Charles Donahue, Jr., ‘Change in the American Law of Landlord and Tenant’, *Modern Law Review*, 37 (1974) 242–63.

CHANGE IN THE AMERICAN [1] LAW OF LANDLORD AND TENANT

THE last ten years have witnessed an extraordinary ferment in landlord-tenant law in the United States. Changes have been made both by the courts and the legislatures, and the process of change has by no means come to rest. The changes have been greatest in the law of residential tenancies and within that broad field, particularly in the law concerning the physical condition of leased premises. That law will provide the principal focus of attention of this paper, but a few prefatory remarks broadly comparing landlord-tenant law and institutions in England and America may be helpful in explaining why the changes have occurred in America in the way they have.

First, America, in marked contrast to the United Kingdom, had, until recently, relatively little legislation on the topic of landlord and tenant. No American jurisdiction has any legislation remotely approaching the scope of the Law of Property Act,[2] and we have little which corresponds to the Rent Acts [3] or to the various Landlord and Tenant and Housing Acts.[4] The Second World War legislation designed to control the price of rented housing and to give tenants some measure of security of tenure was repealed in almost every American jurisdiction shortly after the war.[5]

The reasons for this comparative lack of legislative activity in the landlord-tenant field are complex but are probably to be found in the differences between our political systems. In America, the Federal legislature has little to do with the private law of landlord and tenant. The malapportionment of state legislative districts gave state legislatures a conservative cast, and they generally had little concern with urban problems. Further, the American Federal constitutional system of checks and balances, a system which is mirrored in most of the states, has meant that it is extraordinarily difficult to get any legislation passed unless a great deal of political pressure can be brought to bear. Landlords as a group were quite happy with the state of the law as it was, and tenants as a group lacked the organisation necessary to put pressure on the legislatures.

Landlord-tenant law until recently was also neglected by the

[1] The title of this paper may be deceptive. It is not about the law of two continents but almost exclusively about that of the United States. Convenience of expression and, I fear, a certain arrogance which is all too typical of my country dictate that, at times, I refer to the United States as " America."

[2] 15 Geo. 5, c. 20.

[3] Mostly consolidated in the Rent Act 1968, c. 28; see Megarry, *The Rent Acts* (10th ed. 1967, Supp. 1970).

[4] *e.g.* Landlord and Tenant Act (2 & 3 Eliz. 2, c. 56); Housing Act 1969 (c. 33).

[5] Vestiges of the World War II rent control legislation remain in New York. See 2 R. Powell, *Real Property* § 232 (P. Rohan ed. 1971).

American courts. Most leases, particularly residential leases, involve relatively small amounts of money, and it is rarely worth the parties' while to appeal against a lower court judgment to a court which can render an opinion which will appear in the reports. Thus, most of the reported twentieth century landlord-tenant cases involved commercial leases drafted by counsel for parties of approximately equal bargaining power. These cases rarely concerned the basic principles of landlord-tenant law, but rather offered refinements of the law of the interpretation of written instruments.

This lack of legislation and recent judicial opinions meant that a major characteristic of American landlord-tenant law was its antiquity. For example, the rule in *Dumpor's Case* [6] is still good law in many American states; it was abolished by legislation in this country in 1859.[7] The rule in *Paradine* v. *Jane*,[8] that the total destruction of leased premises without fault by the tenant does not, in the absence of an express agreement to the contrary, relieve the tenant of his obligation to pay rent, has suffered setbacks in the hands of a few state legislatures but is still frequently applied by the courts in the absence of legislation.[9] Until very recently it was settled doctrine that, again in the absence of express provisions to the contrary, most lease covenants are independent.[10] This doctrine of independence has its origins in a time when the rule of *Nichols* v. *Raynbred* [11]—that *no* covenants are dependent—prevailed. Finally, in the area of remedies, it is probably still the law in most American jurisdictions that rent may not be apportioned (a doctrine which was considerably modified here by legislation in 1870 [12]) and also that the landlord is under no obligation to mitigate damages. The no-apportionment doctrine can lead to harsh results when the tenant holds over after the expiration of the lease term, and the no-mitigation doctrine can lead to similar, harsh results when the tenant abandons the premises before the expiration of the term.[13]

A second major difference between our two countries in the institutional setting of landlord-tenant law is that in the United States, in marked contrast to the United Kingdom, residential housing, and hence rented housing, is almost exclusively a matter

[6] (1603) 4 Coke 119b; 76 E.R. 1110. For the status of the rule in America, see 1 *American Law of Property* (hereinafter cited as " A.L.P.") § 3.58 (A. J. Casner ed. 1952).

