

## RENT WITHHOLDING AND THE IMPROVEMENT OF SUBSTANDARD HOUSING

One of the formidable challenges confronting the world today is to house adequately an ever burgeoning human population. The United States has not escaped the problem, and in the midst of an era of great prosperity there exist large groups of Americans who live in dilapidated or otherwise inadequate homes. No particular section of the country has a monopoly on the substandard dwelling, nor is the problem strictly urban or rural in nature.<sup>1</sup> Yet it is in the cities that the problem of overcrowded and run-down housing—of slums—has received the most attention, for it is in the urban slum that the dichotomy between the suburbanite's gracious home and the slum dweller's crowded flat can least be ignored. There the ugliness of slum living intrudes most forcefully upon the affluent American's way of life. It is the urban slum that exacts its high price of existence through disease, crime, broken families, increased municipal expenditures, and decreased tax revenues.<sup>2</sup>

These problems have not arrived unheralded, nor is there a dearth of proposed analyses and solutions to them, yet despite all the attention, and despite the great wealth of the nation, the problems of slums and inadequate housing remain and in some ways are growing more complex. In part this growing complexity is due to the enormity of the task of

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<sup>1</sup> Parenthetically, it might be noted that the percentage of rural housing denominated substandard was far greater than the percentage of urban housing—32.6% as compared with 9.6%. HOUSING AND HOME FINANCE AGENCY, *OUR NONWHITE POPULATION AND ITS HOUSING—CHANGES BETWEEN 1950 AND 1960*, 78-79 (1963) [hereinafter cited as HHFA, *OUR NONWHITE POPULATION*]. "Substandard" housing, as used throughout this Comment and as generally defined by the government, refers to housing that is dilapidated or lacks running hot water, a private flush toilet, or a bath. "Dilapidated" means the structure "does not provide safe and adequate shelter . . . and endangers the health, safety, or well being of its occupants." <sup>2</sup> UNITED STATES BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *CENSUS OF HOUSING: 1960* pt. 1, at XX (1963) [hereinafter cited as *CENSUS OF HOUSING: 1960*].

<sup>2</sup> For examples of the losing ratio of municipal expenditures to revenue in slum areas, see PRESIDENT'S ADVISORY COMM. ON GOVERNMENT HOUSING POLICIES AND PROGRAMS, *RECOMMENDATIONS ON GOVERNMENT HOUSING POLICIES AND PROGRAMS* 151-54 (1953).

The statement that slums produce these problems does not presume to say that bad housing alone creates them; slums are people as well as buildings. However, there appears to be a subtle yet definite causal relationship between overcrowded slum housing and these problems. Rosow, *The Social Effects of the Physical Environment*, 27 J. AM. INST. OF PLANNERS 127 (1961); SCHORR, *SLUMS AND SOCIAL INSECURITY* 7-33 (1963); Wilner & Walkley, *Effects of Housing on Health and Performance*, in *THE URBAN CONDITION* 215 (Duhl ed. 1963). But see FISHER, *TWENTY YEARS OF PUBLIC HOUSING* 62-72 (1959), indicating that it is difficult to isolate deficient housing as a direct cause of the social disorders that characterize slums. The author concludes that this is irrelevant, however, and that the mere existence of housing far below the accepted standards of the majority of people is reason enough for clearing the slums whether or not the housing conditions directly create these problems.

housing nearly two hundred million people, but in part it is also due to the changing character of our cities. As the cities are changing, the basic housing problem<sup>3</sup> takes on new aspects and develops different sub-problems.

During the winter of 1963-64 a new response to the problem of slum housing received wide publicity. This was the use of rent withholding as a means of forcing landlords to make repairs in compliance with the minimum standards established by housing laws. Essentially it has taken two forms. The first type, the true "rent strike," occurs when the tenants in a slum building agree among themselves<sup>4</sup> to refuse to make rent payments unless and until their landlord makes the legally required repairs. The second type of withholding is initiated not by the tenants but by welfare officials who are empowered to withhold rental allotments from public assistance recipients who live in substandard accommodations. This Comment will attempt to analyze the nature, the successes, and the expected future of these two types of rent withholding.

## I

### THE SETTING FOR THE RENT STRIKES

#### *A. The Lack of Adequate Low Rent Housing for Urban Minorities*

The 1960 national census confirmed the continuation of the population movements that have been occurring for several decades: Although the United States is becoming increasingly more urbanized, the central cities<sup>5</sup> are losing many of their residents to the suburbs and smaller

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<sup>3</sup> To the question of what is our "housing problem," a multitude of diverse answers could undoubtedly be obtained. For the purposes of this Comment a broad definition formulated several years ago seems to be adequate: "The housing problem is the problem of enabling the great mass of the people who want to live in decent surroundings and bring up their children under proper conditions to have such opportunities. It is also to a very large extent the problem of preventing other people who either do not care for decent conditions or are unable to achieve them from maintaining conditions which are a menace to their neighbors, to the community and to civilization." VEILLER, *A MODEL HOUSING LAW* 4 (2d ed. 1920).

<sup>4</sup> A single tenant can, of course, decide to withhold his rent, but the experience of a social worker who dealt with housing problems on the Lower East Side of Manhattan during the height of the New York rent strikes was that unless at least half of the tenants in a slum building participated in the withholding, the technique was ineffective. This was because the economic pressure on the landlord was comparatively slight unless a majority participated, and because the tenants could usually be intimidated into paying their rent through threats of eviction. Interview with Miss Joan Ohlson, official of San Francisco Urban League, in San Francisco, Sept. 21, 1964 [hereinafter cited as Interview With Miss Joan Ohlson].

<sup>5</sup> The term "central city" is used with reference to a Standard Metropolitan Statistical Area (SMSA) which is generally a county or group of contiguous counties that contains at least one city of 50,000 inhabitants. Contiguous counties are included in a SMSA if they are essentially metropolitan in character and are socially and economically integrated with the central city. 2 CENSUS OF HOUSING: 1960 pt. 2, at XIV.

towns.<sup>6</sup> Moreover, the furious rush to suburbia has been almost exclusively white,<sup>7</sup> and has been accompanied by a steady in-migration of nonwhites to the central cities.<sup>8</sup> Thus for some time the trend in our cities has been toward an increasing concentration of nonwhites collared by a white ring of suburban housing.<sup>9</sup> Since these newcomers to the cities are poor they are moving into the worst quality housing available. Because most of them are also Negroes, and are thus unable to move freely within the residential housing market, the likelihood of their concentration in blighted and slum areas is increased.<sup>10</sup> The result is that the problems of urban slum housing are rapidly becoming problems of minority group housing.<sup>11</sup>

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<sup>6</sup> During the decade from 1950 to 1960 the total population of the country increased by 18.5%. UNITED STATES BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1964 STATISTICAL ABSTRACT 5. Yet the central cities grew by only 11%, and the remaining areas within the SMSA's increased in population by 47.4%. *Id.* at 14. Part of this population gain in the central cities was due not to people moving into the cities, but to the cities expanding into their suburbs. For example, in California the central cities' population grew by 1,136,000, but 34.6% of the increase was attributable to annexation. GOVERNOR'S ADVISORY COMM. ON HOUSING PROBLEMS, APPENDIX TO THE REP. ON HOUSING IN CALIFORNIA 185 (1963). Furthermore, a substantial number of cities actually lost people. Of the 130 cities with populations exceeding 100,000, 41 showed population losses during the period 1950-1960. Most of those cities evidencing gains were in the South and West. 1964 STATISTICAL ABSTRACT, *supra* at 18-19.

<sup>7</sup> Of the total increase in the suburbs from 1950 to 1960 of 16.9 million people, 16.2 million were whites. HHFA, OUR NONWHITE POPULATION 22-23. The nonwhite population made a substantial percentage gain—about 75%—in the urban fringe areas during this period, but because so few nonwhites had lived there in 1950—about 1 million, their proportionate representation in these areas actually decreased. *Ibid.*

<sup>8</sup> In the 1950's the nonwhite population in the central cities increased by 4 million people, representing a 63% increase over the nonwhite population living in the central cities at the beginning of the decade. *Id.* at 3, 22.

In 1960 Negroes accounted for 92% of the 20.5 million nonwhites in the United States. The proportion is higher in most parts of the country, but the national average is brought down by the large number of Orientals in the West. In the West the "other races" accounted for 51% of the nonwhite group. *Id.* at 1-2.

<sup>9</sup> Marris, *A Report on Urban Renewal in the United States*, in THE URBAN CONDITION 113, 117 (Duhl ed. 1963).

<sup>10</sup> That racial discrimination with regard to the selling or renting of residential housing does exist is almost common knowledge. A poll taken by a national magazine in the fall of 1963 indicated that a majority of white Americans throughout the country considered living next door to a Negro family less objectionable than having a "close friend or relation marry a Negro" and having your "teenage daughter dating a Negro," but more objectionable than the other 8 interracial situations listed in the survey. Newsweek, Oct. 21, 1963, p. 48. See also 1959 UNITED STATES COMM. ON CIVIL RIGHTS REP. 374-85; McENTIRE, RESIDENCE AND RACE 67-87 (1960). Persuasive evidence of the difficulty that nonwhites experience in attempting to move out of slums is provided by figures which show that a far greater percentage of nonwhites in the upper income brackets live in substandard dwellings in urban areas than do whites in comparable income brackets. UNITED STATES BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT HOUSING REPORTS—CHARACTERISTICS OF HOUSING UNITS CLASSIFIED BY 1959 INCOME OF OCCUPANTS 48-55 (Aug. 1964).

<sup>11</sup> This, in turn, is primarily a problem of Negro housing, see note 8 *supra*. But the

Because they cannot afford to or perhaps do not desire to own their own homes, most of the new slum occupants live in rental units<sup>12</sup> which form the hard core of the urban slum.<sup>13</sup> The interaction of a large percentage of urban nonwhites living in rental housing and the high incidence of substandard conditions in these units has been the major factor in the appearance of rent withholding as a coercive technique. It is with regard to these nonwhite occupied rental units that the discussion in this Comment will be most relevant.<sup>14</sup>

Why is there not a greater supply of adequate urban housing available to the low income tenant? The first, and the obvious answer is simply that not enough low rent units have been constructed in the past decades to offset the housing that has become obsolete or dilapidated.<sup>15</sup> During

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problem is not exclusively nonwhite, of course. For example, in New York City the Puerto Ricans, more recent immigrants than the Negroes, live in accommodations that challenge those of the Negroes for the title of worst in the city. Twenty-three per cent of the Puerto Rican occupied rental units were termed substandard in 1960 as compared to 24.5% of the nonwhite occupied rental units. 2 CENSUS OF HOUSING: 1960 pt. 5, at 128-35, 128-40. On the new problems created by the expanding minority group populations of the cities, see generally GRODZINS, *THE METROPOLITAN AREA AS A RACIAL PROBLEM* (1958); Ferguson, *A Brief Commentary on Urban Redevelopment and Civil Rights*, 9 *How. L.J.* 101 (1963).

<sup>12</sup> In 1960 nearly 67% of the nonwhite families living in urban areas were renters, as compared with the 40% of the urban white families who lived in rental units. HHFA, *OUR NONWHITE POPULATION* 78-79.

<sup>13</sup> Sporn, *Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums*, 59 *COLUM. L. REV.* 1026, 1032 (1959). In Los Angeles about 82% of the substandard residences are rental units. MORRIS, *CONSERVATION—A NEW CONCEPT IN BUILDING LAW ENFORCEMENT* 95 (1958).

<sup>14</sup> See note 90 *infra*. A statistical sketch of the nonwhite renter's housing in the central cities does not yield an attractive picture. In the 20 cities with the largest nonwhite populations in 1960, 25.6% of the total nonwhite occupied rental units were deemed substandard. The individual figures were: Birmingham, 63%; New Orleans, 47.6%; Cincinnati, 45%; Memphis, 44.1%; Atlanta, 42.4%; St. Louis, 41.6%; Pittsburgh, 38.8%; Newark, 33.1%; San Francisco, 28.5%; Chicago, 28%; Honolulu, 26%; New York, 24.5%; Dallas, 24.5%; Houston, 23.1%; Philadelphia, 18%; Cleveland, 17.4%; Baltimore, 14.8%; Washington, 13%; Detroit, 13%; Los Angeles, 9.8%. Figures computed on basis of statistics obtained from 2 CENSUS OF HOUSING: 1960 pts. 2-5. These 20 cities contain about 6,426,000, or almost one-third of the nonwhite population in the United States. HHFA, *OUR NONWHITE POPULATION* 28.

