas have experienced a lack of cooperation from officials in implementing statutory remedies. *See* Comment, *The Pennsylvania Project — A Practical Analysis of the Pennsylvania Rent Withholding Act*, 17 VILL. L. REV. 821, 869 (1972), where it is reported that when inspectors certified premises unfit they did not inform the tenants of the availability of rent alteration. The Department also has a policy which prohibits tenants from seeing a list of the violations that the inspector finds. A tenant is told only if the premises are certified "fit" or "unfit." This policy presents serious problems for a tenant wishing to defend an adverse court decision and diminishes his bargaining power with the landlord prior to any suit.

Remedies that depend on withholding by welfare agencies have been criticized for denying the tenant any control over his situation. He is forced to put up with existing conditions until the welfare department acts. *See* Comment, *Rent Withholding: A New Approach*, *supra* note 42; Comment, *Rent Withholding for Welfare Recipients*, *supra*.

143. Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972); Edward v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968); Daniels, *Judicial and Legislative Remedies for Substandard Housings: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L. J. 909, 943 (1971); Moscowitz, *supra* note 33, 1493-94; 84 HARV. L. REV. 729, 737 (1971).

144. *E.g.*, MASS. GEN. LAWS ANN. ch. 239, § 2A (1974) (rebuttable presumption for 6 months); MO. REV. STAT. § 441.620(1) (1969) (no increase in rent, decrease in service, or eviction for 1 year without approval of the court); OHIO REV. CODE ANN. § 5321.02 (Page Supp. 1974); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1975) (no eviction during period of escrow payments).

145. *Cf.* Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968).

146. 463 F.2d 853 (D.C. Cir. 1972).

147. *Id.* at 865.

legitimate purpose, but also a legitimate intent. "In each case the landlord must show that the asserted purpose is not a subterfuge."[148] *Robinson,* by placing the burden of proof on the landlord, relieves the tenant from trying to prove a retaliatory motive.[149]

Retaliatory eviction is actually a misnomer, for a landlord has never had the right to evict a tenant unless that tenant has breached a duty. What modern laws really prohibit is retaliatory termination. Under these laws the landlord can no longer terminate a periodic tenancy (or choose not to renew a long term lease) just by giving notice. He must now prove his reasons for terminating a tenancy when a tenant has exercised his legal rights. In many jurisdictions the restrictions on the landlord's right to terminate extend to raising the rent, diminishing services, or threatening any action for possession.[150]

If restrictions on the landlord's common law rights are too severe the effective utilization of rent alteration remedies may be diminished. If landlords find that they are unable to rid themselves of legitimately undesirable tenants because the burden of proof is too great, they may leave the markets that attract such tenants. Also, if landlords find they are unable to terminate periodic tenancies while the tenant is free to do so, they may make periodic tenancies unavailable to low-income tenants. Recognizing these potentially adverse effects, commentators have suggested other deterrents to retaliatory action. For example, fines could be imposed on landlords found guilty of retaliatory action. Another deterrent may be to prohibit a landlord from reletting premises for some substantial period where he has evicted a tenant for exercising his legal rights.[151]

In order to make the utilization of rent alteration remedies a more flexible process, standards of livability should be unambiguous. Ambiguous standards can cause problems. A tenant who withholds his rent in good faith may be evicted and found liable for double rent.[152] Where tenants are required to initiate action, a reasonable belief that the dwelling falls below livability standards should be an adequate defense

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148. Moscowitz, *supra* note 33, at 1499 n.262 (strength of retaliatory motive must be examined in relation to other motives).

149. *Id.* at 1499.

150. *See* note 144 *supra.*

151. Clough, *Pennsylvania's Rent Withholding Law,* 73 DICK. L. REV. 583, 594 (1969).

152. Double rent would be due because of the rent owed on the vacated premises plus the rent due on the replacement housing.

to eviction proceedings.[153] This should be offset by penalties for a tenant who acts in bad faith. Ambiguities, particularly in situations in which inspection by enforcement agencies is a precondition to rent withholding, prevent uniform application and lead to charges of unfairness and inequality. Where a housing official initiates actions he should be using a flexible housing code. It has been suggested that separate housing codes should apply to existing housing and new housing.[154] Certainty would be promoted if the state legislature or local city department would promulgate as extensive a list as possible of rent impairing violations.[155]

A clear delineation of responsibilities is also important to the landlord.[156] Many landlords operate on a very marginal basis and must be able to budget their expenditures. If they can be certain what defects constitute a breach of their obligations, they will be more likely to make those repairs first. One solution would be to require an owner to repair only those conditions which require a reasonable expense.[157]

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153. *See* Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

154. Note, *Rent Withholding Won't Work*, *supra* note 26, at 88. One way to implement separate housing codes would be to codify the profitability ratios along the lines envisioned in the *Brune* case. *See* note 156 *infra*.