[7] Law of Property Amendment Act 1859 (22 & 23 Vict. c. 35), now replaced by the Law of Property Act 1925, s. 143.

[8] (1647) Aleyn 26; 82 E.R. 897.

[9] See 1 A.L.P. §§ 3.103, 3.75, for the common law rule. For legislative changes, see *e.g.* Minn. Stat. § 504.05 (1969); N.Y. Real Prop. Law § 227 (McKinney 1968).

[10] See *e.g. Brown's Admr.* v. *Bragg*, 22 Ind. 122 (1864); *Stewart* v. *Childs Co.*, 86 N.J.L. 648; 92 A. 392 (1914).

[11] (1615) Hobart 88; 80 E.R. 238.

[12] Apportionment Act 1870 (33 & 34 Vict. c. 35).

[13] See *e.g. A. H. Fetting Mfg. Jewelry Co.* v. *Waltz*, 160 Md. 50; 152 A. 434 (1930) (holdover); *Gruman* v. *Investors Diversified Services, Inc.*, 247 Minn. 502; 78 N.W.2d 377 (1956) (abandonment).

for the private sector of the economy. Public housing is a relatively recent phenomenon in the United States. Very little public housing was built until after the Second World War. Today, roughly 28 per cent. of the housing units in England and Wales are public housing units, less than 2 per cent. of those in the United States are.[14]

America, like England, experienced a severe housing shortage after the Second World War, but the legislative response to this shortage was not so much to build public housing as to provide subsidies to the private housing market in the form of federally-guaranteed mortgages, concessions for savings and loan associations (roughly equivalent to building societies), and support for the secondary mortgage market.[15]

A third major difference between our countries in the institutional setting of landlord-tenant law is a procedural one. The Statutes of Forcible Entry and Detainer [16] have undergone a sea-change as they crossed the Atlantic. They have become the authorisation for what are called in many jurisdictions " summary proceedings." The initial step in this change was a relatively small one. The forcible entry statutes were modified so that a landlord could summarily evict a tenant who held over after the expiration of the term without the landlord's having to show that the tenant detained the premises by physical force. The second step, logically if not historically, was for landlords to include clauses in the lease making the breach of the covenant to pay rent, and frequently other covenants as well, grounds for the forfeiture of the leasehold estate. The legislatures helped out by making non-payment of rent a ground for forfeiture, unless the contrary was expressed in the lease. Thus, the tenant who is in arrears with his rent is served with a notice to quit. If he fails to obey the notice, he is holding over and is liable to be evicted by summary proceedings, usually in a very low level court.

The chief characteristic of summary proceedings is, as the name implies, their summariness. There is nothing quite so depressing for one's sense of the majesty of the law than to sit through a morning session of an American metropolitan landlord-tenant court and watch the judge issue seventy-five judgments in as many minutes.

[14] The figures for England and Wales are based on General Register Office, *Sample Census 1966*, at p. 16 (1968); for the U.S. on U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1970*, at p. 682 (1970). The figures are not quite comparable since the British statistics include both " council housing " and " new-town " housing, whereas the American include only " low-income housing units." Further, the American and British statistics do not seem to define housing units in quite the same way. The gap in the figures is sufficiently dramatic, however, that these slight differences in definition are unlikely to affect its general magnitude.

[15] See J. Krasnowiecki, *Housing and Urban Development* (1969), for a survey, in casebook form, of the various programmes.

[16] 5 Ric. 2, c. 7; 15 Ric. 2, c. 2; 4 Hen. 4, c. 8; 8 Hen. 6, c. 9. For a modern American " summary proceedings " statute, see *e.g.* N.Y. Real Prop. Actions Law § 711 (McKinney 1963).

Summonses for summary proceedings are generally returnable within a week or ten days. The defences which may be raised in the proceedings are frequently limited to a denial that rent is owing, and frequently no set-offs or counterclaims are allowed. In most states there is a delay of a week or so between the entry of the judgment and execution, and in some states the tenant may avoid eviction by paying the back rent during this delay period, but once the delay period is over, the landlord usually can obtain an execution order from the clerk of the court, and on the strength of this order the sheriff will evict the defendant-tenant.[17]

In practice, short-cuts are taken in even this summary a procedure. Service of the summons is frequently made by the most questionable of methods. Default by the tenant is the rule rather than the exception. And the landlord, armed with a default judgment, frequently repossesses the premises himself without waiting for the grace period to expire.