<sup>15</sup> A major cause of the need for residential construction within the past 15 years has been the initiation of slum clearance programs. New housing to serve the displaced families is a necessary concomitant to the clearance and redevelopment of urban areas. These ambitious undertakings are naturally costly. For example, in Chicago 2 square miles of urban blight were cleared at a cost of about \$150 million per square mile. SIEGEL & BROOKS, *SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION—A REPORT TO THE SUBCOMMITTEE ON URBAN REDEVELOPMENT, REHABILITATION AND CONSERVATION OF THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS* 11 (1953). Because of the expense, the only feasible way a locality can finance a redevelopment project is by taking advantage of federal grants-in-aid under Title I of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. §§ 1450-60 (Supp. V, 1963). Through this urban renewal

the Depression residential construction suffered from lack of a demand for new units. The Second World War solved this problem by stimulating a new migration of people to the cities, but then the scarcity of materials for civilian housing served to restrict new construction.<sup>16</sup> In addition, federal and state rent control during the war period dampened builders' enthusiasm for residential construction.<sup>17</sup> At the present time the building industry is enjoying a period of high activity, yet, even so, it is questionable whether construction is keeping pace with the anticipated needs of the nineteen-sixties.<sup>18</sup> Moreover, most of the new housing that is constructed by private industry is in the higher price brackets,<sup>19</sup> consequently few of the added units benefit the low income families whose need is greatest.<sup>20</sup>

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program the federal government absorbs two-thirds of the difference between the costs incurred by the community and the revenue obtained through reselling the slum property for development by private builders. As one of the prerequisites to obtaining federal aid the local public agency in charge of the program must satisfy the HHFA that it has facilities available to adequately relocate the displaced families in standard housing. 63 Stat. 417, 42 U.S.C. § 1455(c) (1958). Since there is little standard low cost housing available anywhere else in the city, this usually necessitates building on the renewal site. Unfortunately, the spirit of the relocation requirements are too often circumvented, and the housing constructed on the site turns out to be the more profitable luxury apartments beyond the reach of the former inhabitants of the area. Marris, *supra* note 9, at 118-20.

<sup>16</sup> See Gilliam, *Legal Procedures for Elimination of Unsafe Buildings*, 17 NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS MUNICIPAL L. REV. 343 (1954).

<sup>17</sup> *Ibid.* Rent control was initiated by the federal government to maintain rents at a stable level during the period when construction materials were being diverted to the war effort. The necessary concomitant to rent or price control was eviction control to prevent the extortion of illegal rents through the threat of eviction. Thus the tenant in effect got a statutorily created lease at a moderate rent for the duration of the controls. After the war several jurisdictions elected to continue controls while the shortage of housing remained. Now they have been abolished in most jurisdictions with the notable exception of New York City. For critical analyses of the effects of rent control in New York City, see Burns, "Controlled Rents and Uncontrolled Slums," *The Reporter*, Nov. 12, 1959, p. 16; Sickman, "The Rent-Control Trap," *Fortune*, Feb. 1960, p. 123.

<sup>18</sup> The HHFA estimates that 16.6 million new urban housing units must be constructed during the 1960's to meet the demands caused primarily by the increase in new households. This would mean an average of 1.6 million units should be built for every year of the decade. However, there were 1,274,000 nonfarm housing starts in 1960, 1,336,800 in 1961, and 1,458,300 in 1962. At this rate by the end of the decade over 2 million units will have to be built annually to meet the demand. 16 HHFA ANN. REP. 13-15 (1963).

<sup>19</sup> During the last quarter of 1962 the median sales price for a home was \$17,700. *Id.* at 15. The builders and real estate operators recognize the trend away from lower priced homes even though they also acknowledge the need for more low cost housing. NAHRO's *Proposed Low-Income Housing Program*, 20 J. HOUSING 307, 309-10 (1963); N.Y. Times, March 21, 1964, p. 24, col. 4 (letter).

<sup>20</sup> Some economists argue that any additions to the housing supply, even in the high price brackets, will relieve a shortage throughout the market since as the high income families move into the new units they create vacancies that families in the lower economic brackets can move "up" to. The inadequacy of this "filter down" theory is it fails to recognize that the housing which becomes available to the poorest families in this manner

There has been hope in the past that government constructed housing could easily span the gap between the need for low rent accommodations and private industry's concentration on the more profitable high cost housing. For fifteen years the federal government has been pledged to the goal of "a decent home and a suitable living environment for every American family."<sup>21</sup> However, progress toward this goal has been discouragingly slow. The early expectations for the potential scope of the public housing program have proven to be overly optimistic,<sup>22</sup> and there are few concrete indications that the government intends within the near future to increase materially its participation in housing construction over its record of the past.<sup>23</sup> Furthermore, serious criticisms have been leveled not only at the quantity of public housing available but also at the form and administration of the existing projects. A great many eligible people do not want to live in public housing, and if given a choice would prefer to remain in their slum homes.<sup>24</sup> A variety of reasons have been pro-

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is too often run-down, or it becomes overcrowded from attempts to meet the higher rents. 16 HHFA ANN. REP. 18 (1963). Furthermore, when slum families are nonwhite, as so many are, they are further prevented from moving into the vacant housing by patterns of segregation.

<sup>21</sup> Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1441 (1958).

<sup>22</sup> In 1949 Congress authorized the construction of 810,000 new units within the following 6 years. Housing Act of 1949, 63 Stat. 428, as amended, 42 U.S.C. § 1410 (Supp. V, 1963). However, this authorization was not completely appropriated until 1961, and by this time costs had risen so that only 525,000 units could be constructed with the original amount authorized. *Hearings on S. 2468 and Other Pending Bills to Amend the Federal Housing Laws Before the Subcommittee on Housing of the Senate Committee on Banking and Currency*, 88th Cong., 2d Sess. 357 (1964) (testimony of Robert Weaver, HHFA Administrator) [hereinafter cited as *Hearings to Amend the Federal Housing Laws*]. Furthermore, the 1949 authorization was not completely committed for construction costs until 1964. Thus, 9 years after the time at which the program was expected to have produced 810,000 new units, it had constructed less than 65% of that amount.

<sup>23</sup> Since the existing authorizations were exhausted by 1964, see note 22 *supra*, the 88th Congress faced the task in that year of again deciding upon the scope of the public housing program. The administration's proposal called for an authorization of \$46 million a year for the following 4 years. S. 2468, 88th Cong., 2d Sess. § 405 (1964). This would have allowed for the construction of 35,000 new units plus the purchase of 15,000 and the leasing of 10,000 existing units during each year of the authorization for a total of 240,000 units. *Hearings to Amend the Federal Housing Laws* at 356. There was feeling by some that even this 60,000 unit per year figure was too modest. *Id.* at 533 (testimony of Mayor Robert Wagner of New York City, urging that the authorization be increased to permit construction of 100,000 units per year). However, the bill that was finally enacted authorized contributions of only \$30,250,000. Housing Act of 1964 tit. IV, § 403, 14 U.S. CODE CONG. & AD. NEWS 3553 (Sept. 20, 1964), 42 U.S.C.A. § 1410(e) (1964). This will be sufficient to construct approximately 37,500 units. CONFERENCE REP. NO. 1828, 88th Cong., 2d Sess., 14 U.S. CODE CONG. & AD. NEWS 4030 (Sept. 20, 1964). This is just about the annual rate of new public housing units that has been maintained for over a decade. *Hearings to Amend the Federal Housing Laws* at 1111.

<sup>24</sup> SCHORR, *op. cit. supra* note 2, at 64; Hartman, *The Limitations of Public Housing*, 29 J. AMERICAN INSTITUTE OF PLANNERS 283, 284 (1963); Marris, *supra* note 9, at 120-21.

pounded to explain this, among them the institutional stigma that attaches to the projects, the excessive regimentation of the tenants, and the feared lack of privacy in public housing.<sup>25</sup> With the apparent and perhaps understandable abdication of the private builders from the low cost housing field, increasing demands are being made on the federal government to participate to a greater extent in this area. However, as the public housing program is expanded it is clear that imaginative thought must be given to improving its implementation and to rendering the projects more attractive to potential tenants.<sup>26</sup>

The realization that new construction alone is not resolving the housing problems of the slum tenant has forced attention to ways of improving the conditions within existing accommodations.<sup>27</sup>

### *B. The Inadequacy to the Slum Tenant of Personal Rights of Action*

The common law armed the tenant with little that would insure him that his dwelling would be kept in a comfortable or even habitable condition. Certainly no duty to repair was imposed upon the landlord.<sup>28</sup> In

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<sup>25</sup> Hartman, *supra* note 24, at 284-88. However, it should be noted that notwithstanding the defects of public housing the demand still far outdistances the supply. On January 1, 1964 the Public Housing Administration had 34,000 formal applications for units in excess of the number that were then constructed or to be constructed under existing authorizations. This occurred even though the HHFA publicized the exhaustion of its current authorizations. *Hearings to Amend the Federal Housing Laws* at 1112.

<sup>26</sup> For a comprehensive proposal of recommended changes to be made in the public housing program suggested by the National Association of Housing and Redevelopment Officials, see *NAHRO's Proposed Low-Income Housing Program* (pts. 1-3), 20 J. HOUSING 253, 307, 371 (1963).

<sup>27</sup> Slayton, *Conservation, Rehabilitation*, 20 J. HOUSING 245 (1963). This was a major recommendation of the special committee that studied the government's housing programs in 1953. PRESIDENT'S ADVISORY COMM. ON GOVERNMENT HOUSING POLICIES AND PROGRAMS, *op. cit. supra* note 2, at 5-9. The committee's report was instrumental in the amending of the urban renewal program to require as a prerequisite to receipt of federal funds that the locality seeking the funds establish a "workable program" for rehabilitation and prevention of the spreading of slums and urban blight. Housing Act of 1954, 68 Stat. 590, 623, as amended, 42 U.S.C. § 1451(c) (Supp. V, 1963). For a description of the 7 elements involved in the workable program, see HHFA, *WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT* (Rev. ed. 1962).

<sup>28</sup> This is true even though the rule may have been contrary to the common understanding. The following note of explanation was appended by the commissioners to the California code section which placed upon the landlord the duty of maintaining a dwelling fit for the occupation of human beings: "This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year eighteen hundred and sixty-one shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not arise again and again for adjudication were it not that the community at large revolt at every application of the rule." POMEROY, CAL. CIV. CODE ANN., note to § 1941, at 514 (1901).

the absence of fraud or an agreement to the contrary, the tenant took the premises as they were, and the landlord owed no obligation of maintenance or repair during the term of the lease.<sup>29</sup> The reasons for this are partly historical and lie in the peculiar nature of a conveyance of a leasehold interest in real property. The tenant became the possessory owner of an estate for years, and during his term the primary indicia of ownership passed to him.<sup>30</sup> Thus at common law the tenant whose home became dilapidated, or even completely destroyed, could neither demand that his landlord make repairs nor escape liability for the rent due under the remainder of his lease.<sup>31</sup> Today the function of the leasehold interest is more to create a contractual rather than a tenurial relationship between the parties.<sup>32</sup> Viewing the situation realistically, the burden for making major repairs and improvements as between the two parties ought to be upon the lessor, at least under the ordinary short-term residential lease. The lessor is generally in the better financial position to make major repairs, and in fact he has the really substantial financial interest in maintaining the quality of the dwelling.<sup>33</sup> However, the rule that in the absence of a covenant to repair the landlord owes his tenant no duty of maintenance has become so firmly entrenched in the law that it is improbable that it will be altered without legislative intervention.<sup>34</sup>

<sup>29</sup> *Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819 (1900); *Divines v. Dickinson*, 189 Iowa 194, 174 N.W. 8 (1919); *Lyon v. Buerman*, 70 N.J.L. 620, 57 Atl. 1009 (1904).

<sup>30</sup> 1 AMERICAN LAW OF PROPERTY § 3.38 (Casner ed. 1952). It is interesting to contrast with the common law theory of estates the consequences of a leasing of real property under the civil law where this division of ownership by time was not recognized. The lessor retained ownership (*dominium*) of the land even while the lessee was in possession, and the arrangement was treated as a simple contract for hire. Thus the primary obligation for maintaining the property remained with the lessor in the absence of a contrary agreement. The lessor warranted the habitability of the rented house at the commencement of the lease and for some time thereafter, and the lessee could make necessary improvements and recover the cost from the owner. BUCKLAND, *ROMAN LAW* 497 (1921); 2 ROBY, *ROMAN PRIVATE LAW* 172-73 (1902).