155. *See* Comment, *Rent Withholding: A New Approach*, *supra* note 42, at 113 (model statute).

156. Landlords are also concerned with the conditions that they are required to furnish. Although the uniformity of standards may not be a prime concern, the standards of fitness do determine the expenditure that will be required to bring their premises up to, and maintain them at, rentable condition. This concern was the crucial factor in determining the legality of standards imposed in St. Louis, Missouri.

In City of St. Louis v. Brune, 515 S.W.2d 471 (Mo. 1974), the court recognized that profitability was a valid consideration in determining the reasonableness of certain housing code requirements. The court found that a private hot bath in each unit was not essential to a healthy environment and was an unreasonable requirement where the installation cost effectively destroyed the landlord's ability to make a profit from the building in question. For an American court in the 1970's to find that a private hot bath is not an essential amenity brings into sharp focus the accepted standard of living for low-income tenants. How far courts will allow or must allow profitability to depress the acceptable standard is not at all clear. *See* Mandelker, *Housing Codes, Building Demolitions and Just Compensation: A Rationale for the Exercise of Police Powers Over Slum Housing*, 67 MICH. L. REV. 635 (1969); 10 URBAN L. ANN. 335 (1975).

157. Note, *Rent Withholding Won't Work*, *supra* note 26. The author points out that this system would not sanction unsafe housing if it is incorporated with proper long term rehabilitation programs. This two step approach is aimed at relieving the tenant of any immediate dangers until a more extensive rehabilitation program can be employed. *See also* J. SLAYET & H. LEVIN, NEW APPROACHES TO HOUSING CODE ADMINISTRATION 28 (1969); Mandelker, *The Local Community's Stake in Code Enforcement*, 3 URBAN LAW. 601, 602 (1971).

An element of "good faith" by either landlord or tenant should be made a component of each remedy. New Jersey has incorporated a scheme by which a landlord may avoid rent alteration by demonstrating to the court that he is willing to make repairs promptly.[158] A landlord should be given access to escrow funds for operation costs upon a showing that irreparable loss would otherwise result.[159] Remedies which are denied to tenants who are behind in rent should be made available if a tenant can show good cause for his delinquency.[160] If, however, either party takes action in bad faith, he should be liable for attorney's fees.[161] Finally, the process can be made more viable if public agencies, which play an important part in the procedure, are well funded and well staffed. Private remedies are stymied if individuals are unable to get the cooperation they need from public agencies.

CONCLUSION

The viability of rent alteration remedies to help low-income tenants is uncertain. Despite the uncertainty, low-income tenants who face living conditions which endanger the health and safety of their families will demand effective short-term relief. These demands will be particularly strong in those states where the landlord-tenant relationship is still defined by the old common law. Given the consequences of inaction, these demands cannot be ignored.

In responding to these demands, the numerous rent alteration

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158. N.J. STAT. ANN. § 2A:42-93 (Supp. 1975). Under this scheme a landlord must post a security bond in an amount deemed sufficient by the court to make repairs. If the landlord fails to make repairs this bond is then applied to the correction of the defects in question.

159. King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973). The court supported this idea, saying, "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 landlord before final adjudication when to deny it would result in irreparable loss to him." *Id.* at 77.

160. Some statutes require that the tenant's rent not be in arrears prior to invoking the statutory remedy. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 239, § 8A (1974), *as amended*, (Supp. 1974) (tenant may not be in arrears when the violation occurs, when the inspection is made, when notice of the condition is given to the landlord, and when the tenant stops paying rent); OHIO REV. CODE ANN. § 5321.09(A)(2) (Page Supp. 1974); WASH. REV. CODE ANN. § 59.18.080 (Supp. 1974). These statutes thus provide a complete defense to a landlord whose tenant is not current in his rent. This approach is not unreasonable if applied to a tenant who is more than a month behind in rent or who has a history of late payments. It is not reasonable, however, when applied to a tenant who has fallen behind because his welfare check has been stolen or is late in arriving. Further, a tenant who has no heat should not be without a remedy because he is a few dollars behind in rent.

161. N.Y. MULT. DWELL. LAW § 302-a (3)(e) (McKinney 1974).

alternatives should be considered. Hopefully, this Note will provide some assistance in formulating the appropriate remedies. By enacting rent alteration remedies which strike the right balance between rights and obligations, safeguards and liabilities, and flexibility and certainty, the deterioration of low-income dwellings can be retarded.