Granted a system of law in which the obligation to pay rent is independent of any obligation of the landlord to provide and maintain habitable premises, the summary proceeding system, if not the abuses of that system, can be defended on the ground that the more expensive it is for landlords to evict tenants who do not pay their rent, the higher the cost of housing will be for those tenants who do. The statutes, therefore, provide the landlord with a remedy which is quick and hence cheap. The availability of summary proceedings *has* had the effect of making distress for rent with its attendant complexities and difficulties an uncommon practice in most American jurisdictions.

Once, however, defences become available to the tenant, the procedural system needs reform. In fact, change in the substantive law of landlord-tenant and change in the procedural law are inextricably intertwined. The small amount of money that is involved in most landlord-tenant cases means that the availability of a cheap remedy is crucial. It does the tenant no good to be told that he has a substantive right to habitable premises if the only way he can enforce that right is by costly proceedings in a higher court. The ideal remedy from the tenant's point of view, granted the substantive right, is a self-help remedy, either a remedy which allows him to cease paying rent and remain on the premises until the landlord comes to terms or one which allows him to abandon the premises without fear that the landlord can sue him for rent once he has left, or, better still, an election between the two.

All this has brought us approximately to 1965. America had an antique if not an antiquated landlord-tenant law, legislatures which were incapable of or uninterested in doing anything about it, a system of housing which put the renting classes almost ex-

[17] See Gibbons, "Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code," 21 Hastings L.J. 369, 371–380 (1970).

clusively on the private market, and a procedural system heavily skewed in favour of landlords. The institutional factors which led to the changes are many and complex.[18] Probably the single most important factor was the late President Johnson's Great Society legislation. This legislation had little to say about landlord-tenant law as such, but it led to the organising of large segments of the renting classes in a way in which they had never been organised before. Organisational techniques which had been successful in the civil rights movement in the South came to be used to organise urban tenants, particularly students and blacks, into tenants' unions. Further, the Great Society legislation made available to the poor an extensive system of legal aid. It is now financially possible for poor tenants to obtain representation not only in landlord-tenant courts but in appellate courts as well.

At the state government level newly reapportioned state legislatures found themselves with many more urban members, and these members were frequently interested in change in landlord-tenant law. State judicial systems, stimulated by the Warren Court and by liberal appointments to the bench, were more receptive to change.

In the residential housing market, on the other hand, the situation seemed worse than it had been since just after the Second World War. New housing starts, particularly lower income housing starts, were not keeping pace with population growth. The cost of money skyrocketed. Partially as a result of the stranglehold of the building trades on the industry and partially as a result of the relative rise in the cost of services in relation to the cost of goods, the price of construction and repair of housing rose enormously. Various presidential commissions reported on just how bad housing was for many of the poor, particularly the black poor.

Finally, there was a new mood of radical consumerism. The resident of a Park Avenue flat who could not get his landlord to fix the garbage disposal unit began to perceive himself as having a problem different in quality but not in kind from that of the black resident of Harlem whose flat was infested with rats.

Let us now examine the principal changes which have occurred in American landlord-tenant law in the context of a " homey ", if not scatological, hypothetical case: the case of Kelly's toilet. Let us suppose that Kelly, a student at a large midwestern university, has taken a bedsitter for the school year in a converted house near the university. The landlord lives in Florida and a management company (estate agent) looks after his interests. Midway into the autumn term, Kelly's water closet ceases to function and he is unable to fix it himself. Kelly calls the management company and gets sympathy but no action. He calls a plumber and discovers that it will cost $20 (roughly £8) just to get the plumber to come

[18] For a good summary, see Indritz, " The Tenant's Rights Movement," 1 N.M.L.J. 1, 4–40 (1971), and sources cited therein.

and look at the toilet and that $20 represents Kelly's non-rent budget for two weeks.

Ten years ago, and even today, the first question a lawyer should ask Kelly is if he knows where the problem in the water closet is. Is there something wrong with the closet itself or does the source of difficulty lie in the plumbing outside the physical limits of his bedsitter? The reason why the question is an important one is because of the way in which the common law in the United States has allocated the repair responsibility between landlord and tenant. In the absence of an express covenant to the contrary, the landlord owes no duty to the tenant to repair or maintain the demised premises. Indeed, the tenant owes the landlord a duty not to commit waste, which duty is often, if not always, the functional equivalent of a duty on the tenant's part to repair and maintain the premises. On the other hand, it is fairly well settled that the landlord owes a duty to the tenant to repair and maintain the common areas of a multiple-unit building, and there is some authority for the proposition that that duty extends to the maintenance of those portions of the heating, plumbing, and electrical systems which lie outside of the tenant's leasehold.[19]