<sup>31</sup> *Fowler v. Bott*, 6 Mass. 63 (1809). There developed an American exception to this rule when an apartment building was destroyed. In these cases the tenant who simply leased a number of rooms owed no further rent upon destruction of the building. See *Ainsworth v. Ritt*, 38 Cal. 89 (1869); *Womack v. McQuarry*, 28 Ind. 103 (1867); *Graves v. Berdan*, 26 N.Y. 498 (1863). The theory is that when the building is destroyed, so is all of the tenant's interest in the property. *Winton v. Cornish*, 5 Ohio 477 (1832).

<sup>32</sup> See Bennett, *The Modern Lease*, 16 TEXAS L. REV. 47 (1937).

<sup>33</sup> The ordinary residential lease reserving and creating nearly every imaginable right and power in favor of the landlord clearly indicates that he, at least, has little doubt who is the real owner of the property.

<sup>34</sup> Within the context of personal injury litigation the cases holding no duty are legion. See, e.g., *Freitag v. Evenson*, 232 Or. 225, 375 P.2d 69 (1962); *Figler v. Subin*, 18 App. Div. 2d 702, 236 N.Y.S.2d 230 (1962); *Lopez v. Gukenback*, 391 Pa. 359, 137 A.2d 771 (1958). At least one judge, however, believes that the courts can and should institute the change. See *Bowles v. Mahoney*, 202 F.2d 320, 325 (D.C. Cir. 1952) (Bazelon, J. dissenting), *cert. denied*, 344 U.S. 935 (1953).



In a few states the duty of major repair work has seemingly been shifted onto the landlord by the enactment of "repair and deduct" laws.<sup>35</sup> Generally, these statutes provide that the lessor of a building intended for human occupation must put it into a condition fit for such use, and repair all subsequent dilapidations not occasioned by the tenant's own negligence. If the lessor fails to make the repairs upon demand, the tenant may make them himself and deduct the cost from the rent, or else vacate without further liability under his lease. The value of these statutes to the tenant is usually more apparent than real, however. In two states he will find that in order to charge the cost of repair against the landlord it must not exceed one month's rent.<sup>36</sup> If the premises are in such a state of disrepair that they are not "fit for the occupation of human beings," it will seldom happen that one month's rent will be able to obviate all of the defects. However, the real obstacle to an effective utilization of these statutes is the landlord's ability to contract away the obligation imposed by the statute.<sup>37</sup> Since the landlord is permitted to shift his duty of repair onto the tenant, in the rare case where the slum tenant reads and understands his lease he will almost certainly discover that he has waived any protection he might have gained under these laws.<sup>38</sup>

It is possible, of course, that the landlord will covenant to make re-

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<sup>35</sup> CAL. CIV. CODE §§ 1941, 1942; MONT. REV. CODE ANN. §§ 42-201, 202 (1947); N.D. CENT. CODE §§ 47-16-12, -13 (1960); OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1952); S.D. CODE §§ 38.0409, -.0410 (1939). In addition, Louisiana with its civil law background, see note 30 *supra*, has a broad requirement that in any leasing for hire situation the lessor must maintain the thing leased in a condition fit for the purpose for which it is hired, and if he fails to do this the lessee may make such repairs as are necessary, and deduct the cost from the rent. LA. CIV. CODE ANN. arts. 2692-94 (1952).

<sup>36</sup> CAL. CIV. CODE § 1942; MONT. REV. CODE ANN. § 42-202 (1947).

<sup>37</sup> In all of the states but Louisiana the statutes expressly allow this. CAL. CIV. CODE § 1941; MONT. REV. CODE ANN. § 42-201 (1947); N.D. CENT. CODE § 47-16-12 (1960); OKLA. STAT. ANN. tit. 41, § 31 (1951); S.D. CODE § 38.0409 (1939). In Louisiana the courts have construed that result into the statute. *Pecararo v. Grover*, 5 La. App. 676 (1927). And see LA. CIV. CODE ANN. art. 11 (1952), allowing waiver of statutory protection by party protected if not against public policy.

<sup>38</sup> Even where the tenant has not waived his rights under these statutes he will find that the courts have construed the repair provisions most strictly against him. In California there is no reported opinion in which the tenant has been allowed to recover or set-off his repair expenses against rent owed on the basis of CAL. CIV. CODE § 1942. This can partly be accounted for because the cost of repairs in California must not exceed one month's rent, see note 36 *supra* and accompanying text. Thus the parties would seldom find it worth while to prosecute an appeal over the small amount at stake. But even where the issue has been raised and the prerequisites of notice and demand have been satisfied, the courts have felt constrained to limit the scope of the statute. *E.g.*, *Van Every v. Ogg*, 59 Cal. 563 (1881) (costs cannot be recovered as a counterclaim or setoff); *Wall Estate Co. v. Standard Box Co.*, 20 Cal. App. 311, 128 Pac. 1020 (1912) (authorizes necessary repairs only, not necessary improvements) (applies only to dwellings, and not to other structures even though "intended for the occupation of human beings") (alternative holdings).

pairs independently of any duty imposed by law.<sup>39</sup> Yet here again the slum tenant will find the remedies available to him are far from satisfactory should the landlord fail to perform. Since the general rule is that covenants in a lease are independent,<sup>40</sup> a breach by the lessor of his promise to repair will not permit the tenant to breach his promise to pay rent. The tenant may have an action for damages based on the landlord's breach, but the slum dweller will find little solace in so uncertain a remedy as this. It is unlikely that the slum tenant will be able to prove sufficiently large damages to warrant the time and expense of a lawsuit,<sup>41</sup> and because the recovery will usually be small, this remedy, even if obtained, will not give the slum tenant what he really needs—an adequately maintained dwelling. A slum home by definition requires major repair work, and a minimal recovery would not facilitate such an undertaking by the tenant.

In order to correct some of the injustices that result from a strict application of the rule of independent lease covenants, the courts developed the fiction of a constructive eviction by the landlord where his breach of a duty imposed by the lease denied the tenant the beneficial use and enjoyment of the premises.<sup>42</sup> Thus if the lessor of an apartment fails to provide heat<sup>43</sup> or to make repairs<sup>44</sup> after he has contractually obligated himself to do so, and this failure is of such a permanent and serious nature as to render the dwelling untenable, the lessee is entitled to treat the breach as an eviction and move out without further liability. This rule gives the long-term tenant with a large financial interest at stake a satisfactory remedy in many cases, yet even a very permissive application of constructive eviction will not help the slum dweller. It is well settled that for the doctrine to be invoked the tenant must vacate within a reasonable time or waive the right to rely on it.<sup>45</sup> To tell

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<sup>39</sup> But not very probable. When there is a shortage of low rent housing available the slum landlord seldom need make any bargaining concessions to his tenants.

<sup>40</sup> RESTATEMENT, CONTRACTS § 290 (1932). This means performance by one party will not be a condition to the other party's duty to perform. This is contrary to the rule of dependent promises that has been applied to most contracts since *Boone v. Eyre*, 1 H. Bl. 273 n., 126 Eng. Rep. 160 (1777).

<sup>41</sup> The measure of damages would be the difference between the value of the premises as it would be if maintained according to the landlord's covenants, and their actual value. *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P.2d 778 (1949); *Rosen v. Needelman*, 83 So. 2d 113 (Fla. 1955). If the dwelling is run down and in a slum neighborhood, the difference in the value of the premises with and without hot water, for instance, may not be very great.

<sup>42</sup> Apparently the first judicial recognition of this doctrine was *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826). See generally 1 AMERICAN LAW OF PROPERTY § 3.51 (Casner ed. 1952).

<sup>43</sup> See *Harper v. McMahon*, 167 Wis. 388, 167 N.W. 431 (1918); *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930) (eviction from business premises).

<sup>44</sup> *Dolph v. Barry*, 165 Mo. App. 659, 148 S.W. 196 (1912).

<sup>45</sup> *Automobile Supply Co. v. Scene-In-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930);

the slum tenant he can move if his apartment has no heat, or when the ceiling begins to buckle is to give him nothing at all, for he lives there only because he has nowhere better to go. The right to move out is an empty one for the people in the slums.

### *C. Housing Codes and the Failure of Adequate Enforcement*

The traditional legal steps that a slum tenant may take in hope of forcing his landlord to make repairs have not proven helpful to the tenant nor have they been effective in improving the general conditions of slum areas. However, long before the emergence of modern concepts of the responsibility of the state for the welfare of its people, it was recognized that the public had an interest in maintaining sound and sanitary housing apart from the immediate effects of substandard dwellings on the occupants.<sup>46</sup> Today the primary means of insuring the quality of the community's housing supply lie not in any legal remedies the occupants of the dwellings may possess, but in the regulatory powers of the states. The vehicles for this regulation are local building and housing laws.<sup>47</sup> Building laws establish requirements to be met in new construc-

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*Callahan v. Goldman*, 216 Mass. 238, 103 N.E. 689 (1913); *Merritt v. Tague*, 94 Mont. 595, 23 P.2d 340 (1933).

There was one situation at common law where the tenant could remain in possession and still escape liability for the rent: If the landlord put the tenant in possession of part of the leased property, but by his wrongful act denied him possession of the rest, the tenant could remain on so much of the property as he had, and the entire rent was abated until the whole of the premises were restored to him. The reasoning is that the landlord should not be allowed to apportion his own wrong by collecting rent for the portion under the tenant's control. *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917). This doctrine of "partial eviction" has been confined to cases of actual, as opposed to constructive, eviction. *City of New York v. Pike Realty Corp.*, 247 N.Y. 245, 160 N.E. 359 (1928).

<sup>46</sup> Perhaps the earliest legislative attempt to regulate the quality of a community's housing in America was Article 25 of the *Articles, Lawes, and Orders, Divine, Politique, and Martiall for the Colony in Virginea*, established by Sir Thomas Gates in 1611 for the then foundering settlement at Jamestown: "25. Euery man shall haue an especiall and due care, to keepe his house sweete and cleane, as also so much of the street, as lieth before his door, and especially he shall so prouide, and set his bedstead whereon he lieth, that it may stand three foote at least from the ground, as he will answere the contrarie at a martiall Court." 3 *FORCE, TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA* No. 2, at 16 (1947 ed.).

<sup>47</sup> The laws usually take the form of municipal ordinances. However, several states have enacted housing codes which are either mandatorily applied to certain residences or may be applicable in the absence of the enactment of local ordinances. See, e.g., CAL. HEALTH & SAF. CODE §§ 17921, 17951 (applicable throughout the state unless locality has housing ordinance at least as restrictive as the state law); IOWA CODE ANN. § 413.1 (1946) (applicable to cities with populations over 15,000); N.Y. MULTIPLE DWELLING LAW § 3 (applicable to multiple dwellings in cities with populations over 500,000). For a short description of the functions of housing codes, and a good analysis of some of the legal problems that have arisen through their use, see Note, 69 HARV. L. REV. 1115 (1956).

tion, while housing laws provide that the already existing units be maintained or improved according to certain standards.

There are three broad subjects covered by housing codes: requirements for installation and proper maintenance of necessary facilities, standard maintenance and sanitation requirements, and occupancy requirements controlling crowding within the units.<sup>48</sup> The laws allocate responsibility for compliance between the owner of the building and the occupant. Usually the occupant will be assigned the duties of keeping his dwelling sanitary, making such repairs as are caused by his own neglect, and similar responsibilities of a "housekeeping" nature.<sup>49</sup> The owner is responsible for making major repairs and keeping his buildings fit for human habitation.<sup>50</sup> To the extent that housing codes exist in large numbers throughout the country, the adequacy of their enforcement will directly reflect the quality of maintenance of the housing supply. The available evidence suggests that after a slow start the adoption of local housing regulations has spurred rapidly within the past decade, and at the present time there probably is a substantial number of cities with housing codes in effect.<sup>51</sup>

As the buildings in a city begin to show the signs of age and decay there is an increasing public recognition of the necessity for housing regulation. Thus the first significant laws establishing standards to be applied retroactively to existing housing were enacted near the turn of the century for the benefit of the large eastern cities.<sup>52</sup> During the next two decades several states and cities enacted housing laws, most of which were based on Lawrence Veiller's Model Housing Law, published in 1914.<sup>53</sup> The recent surge of housing law enactments was stimulated by the Federal Housing Act of 1954 which required the establishment of a "workable program . . . to eliminate, and prevent the development or spread of, slums and urban blight"<sup>54</sup> as a condition to a community's obtaining federal funds under the urban renewal program. The "workable program" requirement was interpreted by the Housing and Home

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<sup>48</sup> HHFA, LOCAL DEVELOPMENT AND ENFORCEMENT OF HOUSING CODES 6 (1953).