Even assuming that Kelly's landlord owes him a duty to repair the toilet, Kelly still has many problems in enforcing his right. First, any judicial remedy open to Kelly is going to take a substantial amount of time, and in the meantime he will have to put up with the inconvenience of having no toilet. Second, if Kelly does sue his landlord in a superior court he will, as a practical matter, have to hire a lawyer (unless he qualifies for legal aid which he probably will not if he has middle class parents), and even if he is successful, American courts will not allow him attorney's fees as part of his costs.[20]

What Kelly needs is a self-help remedy, and this, until recently, American landlord-tenant law has been reluctant to give him. There is one possibility open to him in the doctrine of constructive eviction. As an exception to the general rule that leasehold covenants are independent, American law, like the English, recognises an implied dependent covenant of quiet enjoyment, by which the landlord undertakes that neither he nor anyone acting under him will oust the tenant from possession or substantially interfere with

[19] See generally 1 A.L.P. § 3.78, and the authorities cited therein. For a tort case extending the " common parts " exception to electric switches in the demised premises, see *Gladden* v. *Walker & Dunlop, Inc.*, 168 F.2d 321 (D.C. Cir. 1948).

[20] If there is a small claims court in Kelly's jurisdiction, he might be able to sue *pro se* in it. Not all jurisdictions have such courts, however; the jurisdictional limit in these courts tends to be very low, and at least in some jurisdictions procedure in these courts, despite the intent of the framers of the small claims court acts, has become sufficiently complicated that it is unwise to proceed in one without counsel. For a summary of the difficulties with small claims courts with an accompanying bibliography in the notes, see Eovaldi & Gestrin, " Justice for Consumers: the Mechanisms of Redress," 66 Nw. U.L. Rev. 281, 294–298 (1971).

the tenant's possession during the term. As in English law, eviction by the landlord constitutes a breach of the American quiet enjoyment covenant. The American law, however, has extended the notion of eviction from physical dispossession and intentional acts designed to make the tenant quit the premises to any breach of duty by the landlord which effectively deprives the tenant of his enjoyment of the leasehold.[21] In a leading New York case, for example, the landlord's failure to abate the nuisance in the common halls and passageways caused by another tenant's using her flat for the purpose of prostitution was held to constitute a breach of the covenant of quiet enjoyment justifying the tenant's rescinding the lease and quitting the premises.[22]

The doctrine of constructive eviction, however, probably will not help Kelly. In the first place, it is dependent upon a breach of duty by the landlord, and under traditional doctrine such a duty would arise only by express covenant or if the problem with the toilet lay outside of the physical bounds of Kelly's leasehold. Secondly, in order to claim constructive eviction, Kelly must quit the premises. This he can do as a practical matter only if he can afford to move and if alternative premises are available to him. Thirdly, claiming constructive eviction involves a considerable litigation risk. If a court determines that the landlord has not breached a duty or that the breach of duty did not effectively deprive Kelly of the possession of the premises, Kelly still owes the landlord rent, and in most American jurisdictions the landlord has no obligation to mitigate damages by finding another tenant for the remainder of Kelly's term.

Some recent cases have indicated that the rigours of the constructive eviction doctrine may be being modified. The Massachusetts Supreme Court, for example, has held that a tenant claiming constructive eviction could remain on the premises until he obtained a judicial declaration that the landlord's breach of duty amounted to a constructive eviction. If he is successful, he need pay only fair rental value for the period between the breach and the time he quits.[23] The Massachusetts case, however, involved a commercial lease and a large sum of money. Kelly's situation hardly justifies the expense of a declaratory judgment action.

There has also been talk in the commentators and some hints in the courts of a notion of partial constructive eviction. It is fairly well settled in America, as it is in England, that if the landlord actually evicts the tenant from a portion of the leasehold premises, the tenant's obligation to pay rent is abated in full, both

[21] For the English law on the covenant of quiet enjoyment see *Hill and Redman's Law of Landlord and Tenant* §§ 115–123 (Barnes and Dobry, 15th ed. 1970); *Woodfall's Law of Landlord and Tenant* §§ 1304–1339 (Blundell and Wellings, 27th ed. 1968). For the American law, see 1 A.L.P. 3.47–3.52.

[22] *Phyfe* v. *Dale*, 72 Misc. 383; 130 N.Y.S. 231 (App. T., 1911); see *Dyett* v. *Pendleton*, 8 Cow. 727 (N.Y. 1826).

[23] *Charles E. Burt, Inc.* v. *Seven Grand Corp.*, 340 Mass. 124; 163 N.E.2d 4 (1959).

because of the no apportionment of rent rule and because the landlord may not, it is said, apportion his wrong.[24] Until recently, however, the courts had never applied the partial eviction idea to the situation where the partial eviction was not actual but only constructive. The draconian nature of the remedy probably accounts for this reluctance, and in the light of other developments which we will come to shortly, I think we are unlikely to see any extension of the few lower court cases [25] which favour a doctrine of partial constructive eviction.

Assuming that constructive eviction is not available to Kelly because he does not want to quit the premises and that the courts in his state will not accept the notion of partial constructive eviction, is there any other self-help remedy available to him? It is frequently said that the idea of the independence of leasehold covenants prevents Kelly from having the toilet fixed himself and deducting the cost of repair from his rent. It probably makes things clearer if we confine the application of the doctrine of the independence of leasehold covenants to the situation where the tenant wishes to withhold his performance of the lease obligations in order to put pressure on the landlord to perform or as the first step in rescission, that is to the situation in which if the covenants were dependent, the landlord's breach would justify the tenant in not performing his obligations either permanently or temporarily. But the tenant who pays his rent but deducts the cost of repair from that rent continues to recognise his leasehold obligations; he is simply engaging in non-judicial set-off. Kelly's problem here is not the doctrine of independent covenants, but the insistence of the common law that non-judicial set-off can occur only where the amounts at issue are liquidated.[26] If Kelly can change his unliquidated claim to repairs into an account or an implied accord and satisfaction—that is, if he can get his landlord to acknowledge the obligation and the sum involved—then I think it is open to him in America to set off the cost of repair. In the absence of these acknowledgments he probably cannot set off.[27]

[24] See *Smith* v. *McEnay*, 170 Mass. 26; 48 N.E. 781 (1897); *Fifth Avenue Building Co.* v. *Kernochan*, 221 N.Y. 370; 117 N.E. 579 (1917). For the English law, see *Foa's General Law of Landlord and Tenant* § 235 (Heathcote-Williams, 8th ed. 1957), and authorities cited.

[25] *e.g. Gombo* v. *Martise*, 41 Misc. 2d 475; 246 N.Y.S. 2d 750 (N.Y.C. Civ. Ct.), *rev'd*, 44 Misc. 2d 239; 253 N.Y.S. 2d 459 (App. T. 1964); *Majen Realty Corp.* v. *Glotzer*, 61 N.Y.S.2d 195 (N.Y.C. Munic. Ct. 1946), which also recognises partial constructive eviction, may probably be confined to its facts: the post-World War II housing shortage. See generally Note, "Partial Constructive Eviction: the Common Law Answer in the Tenant's Struggle for Habitability." 21 Hastings L.J. 417 (1970).

[26] See 6 A. Corbin, *Contracts* § 1290 (1962).

[27] The statement in the text paints with a very broad brush and does not do full justice to the complexity of the underlying authorities. Despite the common law rule about non-judicial set-off of unliquidated amounts, there are some American authorities which recognise the power of the tenant to set off damages against rent owing (assuming, of course, that the landlord has breached a duty to repair). See 1 A.L.P. § 3.59, and authorities cited. Even assuming that such action is justified, however, there still remains the question of whether

A number of states have changed the common law set-off rule by so-called " repair and deduct statutes " under which the tenant may set off the reasonable cost of repairs from his rent. The statutes are limited to those situations in which the landlord has a duty to repair, and the amount which may be set off is frequently limited to one month's rent.[28] The effect of such statutes is to put the litigation burden on the landlord. If he feels that the repairs were unjustified either because he had no obligation to make them or because the amounts spent were unreasonable, he must bring a summary proceeding alleging that the rent is still owing. Even under the most restricted summary proceedings statutes, the tenant's statutory repair and deduct claim probably must be heard, since the legislative intent of the statutes is clearly to change the common law set-off rule. The objection to repair and deduct statutes is the same objection which can be raised to non-judicial set-off generally—it allows the tenant to take the law into his own hands. He, rather than a court, determines initially whether there has been a breach and what the damages for that breach should be.