<sup>49</sup> See, e.g., the provisions of the codes summarized in SEGEL & BROOKS, *op. cit. supra* note 15, at 18-22, and in HHFA, *op. cit. supra* note 48, at 31.

<sup>50</sup> *Ibid.*

<sup>51</sup> While current statistics would be more informative, a survey taken in 1960 indicated that at least 229 cities with populations of 10,000 or more had housing codes of some type at the end of 1959, an increase of over 100 cities between 1956 and 1960. Lange, *Municipal Housing Codes*, in 27 MUNICIPAL YEARBOOK 318-19 (Nolting & Arnold ed. 1960).

<sup>52</sup> Pennsylvania enacted a state tenement house law in 1895, Pa. Sess. Laws 1895, No. 110, and New York followed with its comprehensive Tenement House Act of 1901, N.Y. Sess. Laws 1901, ch. 334.

<sup>53</sup> VEILLER, A MODEL HOUSING LAW v-vi (2d ed. 1920).

<sup>54</sup> 68 Stat. 623, as amended, 42 U.S.C. § 1451(c) (Supp. V, 1963).

Finance Agency as consisting of, among other things, a housing code enforcement plan.<sup>55</sup> The 1964 Federal Housing Act<sup>56</sup> will undoubtedly encourage the enactment of still more local codes by providing that the workable program prerequisite to grants-in-aid may now consist *entirely* of code enforcement,<sup>57</sup> and by its requirement that there be in existence an effective code program for six months prior to application for federal funds.<sup>58</sup>

The codes are not doing the job that was expected of them, however, as the figures on the quantity of substandard dwellings in the cities demonstrate.<sup>59</sup> As early as 1927 it was noted that even assuming the existence of a comprehensive, well drafted code, several factors often hindered its proper functioning: lack of component personnel and sufficient appropriations in the administrative enforcement departments, overlapping of authority among the various agencies, inadequate minimum penalties for violations, and lax judicial enforcement.<sup>60</sup>

A threshold problem with which nearly every housing law enforcement agency must deal is the lack of adequate administrative machinery and resources.<sup>61</sup> Often there will not be sufficient personnel to make the regular inspections over a wide area necessary to discover existing violations.<sup>62</sup> These area-wide surveys, as opposed to inspections occasioned

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<sup>55</sup> HHFA, *op. cit. supra* note 27, at 7-8, 20-23.

<sup>56</sup> 78 Stat. 769, 14 U.S. CODE CONG. & AD. NEWS 3521-69 (Sept. 20, 1964).

<sup>57</sup> Housing Act of 1964 tit. III, § 301(b), 14 U.S. CODE CONG. & AD. NEWS 3541 (Sept. 20, 1964), 42 U.S.C.A. § 1460(c) (1964).

<sup>58</sup> Housing Act of 1964 tit. III, § 301(a), 14 U.S. CODE CONG. & AD. NEWS 3541 (Sept. 20, 1964), 42 U.S.C.A. § 1451(c) (1964).

<sup>59</sup> See note 14 *supra*.

<sup>60</sup> Ford, *The Enforcement of Housing Legislation*, 42 POL. SCI. Q. 549, 551-60 (1927).

<sup>61</sup> Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROB. 685, 696 (1960); Note, 69 HARV. L. REV. 1115, 1124 (1956).

<sup>62</sup> SIEGEL & BROOKS, *op. cit. supra* note 15, at 22, 42. During the summer of 1964, New York City completed its first year of a cyclical inspection program, that is, a program of regular checks made throughout a prescribed area, not occasioned by a tenant's complaint, and reported the inspections uncovered 183,373 violations over 1113 city blocks. N.Y. Times, July 15, 1964, p. 26, col. 6.

However, just because a violation is uncovered does not mean it will be promptly acted upon. An article in the New York Times reported the case of a tenant who filed a complaint with the Buildings Department regarding her dangerously sagging ceiling; the clerk marked her complaint "hazardous"; an inspection followed 3 months later; and 5 months later her landlord apparently had not yet been notified. N.Y. Times, Jan. 20, 1964, p. 1, col. 3. Conceding that the writer of the article probably picked a "news-worthy" case for his illustration, still this experience does not seem atypical. On the Lower East Side it usually took the Buildings Department about 2 weeks to make their inspection even in emergency cases, and from 6 weeks to 6 months more for any action to be taken on the complaint. Interview With Miss Joan Ohlson, see note 4 *supra*. The long delays do not reflect on the laxity or ineptitude of the buildings officials as much as they relate back to the basic problem of an undermanned, underfinanced department. Generally the tenants

by complaint, are important not only because they enable the department to act upon a maximum number of violations, but also because the haphazard complaint method debilitates the entire enforcement procedure. The owner who has been cited following a tenant's complaint will feel little respect for the law he has violated when the rest of his neighborhood remains untouched by it.<sup>63</sup> Basically the problem is simply one of getting more funds available to the departments enforcing the codes. This requires that the community and the appropriating bodies be made aware of the prevalence and effects of substandard housing in order to create a sympathy with the purposes and needs of the department.<sup>64</sup> Under the 1964 Federal Housing Act<sup>65</sup> urban renewal grants are for the first time made available to communities to help defray the cost of expanded code programs.<sup>66</sup> The new provision should be of material benefit in diminishing this obstacle to effective code enforcement.

A further administrative problem that hinders adequate housing code enforcement is the often overlapping jurisdiction of numerous enforcement agencies.<sup>67</sup> This overlap tends to create confusion for the public as to which department handles a particular violation.<sup>68</sup> It can also lead to duplication of inspections, and to an abdication of responsibility by all agencies involved. Both inspections and the reporting of complaints would be simplified if enforcement were unified within one department.<sup>69</sup> It has

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found the Buildings Department to be quite cooperative within these physical limitations. *Ibid.*; Kempton, "When You Mobilize the Poor," *The New Republic*, Dec. 5, 1964, p. 11.

<sup>63</sup> HHFA, *op. cit. supra* note 48, at 27.

<sup>64</sup> MORRIS, *op. cit. supra* note 13, at 12-17.

<sup>65</sup> 78 Stat. 769, 14 U.S. CODE CONG. & AD. NEWS 3521-69 (Sept. 20, 1964).

<sup>66</sup> Housing Act of 1964 tit. III, § 301(c), 14 U.S. CODE CONG. & AD. NEWS 3541 (Sept. 20, 1964), 42 U.S.C.A. § 1460(c)(5) (1964). The section provides that in order for a community to be eligible for these grants, it must increase its present expenditures for code enforcement, and the federal government will then absorb two-thirds of the increased cost.

<sup>67</sup> For example, in New York City this is how some of the problems relating to water must be reported: No water, Health Dep't; insufficient water, Dep't of Water Supply; no hot water, Buildings Dep't; leaky water pipes, Buildings Dep't; large leaks, Dep't of Water Supply; overflow from apartment above, Police Dep't; sewage in cellar, Sanitation Dep't; standing water outside, Health Dep't; strange odor in water, Health Dep't; drains stopped, Buildings Dep't. N.Y. Times, Jan. 20, 1964, p. 1, col. 3. Columbia University undertook a three year study of New York's housing regulations in the spring of 1964. The minimum recommendation expected is for some form of unification of administration.

<sup>68</sup> The minimum step that a city should take toward unification is to establish a single phone number a person can call to register his complaint. However, this is not possible in many cities. It was not until just recently that New York City took steps toward instituting such a system after many months of promises. See N.Y. Times, April 22, 1964, p. 40, col. 2; *id.*, Jan. 28, 1965, p. 1, col. 1.

<sup>69</sup> This has been done in Philadelphia where, although several agencies are involved in the rehabilitation program, only one is charged with inspection. Note, 106 U. PA. L. REV. 437, 441-42 (1958).

been argued that an agency should carry out enforcement only in those areas in which it has the requisite expertise,<sup>70</sup> but this can be accomplished without abandoning the centralization of responsibility within one department. For example, in Los Angeles the building department has the primary responsibility for the administration of the housing code, but it may call upon the fire and health departments to make special inspections where expertise in these fields is required.<sup>71</sup> While some satisfaction has been reported with the Baltimore plan of conducting area wide surveys by teams composed of members of the various departments involved in enforcement,<sup>72</sup> the Los Angeles program appears to be more workable.<sup>73</sup> Administration is unified under one department with the consequent advantages of efficiency and certainty of responsibility, yet the system is flexible enough to provide for situations where the primary enforcing agency lacks the technical knowledge to conduct an adequate inspection.

A continued failure to comply with the standards set up in the housing codes after notice of the violation from the enforcing agency normally constitutes a misdemeanor, subjecting the violator to a fine or imprisonment.<sup>74</sup> Too frequently, however, only minimal fines are assessed against the offenders, with the result that the slum landlord may prefer to absorb

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<sup>70</sup> Nelson, *California Housing Code*, 19 J. HOUSING 39, 40 (1962) (author is the head of California's state housing division).

<sup>71</sup> HHFA, *op. cit. supra* note 48, at 22.

<sup>72</sup> Note, 72 HARV. L. REV. 504, 546 (1959).

<sup>73</sup> Los Angeles's program of housing conservation has been relatively successful in preserving even the nonwhite occupied rental units, generally the most run-down in a large city. See note 14 *supra*.

<sup>74</sup> *E.g.*, CAL. HEALTH & SAF. CODE § 17995 (maximum of \$500 fine or six months imprisonment or both); N.Y. MULTIPLE DWELLING LAW § 304 (maximum of \$1000 fine or six months imprisonment, also provides for civil penalty of \$250 plus costs); and see provisions of selected municipal codes in HHFA, LOCAL DEVELOPMENT AND ENFORCEMENT OF HOUSING CODES at 41, 47, 55 (1953).

An ultimate sanction available in New York is for the city to appoint a receiver to make the repairs and recover the cost from the rent. The receiver takes a lien that has priority over all other encumbrances with respect to the rents, but not the asset value of the property. N.Y. MULTIPLE DWELLING LAW § 309(5)(a) & (e). After two years of operation with the receivership program the Buildings Department reported favorable results through its use although only 32 buildings had been subjected to receivership at that time. Gribetz, *New York City's Receivership Law*, 21 J. HOUSING 297 (1964). The constitutionality of the statute has recently been upheld, see *In re Dep't of Bldgs. of the City of New York*, 14 N.Y.2d 291, 251 N.Y.S.2d 441 (1964), but it is a drastic measure and should be invoked only when the other official means of enforcing compliance have failed.

A less heroic remedy at the city's disposal is to make the repairs and bill the landlords for the expense. The problem is in financing the program: the city recognizes that it cannot expect prompt payment from landlords with a long history of delinquency. N.Y. Times, Jan. 24, 1965, p. 1, col. 7.

the slight penalty involved rather than undertake extensive repairs.<sup>75</sup> A common explanation for this lax judicial attitude toward housing violations is that the trial judge who has been hearing felony cases all day is not easily convinced that the well-dressed gentleman before him is a criminal because he has not provided hot water for his tenants.<sup>76</sup> Another reason given is that where the requirements of the code are unrealistically high the courts in recognition of this will enforce them leniently.<sup>77</sup> Finally, it has been hypothesized that, when applying sanctions against the owners, the courts consider that the tenants themselves may have caused or contributed to the violations.<sup>78</sup>

Several jurisdictions have attempted to solve these problems by the creation of special housing courts.<sup>79</sup> Their advantage lies in acquainting a relatively small number of judges with the special problems of housing law enforcement, and in preventing the landlords from transferring their cases to the more lenient judges through continuances. The establishment of these courts would be particularly significant in the large cities where there are many housing cases to be heard.<sup>80</sup>

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<sup>75</sup> Note, 106 U. PA. L. REV. 437, 450 (1958); Note, 69 HARV. L. REV. 1115, 1123 (1956). Some landlords have even attempted to write off fines as expenses on their income tax returns. Note, 31 U. CHI. L. REV. 180, 189 n.44 (1963).