Neither constructive eviction nor repair and deduct are likely to help Kelly, for they both depend upon a finding that the landlord owes him a duty to repair the toilet. The common law, as we have seen, does not place that duty on the landlord unless the cause of the damage lies outside the apartment, and if Kelly has a lease, that lease will probably directly or indirectly put the burden to repair on him. It is quite likely, however, that Kelly's landlord has a public obligation to keep that toilet in repair. Most American cities and towns have a housing code.[29] The pattern and

the tenant can raise the issue in a summary proceeding. At this point he may be blocked either by the doctrine of independent covenants or the statutorily prescribed summariness of the proceeding, or some imperfectly articulated combination of the two. Compare *Rene's Restaurant Corp.* v. *Fro-Du-Co Corp.*, 137 Ind. App. 559; 210 N.E.2d 385 (1965) (allowing the set-off), with *Young* v. *Riley*, 59 Wash. 2d 50; 365 P.2d 769 (1961) (refusing to allow it).

The situation in England seems equally confused. Repair and deduct is referred to as " an ancient common law right " in *Lee-Parker* v. *Izett* [1971] 1 W.L.R. 1688, 1693 (Ch.), on the basis principally of what are apparently dicta in *Taylor* v. *Beal* (1591) Cro.Eliz. 222; 78 E.R. 478. In the nearly four hundred years which intervened between *Taylor* and *Lee-Parker* the former case seems to have been almost forgotten, and a doctrine seems to have developed that a tenant who repairs and deducts cannot successfully prevent his landlord from distraining for the deducted amount. See *Hill and Redman*, *supra*, note 21, at § 209; *Foa*, *supra*, note 24, at § 890, and authorities cited.

[28] *e.g.* Cal.Civ.Code § 1942 (1954 West, Supp. 1972) (limited to one month's rent); N.D.Cent.Code §§ 47–16–12, 47–16–13 (1960) (no limitation).

[29] The literature on housing codes is substantial. The text which follows is based principally on Mood, " The Development, Objective and Adequacy of Current Housing Code Standards " in National Commission on Urban Problems, *Housing Code Standards: Three Critical Studies* (Research Rep. No. 19, 1969), and F. Grad, *Legal Remedies for Housing Code Violations* (National Commission on Urban Problems, Research Rep. No. 14, 1968). See Gribetz and Grad, " Housing Code Enforcement: Sanctions and Remedies," 66 Colum. L. Rev. 1254 (1966); Mandelker, " Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing,"

contents of these codes vary widely, but a typical pattern runs something like this. The legislation declares that no residential unit can be rented, or sometimes that no residential unit can be occupied, unless there is a certificate of occupancy outstanding on the premises. This certificate is issued by a city official, a building or housing inspector, who determines at the time of issuance of the certificate that the unit in question complies with the requirements of the code.

Substantive code requirements are a detailed *mélange* of legislative judgments concerning good building, good health, and frequently a particular style of life. The same code may require that all units upon which a certificate is issued after 1965 have copper pipes and at least one 240-volt electric line, that the building not be infested with vermin, and that every unit have at least one working toilet, sink, and bathtub. Not all housing codes are quite so confused as this. Many jurisdictions have separate building codes which outline the requirements for plumbing and electricity in newly constructed units, and many jurisdictions often have a separate health code which deals with such matters as vermin. But it is the rare jurisdiction which does not have in its housing code elements which reflect more the political power of the building trades than a concern with the habitability of the premises, and it is a rare jurisdiction which does not have regulations in places other than the housing codes which concern the habitability of residential premises. This hodge-podge characteristic of the housing codes makes it difficult to take them as a legislative judgment about the minimum essentials of habitable housing.

Effective enforcement of housing codes has been a major problem in almost every American jurisdiction. Although failure to comply with the housing codes makes the landlord liable to pay fines, the level of the fines is frequently lower than the cost of " bringing the building up to code." Thus the payment of fines becomes for many landlords a cost avoidance device. The ultimate sanction, revocation of the certificate of occupancy, is rarely used, both because the housing inspector may be corrupt and because even an honest housing inspector is reluctant to put tenants out on the street except as an absolute last resort. Further, housing inspection offices are notoriously understaffed. Without a complaint from the tenants years may go by before any given building is inspected.

The traditional American doctrine is that the fact that the landlord has a duty under the housing code to repair does not mean that the tenant can enforce this duty.[30] The public prosecutor is generally the only person who can bring an action under the codes.

67 Mich. L. Rev. 635 (1969). For an outline of the situation in England, see West, " Landlords and the Housing and Public Health Acts " (1964) 28 Conv.(N.S.) 348.

[30] If someone is injured, however, because of the failure to repair, the landlord may be liable in tort. See generally 2 R. Powell, *Real Property* §§ 233–234 (P. Rohan ed, 1971).

The fact that the landlord may have a public obligation to keep Kelly's toilet in repair does not affect the fact that the landlord can look to Kelly either under the common law or under the lease covenants to perform this public obligation for him.

Thus, even if Kelly's landlord has an obligation under the housing code to maintain Kelly's toilet (and he usually has), the most likely thing that will happen if Kelly complains to the housing inspector is nothing at all. The inspector may be too busy to do anything, or the landlord's management company may see to it that he does nothing, or he may initiate the tortuous process of prosecution which will come to fruition in a $25 fine long after Kelly has left the university. Far less likely, but still with disastrous results for Kelly, the certificate on the building may be suspended, in which case Kelly will have to move out, or the management company may insist that Kelly perform his repair obligation, so that the certificate may remain outstanding on the building. Further, as a result of his complaint to the building inspector, Kelly may find that he is the victim of a retaliatory eviction. His lease may not be renewed when it expires or if he holds under a month-to-month tenancy, he may find a thirty-day notice to quit in his mail box.

Let us now review five of the recent leading cases which change American landlord-tenant law with a view to their application to Kelly's situation.

Lemle v. *Breeden* [31] involved the rental at $800 a month (roughly £80 a week) of what was modestly described as a " Tahitian-style grass shack " in Hawaii, complete with swimming pool and furnishings. During the tenant's half-hour, daylight inspection of the premises, he did not perceive nor did the landlord's agent, if he knew, tell the tenant that at night rats came up from the beach and gambolled about on the house's corrugated tin roof. Upon experiencing this dismal fact and upon ascertaining that the rats could not be exterminated, the tenant abandoned the premises and sued to recover his deposit and initial lease payment. The Supreme Court of Hawaii rendered judgment in his favour. The holding of the case involves nothing more than an application of the common law implied warranty of habitability in short-term leases of furnished premises.[32] The court's rationale, however, is much broader. Citing the extension of warranties of fitness in the field of sales of chattels, the court said that a warranty of habitability should be implied in all residential leases and that a substantial breach of the warranty should permit the tenant to rescind the lease.[33]

[31] 51 Hawaii 426; 462 P.2d 470 (1969).

[32] The subsequent Hawaii case of *Lund* v. *MacArthur*, 51 Hawaii 473; 462 P.2d 482 (1969), makes it clear that the fact that premises in *Lemle* were furnished was of no moment for the decision in the case and the Hawaii courts will imply a warranty of habitability in all residential leases.

[33] Although the common law rule of *caveat emptor* in leases was, until quite recently, well established in the United States (see 1 A.L.P. § 3.45), it appears

The next case, *Brown* v. *Southall Realty Co.*,[34] comes from the District of Columbia. *Brown* involved a suit by a landlord for back rent against a tenant who had abandoned the premises after finding them uninhabitable. The tenant defended the suit on the ground that the lease was illegal because entered into in violation of the provisions of the D.C. Housing Code which declare, in effect, that no person is to let a dwelling which is unsafe or unsanitary. Brushing aside the notion that this provision was not intended to render such leases void, the court held Mrs. Brown's lease void and therefore unenforceable.

Like the *Lemle* case, *Brown* is confined to situations which existed at the time of letting.[35] On the other hand, as subsequent D.C. cases make clear, the illegality doctrine announced in *Brown* applies not only to the tenant who has abandoned the premises but also to the tenant who remains on the premises.[36] He need not pay rent; he may sue to recover any rent payments made under the " illegal " lease, and he may be evicted by his landlord only if the landlord wishes to remove the unit from the housing market.

The next step, *Marini* v. *Ireland*,[37] decided by the Supreme Court of New Jersey, involves much the same operative facts as Kelly's toilet. In *Marini* the tenant had hired a plumber to repair the toilet and had deducted the cost of repair from her rent. She defended the landlord's summary dispossession action on the ground that because of the landlord's breach of duty to repair, she was justified in deducting the cost of the repairs from the rent. The New Jersey court held that her defence could be raised in a summary proceeding action and that she ought to prevail. Relying on *Lemle* and on previous New Jersey authority, the court held that the landlord impliedly warrants that premises leased for residential purposes are habitable. There is also an implied covenant by the landlord to maintain the premises in habitable condition, unless the deficiencies are caused by the fault of the tenant. Further, granted the housing shortage, the tenant should not have to rely exclusively

to be no older than *Hart* v. *Windsor* (1843) 12 M. & W. 68; 152 E.R. 1114. *Smith* v. *Marrable* (1843) 11 M. & W. 5; 152 E.R. 693, which is generally held to have announced the " furnished premises for a short term " exception may in fact stand for an older rule implying a far broader warranty. There are surprisingly few English cases on the topic, and one commentator has concluded that it is still open to the Court of Appeal to hold that there is a warranty in the case of even unfurnished flats and in the case of concealed defects and that it is open to the House of Lords to hold that there is a general warranty in all residential lettings if it is willing to overrule but two cases. West, " Implied Obligations of a Landlord as to the Condition of the Premises at the Time of Letting " (1961) 25 Conv.(N.S.) 184, 193–195.