<sup>76</sup> SIEGEL & BROOKS, SLUM PREVENTION THROUGH CONSERVATION AND REHABILITATION—A REPORT TO THE SUBCOMMITTEE ON URBAN REDEVELOPMENT, REHABILITATION AND CONSERVATION OF THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS 108-09 (1953); N.Y. Times, Jan. 31, 1964, p. 29, col. 4; Note, 106 U. PA. L. REV. 437, 450 (1958).

<sup>77</sup> Note, 31 U. CHI. L. REV. 180, 186-92 (1963). This raises a problem that invariably plagues the drafters of a housing code: The minimum provisions must be low enough to be enforced realistically in slum areas, but high enough so they are effective in maintaining conditions compatible with present standards in not yet run-down areas. The obvious solution would be to draft two codes to be applied in different areas of the city. This would seem to solve the problem, but these "zoned codes" may well be unconstitutional. In order to validate them the court would have to hold that the minimum standards necessary for the health, safety, and welfare of some people are different than for others. This may be in violation of the equal protection clause of the fourteenth amendment. But see Note, 69 HARV. L. REV. 1115, 1121-23 (1956), arguing that zoned codes have two separate purposes, slum amelioration and slum prevention, and constructing an argument in favor of their validity by analogizing to land use zoning.

<sup>78</sup> N.Y. Times, Feb. 22, 1964, p. 28, col. 5, at col. 7.

<sup>79</sup> There are special courts to hear housing cases in Baltimore and several boroughs in New York City. For a favorable appraisal of the Baltimore housing courts, see HHFA, *op. cit. supra* note 74, at 29-30. The mere designation of a special branch of the court to hear housing cases will not suffice, however. For an example where this did absolutely no good because of a pervasive lack of commitment to the housing problems, see SIEGEL & BROOKS, *op. cit. supra* note 76, at 60-62 (Chicago).

<sup>80</sup> However, smaller communities have indicated an interest in special housing courts also. A survey of 25 redevelopment agencies in California indicated that a substantial majority of them in both large and small cities favored the establishment of a housing court in their community. GOVERNOR'S ADVISORY COMM. ON HOUSING PROBLEMS, APPENDIX TO THE REPORT ON HOUSING IN CALIFORNIA 596, 599 (1963).



An additional response to the problem would be the establishment within the enforcing department of an administrative tribunal armed with the power to levy sanctions. These administrative hearings would offer several advantages. Assuming that the majority of violations will be finally disposed of there, the number brought to court would be reduced, resulting in more time for a careful preparation of those cases that are actually tried. They would also be valuable in cities where the volume of cases does not justify a full scale housing court.<sup>81</sup> By handling most of the cases within the department the enforcement agency could maintain greater flexibility in dealing with offenders, and ensure that the interests of the community would be given due consideration at the hearings.

Perhaps the most stubborn obstacle to the improvement of housing through code enforcement is the practical effect of strict enforcement: Often thousands of tenants would be thrown into the streets with no place to go.<sup>82</sup> Faced with the need for extensive repairs the landlord may either raise the rent substantially,<sup>83</sup> or simply vacate the building and take it

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<sup>81</sup> 3 NEW YORK STATE DIV. OF HOUSING, HOUSING CODES—THE KEY TO HOUSING CONSERVATION 22-23 (1960).

<sup>82</sup> Several years ago it was estimated that enforcement of Chicago's building and fire ordinances would mean 100,000 people would be displaced. Note, *IND. L.J.* 109, 120 n.37 (1953).

<sup>83</sup> There is reason to doubt that this result must always follow from requiring a landlord to make repairs. The idea that improvements will necessitate sharp increases in rent presupposes that landlords must pass their cost onto the tenants. This, in turn, raises the question of the profitability of slum rental units. Put more bluntly, are slum tenants being "gouged"? The available published figures on the ratio of income to investment in rental property are not conclusive, but many commentators and several isolated examples indicate that the return on slum tenements is very good indeed. Seligman, *The Enduring Slums*, in *THE EXPLODING METROPOLIS* 120 (Editors of Fortune 1958); *Slum-Makers are Shadowmen*, 14 *J. HOUSING* 232 (1957). One critic has stated that a 30% annual return on the landlord's original investment is not unusual. SCHORR, *SLUMS AND SOCIAL INSECURITY* 94 (1963).

These indications of profitability are bolstered by the opinions expressed in Vaughan, "Are Minimum Standard Apartment Houses a Good Investment?," *The Apartment Journal*, Dec. 1962, p. 6. The author, apparently a Los Angeles investor well acquainted with dealings in rental accommodations, states that run-down apartments sell for from four to five and one-half times the annual gross income, as compared to "pride of ownership" property selling for six to eight times its gross income. *Ibid.* The danger with the former, of course, is that the profits may be eaten up by forced repairs. However, he goes on to state that "if you want capital gain with quick turnover, areas with 'clunkers' and high rent demand are hard to beat. I know operators who seek this type of property, depreciate it as fast as possible, sell it and get out and leave the next owner to face the music of the milked units. This type of operation takes nerve, judgment, time and knowledge and is not recommended for the ordinary investor." *Id.* at 15. The implication is clear that the "operator" who is impervious to the welfare of his tenants will profit handsomely from investment in slum apartments.

As the article above indicates, a primary reason for the profitability of slum property

is that the purchase price can be retrieved through a rapid depreciation writeoff, precisely because it is old, poorly maintained, and thus has a short useful life. The owner buys the property, depreciates it quickly, preferably using a method of accelerated depreciation, then sells it and pays the lower capital gain rate on the difference between the sales price and the adjusted basis of the property. The whole operation encourages frequent changes of ownership and discourages sound maintenance policies. See Sporn, *Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums*, 59 COLUM. L. REV. 1026 (1959). Some of the lucrativeness of this type of operating has been undercut by the enactment of Internal Revenue Code § 1250. This section provides that when depreciable real property is disposed of, all or a part of the gain may be treated as ordinary income for tax purposes. After the property has been held for one year the amount of the gain attributable to depreciation deductions in excess of those that would result under the straight line method of computation is taxed as ordinary income. However, this treatment does not apply if the property has been held for one year and the straight line method of computing depreciation is utilized; nor does it apply if the property has been held for ten years, no matter which system of computation is employed, since there is a declining percentage of the gain subject to the application of the higher tax, computed at 100% less 1% for every month the property has been held over twenty months.

There is a consensus of agreement that Negro tenants pay more than do white tenants for comparable accommodations due to the former's restricted market. See HHFA, OUR NONWHITE POPULATION 14; MILLSPAUGH & BRECKENFELD, THE HUMAN SIDE OF URBAN RENEWAL 11 (1960); SCHORR, *op. cit. supra* at 84-85; WEAVER, THE NEGRO GHETTO 261 (1948); 1961 UNITED STATES COMM. ON CIVIL RIGHTS REP. bk. 4, at 1; Cooney, "How to Build a Slum," *The Nation*, Feb. 14, 1959, p. 140. It is claimed that Negroes in Chicago are paying \$73 million a year because of their limited housing market. Benedict, *Civil Rights and Racial Unrest—A Lawyer's Problem*, 45 CHI. B. RECORD 225, 226 (1963).

In New York City this question of the profitability of slum housing has a unique feature because most of the low rent housing there is still subject to rent and eviction control. See note 17 *supra*. Landlords are guaranteed a net annual return of 6% computed without deduction for mortgage interest or allowance for depreciation in excess of 2%, NEW YORK, N.Y., ADMINISTRATIVE CODE § Y51-5.0(g)(1)(a) (1963), but they claim the rates set by the Rent and Rehabilitation Agency are not sufficient to permit them to undertake extensive improvements called for by the Multiple Dwelling Law. These claims were apparently substantiated to some extent when in 1964 the New York Real Estate Commissioner released the results of a study undertaken on the costs to the city of improving and operating 18 buildings taken into receivership by the city. The commissioner reported that 13 of the buildings would never pay for themselves and the remaining 5 would do so only over a long period of time. N.Y. Times, Feb. 12, 1964, p. 1, col. 1.

New York currently provides tax incentives for making repairs that remove housing violations in certain classes of dwellings. Any increase in the assessed valuation resulting from improvements eliminating building violations is exempt from local taxes for 12 years. Furthermore, the total tax on the buildings and land is reduced each year for 9 years by an amount equal to 8 1/3% of the value of the improvements. NEW YORK, N.Y., ADMINISTRATIVE CODE § J51-2.5(c) (1963). These incentive provisions are almost necessary in New York with its combination of rent control and an acute housing shortage that neither stimulates low rent construction nor allows the city to take the substandard units off the market through demolition. They would probably be desirable in other cities with similarly intransigent problems with slum housing. However, the loss in municipal revenue must be weighted against the value of the tax reduction as an inducement to removing the violations. Furthermore, it would seem that unless the problem is widespread there is no need to reward the landlord for merely complying with a legal duty. Nevertheless, New York and cities with like problems can and should use this device along with any other means in attempts to either coerce or induce compliance with the housing laws.

In the event these tax incentive devices do not persuade the landlord to make the

out of the housing supply.<sup>84</sup> If either possibility occurs the effect will be to push impoverished tenants out into a market where adequate low rent housing is extremely scarce. As a consequence, displaced tenants would be forced to relocate in already overcrowded slum areas, or in improved areas but at the cost of spending a greater share of their income on housing,<sup>85</sup> or in the hard-to-find public housing.<sup>86</sup> The problem is aggravated by the absence of satisfactory relocation procedures in most areas. While there are statutory requirements that families displaced by urban renewal programs be adequately rehoused,<sup>87</sup> no such guarantee exists for the tenant displaced by a routine enforcement of the local codes.<sup>88</sup> In sum, while strict enforcement is desirable, even necessary, the enforcing agencies are faced with the prospect that the immediate effect of strict enforcement often may be to deprive a tenant of his home and merely force him into another slum.

It is within this context that the rent strike has appeared. The slums in the central cities are becoming occupied predominantly by Negroes and other minorities. Not enough new dwellings are being constructed to house these people at prices they can afford. Minimum building and health standards have not been maintained in existing housing. The sum of these factors equals yet another item on a long list of the Negro's grievances. During a time when Negroes are reacting with some form of direct action against all manner of discriminatory treatment, real or supposed, it is not surprising that the rent strike too has been used.<sup>89</sup> Thus,

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repairs, it is not overly harsh even in New York to require repairs or to take the property into receivership, since it was through the previous delinquency of the owners that the buildings were allowed to get into such an extreme state of disrepair. This conclusion applies a fortiori to slum housing in other cities in light of the probability that the owners have in the past been reaping large profits from the property at the expense of their tenants' well being.

<sup>84</sup> The city may have the power to raze a seriously substandard structure where the cost of repair is excessive in relation to the value of the building. See generally RHYNE, *DEMOLITION, VACATION OR REPAIR OF SUBSTANDARD BUILDINGS* (1945).

<sup>85</sup> This alternative is unattractive since for the low income family it will mean reducing expenditures for other necessities such as food and clothing. SCHORR, *op. cit. supra* note 83, at 102-03. Furthermore, since nonwhite families form a large percentage of dislocatees, 1961 UNITED STATES COMM. ON CIVIL RIGHTS REP. bk. 4, at 91, this choice, however desirable, is severely restricted for many tenants.

<sup>86</sup> See note 25 *supra*.

<sup>87</sup> See note 15 *supra*.

<sup>88</sup> But note that since the passage of the 1964 Federal Housing Act code enforcement programs may be a part of an urban renewal project, and be eligible for federal funds. See notes 65 and 66 *supra* and accompanying text. If a community takes advantage of these grants it will be required to help the displaced tenants find satisfactory housing.

<sup>89</sup> The rent strike is not a new tactic; numerous accounts of its use can be found in the newspapers, particularly during periods of acute housing shortage. In New York and Chicago, for example, many tenant strikes were organized during the widespread shortage

tenant initiated rent withholding today has close connections with the Negro civil rights movement, and the existing civil rights groups have supplied many of the leaders of the strikes as well as the inspirational impetus of a dynamic cause.<sup>90</sup> The result is that the temper of the times lends a dedication to the participants in the rent strikes that promises this tactic will be used further in the times to come.

## II

### RENT WITHHOLDING IN NEW YORK CITY

#### A. The Tenant Initiated Rent Strikes

The wave of rent strikes that occurred during the winter and spring of 1963-64 originated in New York City. Since New York has the largest number of nonwhites of any city in the United States,<sup>91</sup> and the tenements in the Negro districts there are among the most dilapidated and overcrowded in the country,<sup>92</sup> it was a natural birthplace. Significantly, at the

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of housing that followed World War I. See N.Y. Times, May 7, 1919, p. 9, col. 1; *id.*, May 2, 1920, p. 16, col. 5; *id.*, Nov. 28, 1920, p. 3, col. 3; *id.*, Dec. 3, 1920, p. 2, col. 7.

In Mexico during this same general period a rent strike, or what began as a rent strike, lasted from the spring of 1922 until the spring of 1925, and involved bloodshed as the tenants took over the town of Vera Cruz, defying the military's attempts to evict them. N.Y. Times, May 14, 1922, § II, p. 1, col. 2; *id.*, July 8, 1922, p. 6, col. 3; *id.*, July 8, 1923, § VII, p. 3, col. 1. An agreement was reached whereby the tenants were given 20 years in which to pay their back rents. *Id.*, March 16, 1925, p. 21, col. 7.

A somewhat more successful strike from the tenants' viewpoint was conducted in England during the spring and summer of 1939. After 48 hours of negotiations between landlords and tenants, a 21-week-old rent strike in Stepney reached a settlement according to which 320 families were granted rent reductions totalling £1000 per year, and the landlords agreed to spend £2500 on repairs the first year and £1500 per year thereafter. The Times (London), June 28, 1939, p. 16, col. 3; *id.*, June 30, 1939, p. 16, col. 5.

<sup>90</sup> Rent strikes were organized by the Congress of Racial Equality in Cleveland and Brooklyn, *Withholding Rent: New Weapon Added to Arsenal for War on Slumlords*, 21 J. HOUSING 67, 70-72 (1964); by the Student Non-Violent Coordinating Committee in Washington, Washington Daily News, Jan. 24, 1964, p. 10, col. 1. In Harlem the acknowledged leader of the strikes was Jesse Gray, director of the Community Council on Housing, and a militant leader of the Negro rights cause. N.Y. Times, Dec. 31, 1963, p. 32, col. 2.

Nothing inherent in the rent strike restricts its use to minority groups. However, an outside force is usually necessary to stir the inhabitants of slum districts into action since they often feel, quite understandably, that there is very little they can do about improving conditions. A great many of them have either given up hope or else feel scant personal ties with the neighborhood. See Salzman, *Redevelopment Effectiveness Contingent on Understanding Slum Occupants*, 13 J. HOUSING 289 (1956). In either case the resulting apathy with their surroundings does not lend itself to vigorous self-help campaigns. See note 153 *infra*. Because the Negro districts are usually the worst in the city, the aura of discrimination and the existing civil rights groups often provide this needed stimulant that is lacking in other slum areas.

<sup>91</sup> Over 1.1 million. HHFA, OUR NONWHITE POPULATION 28.

<sup>92</sup> If the population density in the worst blocks in Harlem was duplicated over the entire city of New York, all of the people in the United States would fit into 3 New York boroughs. 1959 UNITED STATES COMM. ON CIVIL RIGHTS REP. 367.

height of the strikes the majority were organized in predominantly Negro sections of the city.<sup>93</sup> But more importantly, New York City provides a favorable statutory framework upon which the rent strikes could be based. First, widespread rent and eviction control protects the rent paying tenant from arbitrary eviction upon the termination of his lease.<sup>94</sup> And second, Section 755 of the New York Real Property Actions and Proceedings Law provides that if housing violations which are serious enough to constructively evict the tenant have been recorded with the appropriate New York City agencies, a court may stay eviction proceedings brought for nonpayment of rent upon the tenant's deposit of the amount due into court. When the requisite repairs have been made the landlord is entitled to all of the back rent. In many of the rent strike cases this proved to be a safe legal basis for withholding rent from the landlords.<sup>95</sup> However, the standard of "constructive eviction" is vague, and cases with similar facts were often resolved differently, apparently varying with the predisposition of the judge trying the case.<sup>96</sup>

In *Gombo v. Martise*,<sup>97</sup> a case that received some publicity when it was decided,<sup>98</sup> the trial court went around and considerably beyond the statute by declaring that when violations exist in a dwelling that are a hazard to life and limb the tenant is entitled to a full refund of his deposit made to the court, and until the repairs are made he is not obliged to pay rent to anyone. The opinion characterizes such hazardous violations as constituting a "partial eviction," relying on Judge Cardozo's opinion in *Fifth Ave. Bldg. Co. v. Kernochan*.<sup>99</sup> In that case the court permitted the tenant to remain in possession of part of the leased premises without paying any rent, but the court made clear it was dealing "with an eviction which is actual and not constructive."<sup>100</sup>

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<sup>93</sup> In February of 1964 Jesse Gray, the director of the Community Council on Housing, reported that out of a total of 519 buildings on strike in New York, 325 were in Harlem. N.Y. Times, Feb. 26, 1964, p. 39, col. 4. Of the remaining buildings about eighty were claimed by the Rent Strike Committee on the Lower East Side of Manhattan, a racially integrated area. But even here the Negro neighborhood organizations, for example the Negro Action Group, were among the most active. Interview With Miss Joan Ohlson, see note 4 *supra*.

<sup>94</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE § Y51-6.0 (1963); see note 17 *supra*.

<sup>95</sup> After about two months of rent strike cases being brought to court, a leader of the strikes reported that 90% of the 204 cases tried had been decided in favor of the tenants. N.Y. Times, March 3, 1964, p. 1, col. 2, at 26, col. 6.

<sup>96</sup> After the initial decisions favoring the tenants were rendered, several cases were decided against them although the facts were substantially identical to those in which the tenants had prevailed. Interview With Miss Joan Ohlson.

<sup>97</sup> 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct. of N.Y.C. 1964).

<sup>98</sup> See N.Y. Times, Jan. 9, 1964, p. 1, col. 2; Wall Steet Journal, Feb. 4, 1964, p. 16, col. 4.

<sup>99</sup> 221 N.Y. 370, 117 N.E. 579 (1917). See note 45 *supra*.

<sup>100</sup> Fifth Ave. Bldg. Co. v. Kernochan, *supra* note 99, at 373, 117 N.E. at 580.

The trial court's decision in *Gombo v. Martise* has been overruled,<sup>101</sup> but there has been considerable support for the basic idea behind the *Gombo* decision—that tenants should not have to make any rental payments so long as their apartments are in a dangerous or unhealthy condition. In the 1964 New York legislative session, nine separate bills were introduced all of which, if passed, would allow tenants in seriously substandard accommodations to withhold their rent, and, upon their landlord's continued failure to make required repairs, to either keep the money with no further obligation or apply it directly to the necessary repair work.<sup>102</sup> The feeling behind these proposals is that Section 755 of the Real Property Actions and Proceedings Law is not an adequate stimulant to prompt repairs because the landlord knows he will eventually get the withheld rent.<sup>103</sup> It is also believed that section 755 is too restrictive in not allowing the courts any freedom in releasing the money deposited to either the landlord or the tenant in order to allow him to make essential repairs,<sup>104</sup> or in crediting the tenants with expenditures for necessary repairs actually made by them.<sup>105</sup> One of the most workable of the new bills, and perhaps the one with the best chance to be enacted, is the joint proposal of the New York City Bar Association and the Community Service Society of New York.<sup>106</sup> Its principal virtue is that it discards the existing prerequisite to rent withholding under section 755, "conditions constituting a constructive eviction," and substitutes for it the test of a "rent impairing violation," defined as "a condition in a multiple dwelling which . . . constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety

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<sup>101</sup> *Gombo v. Martise*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T. 1964).

<sup>102</sup> COMMUNITY SERVICE SOCIETY OF NEW YORK, 1964 HOUSING LEGISLATION IN NEW YORK STATE 66-77 [hereinafter cited as CSS, 1964 HOUSING LEGISLATION].

<sup>103</sup> Ass'n of the Bar of the City of New York, Memorandum in Support of the Proposed Amendment to Multiple Dwelling Law Providing for Abatement of Rent, p. 5, Dec. 19, 1963 [hereinafter cited as New York City Bar Memorandum]; Memorandum in Support of Assembly Intro. 1955, Print 5891, pp. 1-2, 1964. This argument has considerable weight, but its persuasiveness should be balanced with the common situation of slum property being heavily mortgaged. It is reported to be possible to purchase a tenement house in New York for as little as \$5000 encumbered with 2 or 3 mortgages accounting for 95% of its value. N.Y. Times, Jan. 20, 1964, p. 1, col. 3, at 16, col. 6. Under these circumstances the landlord without income independent from his "struck" apartment building will be financially hurt by even a protracted deferral of rent, since it will be difficult for him to make payments against the mortgage. However, since investment in slum property would not seem to be particularly attractive for the casual investor, it may be that most of the slum tenements in New York are owned by individuals or corporations with extensive investments.

<sup>104</sup> Memorandum in Support of Assembly Intro. 1955, Print 5891, *supra* note 103, at 2.

<sup>105</sup> *Id.* at 2-3.

<sup>106</sup> N.Y. Sen. Intro. No. 3363, Print No. 4698 (1964); N.Y. Assem. Intro. No. 4505, Print No. 6203 (1964) (CSS, 1964 HOUSING LEGISLATION 66-67).

of the occupants."<sup>107</sup> The department in charge of enforcement would be empowered to promulgate a list of specific violations serious enough to be designated rent impairing. Subsection 3(a) of the bill provides that when a rent impairing violation has been recorded and verified by the enforcing department, notice to that effect will be sent to the owner, and if the condition goes uncorrected for six months following the notification, the tenant will owe no duty to pay rent for as long after the six months period as the violations remain.<sup>108</sup> Under the present test of constructive eviction tenants are forced to gamble on how a court will interpret the term, and run the risk of eviction for nonpayment of rent if the court fails to give the phrase the same meaning as do the tenants. It is an unnecessary hardship to force the tenants to take this risk. The bill prepared by the City Bar and the CSS would correct this by enabling the enforcing department to clarify for the tenants, the landlords, and the courts under just what circumstances the rent may be withheld. Safeguards for the landlords have been drafted into the bill: In a suit for back rent the tenants cannot raise the statute as a defense if they themselves caused the violation; the rent must be paid into court while the action for rent is pending; and costs and attorney's fees not exceeding one hundred dollars are to be paid by the tenants if they should raise the defense in bad faith.<sup>109</sup>

A fundamental weakness in the bill is the excessively long period that the tenants must endure conditions that concededly constitute "a fire hazard or a serious threat to [their] life, health or safety" before invoking the sanction of rent withholding.<sup>110</sup> Surely a month to six weeks would be sufficient time for the landlord to either complete the repairs or make such progress as to evidence a bona fide intention to do so. Any inconvenience caused to the owner by requiring prompt action must be considered in light of the hazardous conditions which the tenants must endure pending his taking action.

Unfortunately, neither the New York City Bar-CSS sponsored bill nor any of the other rent withholding proposals were enacted during the 1964 session. The City Bar-CSS proposal has been amended, however, to provide that it will be effective only for a period of two or three years, and if then found to be satisfactory will be renewed. As amended the bill is expected to be reintroduced at the 1965 session, and its proponents are

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<sup>107</sup> New York City Bar Memorandum, Appendix: "An Act to Amend the Multiple Dwelling Law" at 1.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> *Id.* at 2-3.

<sup>110</sup> Furthermore, the 6-month period does not begin to run until an inspection has been made. This may be delayed for some time after the condition arises and the tenant files his complaint. See note 62 *supra*.

hopeful of enactment.<sup>111</sup> If the proposal is enacted with the recommended shortening of the period between notice to the landlord and the time when the tenants may withhold their rent, it will be a significant addition to the present arsenal of weapons available to coerce compliance with the housing laws. An indication of what its worth might be is shown by the past successes of the use of rent withholding under the less coercive provisions of section 755.<sup>112</sup> Under the proposed statute the pressure on the owner to make required improvements would be direct and immediate, without the delays often evidenced in proceedings to impose criminal penalties on the landlord. Moreover, there would be far less uncertainty over the nature and amount of the penalty than is inherent in present sanctions: If sufficiently threatening violations are certified by the inspecting department to exist in a unit then the landlord will not be able to collect any rent from the tenants for as long as the violations remain after he has been given a reasonable time to make the needed improvements. The only uncertainty to be litigated might be whether the tenants themselves caused the violation. Perhaps the strongest argument for legalizing rent withholding, however, is that where used it may divert a potentially explosive situation into manageable channels. When the failure of official enforcement of the minimum housing standards in an area has precipitated discussion of the advisability of enacting rent strike legislation, the tenants' dissatisfaction with their deplorable living conditions has understandably grown to great proportions. By providing the tenants with an orderly, yet effective, and directly accessible means of attempting to improve their living conditions, the city and state may be able to avert more militant expressions of protest.

### *B. The Spiegel Law*

Besides Section 755 of the Real Property Actions and Proceedings Law which permits tenants to initiate rent withholding, there exists in New York a withholding statute subject to quite different considerations. The recently enacted Spiegel Law<sup>113</sup> empowers New York welfare offi-

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<sup>111</sup> Letter from Chairman of the New York City Bar Committee on Housing and Urban Redevelopment to the author, Sept. 15, 1964, on file in offices of *California Law Review*.

<sup>112</sup> By the middle of the summer of 1964 a leader of the Harlem rent strikes reported that only 60 to 70 of the original 325 buildings were still on strike. The rest of the buildings had gone off the strike, he stated, following repairs by the landlords or by the city under the receivership law. N.Y. Times, Aug. 11, 1964, p. 25, col. 2. However, part of this "success" may be because heat and the other attributes of a well maintained apartment are not as sorely missed during the summer months.

Also there is general agreement that institution of the city's new rat extermination drive was due in large part to the stimulus of the rent strikes. Interview with Miss Joan Ohlson.

<sup>113</sup> N.Y. SOCIAL WELFARE LAW § 143-b.



cials to withhold rental allowances from public assistance recipients who are living in a building with housing code violations which are "dangerous, hazardous or detrimental to health or life." The statute further provides that proof of the existence of such violations will be a defense to any action brought against the welfare tenant for nonpayment.<sup>114</sup> If, and when, the landlord makes the required repairs he receives all the back rent withheld under the authority of the Spiegel Law.<sup>115</sup> The law was enacted owing to the realization that the state had been in essence subsidizing a great deal of seriously substandard housing through the payment of rent allotments to welfare recipients living in slum districts.<sup>116</sup>

At the present time the validity and effectiveness of the Spiegel Law are still subject to question. In the first place, it is of uncertain constitutionality. In *Trozze v. Drooney*<sup>117</sup> a Binghamton city court in a rather obscure opinion held that the Spiegel Law is violative of the Federal Constitution, apparently on the grounds that the law impaired the landlord's contract rights, and involved a taking of his property without due process of law. However, in *Schaeffer v. Montes*<sup>118</sup> and again in *Milchman v. Rivera*<sup>119</sup> two New York City civil courts upheld the Spiegel Law as a proper exercise of the state's police power. In both of the latter cases the courts, while considering the statute as a whole, specifically upheld that portion providing that the defense is available to a tenant when the hazardous condition exists in his building although not in his particular accommodations. It was stated that the purpose of the law is not only to protect the health and safety of the welfare recipient, but also to eradicate slums as such.<sup>120</sup>

The arguments in favor of the validity of the Spiegel Law seem much stronger than those against. The courts have long recognized that the state's regulatory powers extend to requiring the maintenance of minimum health and safety standards in dwelling units.<sup>121</sup> Since the potential exercise of the state's power to regulate for the welfare of its people must

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<sup>114</sup> But a welfare official's determination that certain violations are dangerous, etc., is not binding upon the court, and unless the tenant's evidence in an action for eviction demonstrates such a threatening condition a Spiegel Law defense will be struck down. *Kuperberg v. Rivera*, N.Y.L.J. vol. 149, No. 9, p. 17 (N.Y. County Civ. Ct. Jan. 14, 1963).

<sup>115</sup> See *Sterling 1373 Corp. v. Ramos*, N.Y.L.J. vol. 149, No. 16, p. 18 (Kings County Civ. Ct. Jan. 23, 1963).

<sup>116</sup> It was estimated that \$25 million annually was being paid by the Welfare Department for substandard housing in New York City. *Message of the Governor on Approving L. 1962, ch. 997*, McKinney's N.Y. Sess. Laws, 185th Sess. at 3678 (1962).

<sup>117</sup> 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghamton City Ct. 1962).

<sup>118</sup> 37 Misc. 2d 722, 233 N.Y.S.2d 444 (Civ. Ct. of N.Y.C. 1962).

<sup>119</sup> 39 Misc. 2d 347, 240 N.Y.S.2d 859 (Civ. Ct. of N.Y.C. 1962).

<sup>120</sup> *Milchman v. Rivera*, *supra* note 119, at 357, 240 N.Y.S.2d at 870.

<sup>121</sup> *Welch v. Swasey*, 214 U.S. 91 (1909); *Health Dep't v. Rector of Trinity Church*, 145 N.Y. 32, 39 N.E. 833 (1895).

be read into the terms of any contract,<sup>122</sup> the Contract Clause of the Constitution will not be deemed to have been violated when the landlord's contractual rights are extinguished through an otherwise permissible use of state power.<sup>123</sup> Thus the contractual right of a landlord to evict his tenants at the termination of their lease,<sup>124</sup> or even his power to take his accommodations off the rental market<sup>125</sup> may be suspended in the interest of the public's welfare. Today the more serious challenge to this type of state action will be based on due process grounds.<sup>126</sup> However, it has been held a reasonable means of enforcing minimum housing standards to order a building vacated,<sup>127</sup> or even to appoint a receiver to make repairs and collect rents until the costs have been recovered.<sup>128</sup> In light of these permissible uses of the state's power, it does not seem unduly coercive to restrict the landlord's right to recover rent until certain hazardous violations have been corrected. Moreover, the Spiegel Law suspends the landlord's rights to the rent only so long as he refuses to make the required improvements. Upon completion of the repairs he may recover the withheld rent.<sup>129</sup> There is no constitutional imperative that state legislation extinguishing contract rights do so only temporarily,<sup>130</sup> yet where this is so the arguments in favor of the reasonableness of the law will obviously be strengthened.

Another possible attack on the constitutionality of the Spiegel Law is that it denies the effected landlords the equal protection of the laws since it will be applied only to those who rent to welfare recipients. However, a classification within a statute will not be deemed to violate the equal protection clause of the fourteenth amendment as long as the dis-

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<sup>122</sup> *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Manigault v. Springs*, 199 U.S. 473 (1905).

<sup>123</sup> *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

<sup>124</sup> *Bowles v. Willingham*, 321 U.S. 503 (1944); *Teeval Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884 (1950), *cert. denied*, 340 U.S. 876 (1950); *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 130 N.E. 601 (1921).

<sup>125</sup> *Loab Estates v. Druhe*, 300 N.Y. 176, 90 N.E.2d 25 (1949); *Suppus v. Bradley*, 278 App. Div. 337, 105 N.Y.S.2d 48 (1951).

<sup>126</sup> After serving many years of yeoman duty as a major protector of the individual's rights against state action, the contract clause has fallen into virtual disuse as a constitutional weapon. The arguments formerly based on that clause are now usually founded on the expanded due process clause of the fourteenth amendment. See CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION* 361-62 (1953). Perhaps the *coup de grâce* to the vitality of the contract clause was administered in *East New York Sav. Bank v. Hahn*, 326 U.S. 230 (1945).

<sup>127</sup> *Adamec v. Post*, 273 N.Y. 250, 7 N.E.2d 120 (1937).

<sup>128</sup> *In re Dep't of Bldgs. of City of New York*, 14 N.Y.2d 291, 251 N.Y.S.2d 441 (1964).

<sup>129</sup> See note 115 *supra* and accompanying text.

<sup>130</sup> *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940).

stinction rests upon a substantial basis, and is not arbitrarily contrived.<sup>181</sup> In the case of the Spiegel Law the application of the sanction only to landlords accommodating welfare recipients is probably a reasonable classification since the state has a definite interest in seeing that its funds are not expended to subsidize slum dwellings.

Even assuming the constitutional validity of the Spiegel Law, other criticisms cast doubts upon the wisdom of the act. On the one hand, it has been faulted as too lenient because the withheld funds are released to the landlord when he has completed repairs.<sup>182</sup> On the other hand, the statute has been assailed even by proponents of vigorous code enforcement as granting to the welfare officials too extensive powers in withholding the allotments without providing any clear standards to be applied.<sup>188</sup> This criticism appears warranted. Both the administration of the law and its efficacy as a stimulant to action through its threatened use would be improved if a list of specific conditions permitting withholding were compiled. Such clarification of the circumstances permitting the use of the Spiegel Law would ensure its more uniform application, and minimize the occasions where offending landlords will put off repairs hoping their particular accommodations will not be deemed to come within the vague provisions of the statute. A further criticism is that the Spiegel Law degrades welfare tenants by singling them out for special treatment.<sup>184</sup> The assumption implicit in this argument is that the tenant will prefer to continue living in dangerous or unsanitary surroundings rather than have the statute invoked on his behalf by the welfare officials. Certainly this will not always be the case. Moreover, much of the value of the Spiegel Law, as is the case with any sanction, is in the threat of its being used. In the cases where the landlord voluntarily makes the required repairs because of the threatened use of the Spiegel Law no stigma would attach to the welfare tenant since no actual withholding would take place. Finally, any embarrassment that may actually be caused to the welfare recipients should be balanced against the general

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<sup>181</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The equal protection clause today has only slight force as a weapon for striking down a state's economic regulations. Compare the majority and concurring opinions in *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

<sup>182</sup> Letter from official of the Nassau County Dep't of Public Welfare to the author, Sept. 3, 1964, on file in offices of *California Law Review*.

<sup>183</sup> CSS, 1964 HOUSING LEGISLATION 80. The welfare officials are permitted to conduct their own inspections, and the decision to withhold is entirely up to them. N.Y. SOCIAL WELFARE LAW § 143-b(2) & (4). However, in a summary proceeding for nonpayment of rent where the Spiegel Law is asserted as a defense the court may determine that the violation is not hazardous or detrimental to the tenant's health, and the defense will be denied. *Kuperherg v. Rivera*, N.Y.L.J. vol. 149, No. 9, p. 17 (Civ. Ct. of N.Y. County Jan. 14, 1963).

<sup>184</sup> CSS, 1964 HOUSING LEGISLATION 80.

interest of the state in improving slum areas, and the significant value the Spiegel Law should have in achieving this goal.<sup>135</sup>

### III

#### RENT WITHHOLDING OUTSIDE OF NEW YORK

##### *A. Tenant Organized Rent Strikes*

Tenant led rent strikes have been organized in several areas outside of New York City.<sup>136</sup> They are likely to continue to appear throughout the country as tactics of protest within the civil rights movement. However, it is probable that they will not meet with such success as has been witnessed in New York since elsewhere there are generally no adequate legal theories upon which tenants may safely withhold their rent. Moreover, since rent control has been extinguished nearly everywhere but in New York City, even if a court should rule that rent need not be paid as long as a dwelling remains in a dangerous condition, the effect of such a holding could be undercut by a landlord exercising his right to recover possession of the premises upon the expiration of the tenant's lease.<sup>137</sup> In the common event that the slum tenant simply has a month-to-month tenancy,<sup>138</sup> this can be done in most jurisdictions by giving a thirty-day notice to quit.<sup>139</sup> The only alternative would be to hold that when dangerous code violations exist in a unit, they will be a defense not only to an action for rent, but also to the landlord's right to recover possession upon termination of the lease. This would in effect give the tenant a judicially created lease for as long as the condition remains.<sup>140</sup>

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<sup>135</sup> Presumably a large percentage of the people living in slum districts are also on public assistance. If so, the law would have wide application since the withholding is not restricted to situations where the violation exists in a recipient's apartment, but it may also be utilized if a dangerous condition exists anywhere in the building. See note 119 *supra* and accompanying text.

<sup>136</sup> See note 90 *supra*.

<sup>137</sup> This is essentially what happened to end a rent strike in Washington, D.C. The landlord first brought an action for nonpayment of rent which was decided against the tenant. While the appeal was pending, the landlord filed a thirty-day notice to vacate, and upon failure to post another appeal bond the tenant was forced to vacate. *Washington Post*, April 11, 1964, § 3, p. 3, col. 1; *id.*, May 5, 1964, § C, p. 2, col. 8.

<sup>138</sup> In the absence of a stated term, in most jurisdictions a periodic tenancy will arise by implication from the agreement to pay rent. 1 *AMERICAN LAW OF PROPERTY* § 3.25 (Casper ed. 1952).

<sup>139</sup> *E.g.*, MINN. STAT. ANN. § 504.06 (1945) (notice equal to period of payment); OKLA. STAT. ANN. tit. 41, § 4 (1954) (notice equal to period of payment or 30 days); PA. STAT. ANN. tit. 68, § 250.501 (Supp. 1964) (30 days); WASH. REV. CODE ANN. tit. 5904.020 (1961) (30 days).

<sup>140</sup> To hold this would be to go beyond the basic principles of rent and eviction control in this limited area since under those regulations the tenant must at least pay a reasonable rent. See note 17 *supra*. In light of the criticism presently directed at the legislatively created

In most jurisdictions the success of a rent strike will depend primarily upon its "nuisance value,"<sup>141</sup> and its ability to create public interest in the needs of the slum areas. The latter effect of a rent strike can be of considerable importance. A good deal of publicity depicting the squalor and deterioration of the slums usually accompanies a rent strike, and may result in increased pressure on the landlords from the code enforcement agencies and the legislature.<sup>142</sup>

It would be possible, of course, for a state to enact a law similar to the one presently proposed in New York<sup>143</sup> enabling a tenant to withhold his rent upon the failure of his landlord to eliminate dangerous violations and permit the existence of such violations to be a defense to the landlord's action for nonpayment. Even in the absence of rent and eviction control, such an act would embody some of the coercive effects of the New York legislation. The statute might further provide that the existence of hazardous violations suspends the landlord's ability to recover possession upon the termination of the tenant's lease.<sup>144</sup> This would protect the slum tenant from a landlord's evasion of the purposes of the statute in the situations where he may evict by serving a notice to quit.<sup>145</sup> It is probable that where the existence of substandard housing is widespread and the official means of enforcement have proven grossly inadequate such a law would be advisable. The value of rent withholding as an enforcement technique in this situation lies in its directness, and in its bypassing the ineffectual and probably understaffed enforcement agency. The justification for the extreme measure lies in the seriousness of the problem and the continued failure of other means of enforcement.

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controls, see Burns, "Controlled Rent and Uncontrolled Slums," *The Reporter*, Nov. 12, 1959, p. 16; Siekman, "The Rent-Control Trap," *Fortune*, Feb. 1960, p. 123, it is highly doubtful that a court would venture so far from the well-trod ways of the common law unassisted.

<sup>141</sup> Under some circumstances this can be considerable indeed. For example, in *Knowles v. Robinson*, 60 Cal. 2d 620, 387 P.2d 833, 36 Cal. Rptr. 33 (1963), the final decision in favor of the landlord in a "summary" action for unlawful detainer was delayed by the defendant for exactly two years after the termination of the lease. The slum tenant, however, will have neither the assets nor the inclination to play such legalistic games.

<sup>142</sup> See note 112 *supra*.

<sup>143</sup> See notes 106-08 *supra* and accompanying text.

<sup>144</sup> In effect the tenant in a substandard dwelling would have the advantages of eviction control. See note 17 *supra*. There is some precedent, however, for allowing a tenant to remain in possession following the termination of his lease even in the absence of comprehensive rent and eviction control. In Connecticut and Massachusetts for example, the courts have discretionary power to stay summary actions for the recovery of possession of dwellings for up to six months when the tenant evidences an inability to obtain suitable accommodations elsewhere in the city. CONN. GEN. STAT. ANN. § 52-546 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 239, §§ 9-11 (1959).

<sup>145</sup> See notes 137-39 *supra* and accompanying text.

### B. Welfare Rent Withholding

Again, because of the presence of rent and eviction control in New York City, the wisdom and effectiveness of welfare rent withholding is also subject to quite different considerations there than in most other jurisdictions. A program somewhat similar in effect to the Spiegel Law<sup>146</sup> has been utilized in Cook County, Illinois since 1961.<sup>147</sup> When the appropriate Chicago agency has persuaded a court to issue a mandatory injunction requiring a landlord to bring his building into compliance with the codes, the Cook County Department of Public Aid orders the rent allotments of the tenants in the building on welfare withheld until the repairs have been completed.<sup>148</sup> Apparently this action by the welfare department does not immunize the tenants from eviction, their only protection being the services of the department's attorneys in the eviction and the department's assistance in finding more desirable accommodations.<sup>149</sup> Still, the department considers the withholding of welfare rents to be their most effective weapon in dealing with the slum landlord.<sup>150</sup>

The Illinois procedure would seem to have distinct drawbacks. In a jurisdiction where there is no protection for the nonpaying tenant, this withholding technique will almost certainly result in the eviction of nonpaying welfare recipients. In New York City the interest of the state in seeing that its funds are not used to perpetuate slums and the potential effectiveness of this procedure militates in favor of its use. Yet there

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<sup>146</sup> N.Y. SOCIAL WELFARE LAW § 143-b. See notes 113-35 *supra* and accompanying text.

<sup>147</sup> Letter from official of the Cook County Dep't of Public Aid to the author, Aug. 25, 1964, on file in offices of *California Law Review*.

The California Public Welfare Department has also undertaken a limited program of rent withholding restricted to recipients of public assistance for age, disability and blindness. Under the California regulations the recipient is entitled to a minimum of \$21 a month for rent and whatever amount above that he actually expends up to a maximum of \$63. CALIFORNIA STATE DEP'T OF SOCIAL WELFARE, OLD AGE SECURITY—MANUAL OF POLICIES AND PROCEDURES § A-202.05 (A1) (1964). If the recipient is living in substandard housing the difference between the \$21 minimum and his actual rent may be withheld by the department following a three month period to permit time for repairs or for the tenants to relocate. *Id.* § A-202.05(A3) (1964). In San Francisco the new policy was first applied to recipients who lived in hotels. At the beginning of the program in the spring of 1964 there were 112 substandard hotels on the department's list wherein 250 aged, disabled, or blind recipients lived. By November 1964 only 51 of the hotels were still deemed substandard, and only 19 recipients were residing in them. Telephone interview with Mr. Wilber Leeds, Assistant Director of San Francisco Public Welfare Dep't, Nov. 25, 1964. In light of this satisfactory response the San Francisco department has recently extended the withholding to substandard apartment houses where aged, disabled, or blind recipients reside. *San Francisco Examiner*, Nov. 20, 1964, p. 1, col. 3.

<sup>148</sup> Letter from official of the Cook County Dep't of Public Aid to the author, Aug. 25, 1964, on file in offices of *California Law Review*.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

the tenant is protected from eviction.<sup>151</sup> In other jurisdictions, unless the welfare tenant can be guaranteed satisfactory relocation elsewhere, it would seem that the adoption of this method of rent withholding would be unwise and demeaning to the welfare tenant. In effect it would probably ensure the tenant's eviction and make it difficult for him to find other accommodations.<sup>152</sup>

#### CONCLUSION

The tenant led rent strike is more a symptom than a cure. It is primarily a weapon of protest rather than an effective device for bringing a lasting solution to the problems of slum housing. When the rent strike arises it indicates the accepted methods of creating an adequate supply of standard low cost housing have broken down. Where the technique has been given a statutory basis it serves both as a reasonably satisfactory channel for protesting an intolerable situation and as a substitute for the normal methods of code enforcement. As the latter, however, it suffers from several defects. First, there is no guarantee that the sanction will be consistently applied. Since the use of the method depends upon the tenants' own initiative, it may be invoked sporadically with some owners being subjected to what is admittedly a heavy sanction while others get by with an occasional fine, or perhaps no penalty at all.<sup>153</sup> This disparity of application neither creates a respect for the law and a willingness to comply voluntarily with the minimum standards, nor ensures a uniformly adequate supply of housing. Secondly, this type of enforcement technique

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<sup>151</sup> However, in all jurisdictions subject to a welfare rent withholding procedure, including New York City, the welfare tenant not already in possession will likely encounter discrimination when seeking accommodations since landlords who consider renting to a welfare recipient must ponder the likelihood of not being paid should it be determined that their units are substandard.

<sup>152</sup> Apparently there has been some evidence of this in those portions of New York State covered by the Spiegel Law but not under rent control. Letter from official of the Nassau County Dep't of Public Welfare to the author, Sept. 3, 1964, on file in offices of *California Law Review*.

Different conclusions prevail with regard to the California welfare withholding program. See note 147 *supra*. The distinction lies in the limited character of the California program. Because the recipients covered—the aged, the disabled, and the blind—present a stable source of income to the landlords, and because they pay their rent promptly and cause them little trouble, they are actively sought by low-rent hotel and apartment owners to occupy their accommodations. Consequently, when the landlords were faced with the prospect of losing this preferred clientele they usually made efforts to comply with the housing regulations. Telephone interview with Mr. Wilber Leeds, Assistant Director of San Francisco Public Welfare Dep't, Nov. 25, 1964.

<sup>153</sup> Miss Ohlson found that some tenants who lived in the most miserable surroundings were sometimes too apathetic to even attend a tenants' meeting to discuss ways of improving their conditions, while others who lived in comparatively better accommodations were ready and willing to carry out a rent strike. Interview with Miss Joan Ohlson, see note 4 *supra*.

is apt to be too harsh and inflexible. The best housing law enforcement program is the one where compliance can be obtained through persuasion, and where actual resort to the penal sanctions is rarely necessary.<sup>154</sup> Where the tenants themselves administer and apply these heavy penalties, landlord-tenant relationships will become strained, and the opportunity to persuade compliance will be diminished. Furthermore, the potential uses of these heavy sanctions would tend to make investment in low rent property unattractive, possibly resulting in even less new construction in low cost housing and in transfers of the existing accommodations to speculators interested only in a quick depreciation and resale.<sup>155</sup> It is only when the problem has reached the point where the traditional means of enforcement have completely failed that these considerations must yield to the immediate safety and welfare of the tenants. In such a case rent withholding legislation is justified.

Welfare rent withholding is not subject to some of these criticisms since it is administered by an official agency, and presumably will be consistently and rationally applied. The more serious criticisms of this technique relate to the effect of forced withholding and relocation upon the welfare recipients. Even so, the use of the device is a recognition that the normal enforcement methods have proven unsatisfactory.

Overriding all criticisms of the wisdom and effectiveness of rent withholding are the inadequacies inherent in any attempt merely to coerce compliance with housing laws. Substandard buildings are usually old,<sup>156</sup> and they can be repaired and maintained according to ever rising standards for only so long. Eventually they must be torn down and replaced with new housing adapted to the needs of low income families. Neither rent strikes nor any other means of housing law enforcement can bring

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<sup>154</sup> MORRIS, CONSERVATION—A NEW CONCEPT IN BUILDING LAW ENFORCEMENT 41 *passim* (1958); 3 NEW YORK STATE DIV. OF HOUSING, HOUSING CODES—THE KEY TO HOUSING CONSERVATION 23 (1960).

<sup>155</sup> There is a further theoretical objection to the use of rent withholding as a penalizing device, although as a practical matter it will seldom be of much significance. That is that the severity of this all-or-nothing penalty will have little relation to the gravity of the landlord's offense. Hopefully, a legal sanction will be scaled to the degree of social harm caused by the wrongdoer. However, the application of a rent withholding penalty is likely to impose the heaviest burden on the least offending landlord. Since ordinarily the most run-down, socially harmful housing will yield the lowest rent, the withholding of this amount from the owner will be less of a monetary sanction than the withholding of income from better maintained, albeit substandard, accommodations commanding higher rents. This distinction will usually be moot, however, since in practice rent withholding is utilized only where the tenants are living in the most dilapidated housing, and any rent differential will be small.

<sup>156</sup> Today there are in New York City about 43,000 tenement buildings constructed prior to the passage of the Tenement House Act in 1901. These "old law" tenements house nearly 900,000 people. N.Y. Times, Jan. 6, 1964, p. 1, col. 2, at 29, col. 6; *id.*, Dec. 26, 1963, p. 26, col. 1.



this about directly. What the rent strikes can and do accomplish is to indicate dramatically the need that exists. This need has not been fully met by the present sources of residential construction. The signs seem to point to the necessity for greater participation by the federal government, either through subsidies to private contractors or, more directly, through the public housing program. Whatever the source of the cure, until there is a more effective commitment to this area of housing construction, rent strikes are likely to continue to appear, and, irrespective of their usefulness as an enforcement device, repeatedly indicate the need for more standard low cost homes.

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