[34] 237 A.2d 834 (D.C. App. 1968), *cert. denied*, 393 U.S. 1018 (1969).

[35] See *Saunders* v. *First National Realty Corp.*, 245 A.2d 836 (D.C. App. 1968), *rev'd on other grounds sub nom. Javins* v. *First National Realty Corp.*, 138 App. D.C. 369; 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), discussed *infra* in text accompanying note 58.

[36] See *Diamond Housing Corp.* v. *Robinson*, 257 A.2d 492 (D.C. App. 1969); *Robinson* v. *Diamond Housing Corp.*, 267 A.2d 833 (D.C. App. 1970), *rev'd* 463 F.2d 853 (D.C. Cir. 1972).

[37] 56 N.J. 130; 265 A.2d 526 (1970).

upon the remedy of constructive eviction. As an alternative she might give notice to the landlord and upon his failure to repair, perform the repairs herself and deduct the cost of repairs from her rent.

The fourth case, and certainly the most extreme in the sequence, also comes from the District of Columbia: *Javins* v. *First National Realty Corp.*[38] *Javins* involved a rent strike by the tenants of a large tenement in a notoriously shoddy part of Washington. When sued for possession for non-payment of rent the tenants countered by offering to prove that the building contained in excess of 1,500 code violations. They could not prove, or did not offer to prove, that these violations existed at the time their leases were entered into, and on this ground the intermediate appellate court dismissed their action. The D.C. Circuit, however, reversed the intermediate court and held that every residential lease contains an implied covenant to maintain the premises up to code. Further, this covenant could not be waived by private agreement. Further still, breach of this covenant would result in abatement of the obligation to pay rent in whole or in part.

Applying these cases to Kelly's situation we find that the rationale, if not the holding, of *Lemle* will apply if the problem with the toilet existed as of the time Kelly entered the premises and if the court is prepared to hold (as I think most American courts would be) that a toilet is necessary for the habitability of the premises. In order to obtain a self-help remedy under *Lemle*, however, Kelly must quit the premises. The rationale of *Brown* would apply if the housing code in Kelly's jurisdiction contains language similar to that of the District of Columbia (many but not all codes do) and if it contains (as almost all do) a requirement of functioning plumbing. *Brown*'s progeny go further than *Lemle* in not requiring that the tenant quit the premises. Further, at least while the premises contain the code violations, the landlord may not enforce the obligation to pay rent under the " illegal " lease. Whether the tenant may still owe the landlord the fair value of the premises if the landlord sues him in assumpsit for use and occupation is a question which is not completely settled even in the District.[39] The application of *Marini* to Kelly's situation is obvious, assuming that the court is prepared to hold that a toilet is necessary for habitability

[38] 138 App. D.C. 369; 428 F.2d 1071 (D.C. Cir.), *cert. denied.* 400 U.S. 925 (1970).

[39] In *Davis* v. *Slade*, 271 A.2d 412 (D.C. App. 1970), the tenant abandoned the premises under the *Brown* doctrine and sought to recover from the landlord payments made pursuant to the " illegal " lease. The court concluded that the tenant was entitled to recover but that the landlord was entitled to off-set in quasi-contract the reasonable value of the premises in their actual condition when occupied. Whether the landlord could maintain an independent suit in quasi-contract has not, to my knowledge, been decided by the D.C. courts. Further, the *Davis* case may be superseded by D.C. Housing Reg. § 2902.1 (a), (b) (1970) which provide in pertinent part that " any letting of a habitation which . . . is unsafe or unsanitary by reason of violations of these Regulations . . . shall render void the lease or *rental agreement* for such habitation." (Emphasis supplied.) The emphasised language may have the effect of voiding the agreement upon which the action for use and occupation is founded.

and assuming that Kelly has the repairs made at reasonable cost. *Javins* also applies and is more extreme because it contains no requirement that the code violations amount to a constructive eviction and because the tenant need not make repairs. The amount of rent, if any, which the tenant owes is dependent entirely on a jury's finding, and the jury is given no guidance other than that it may find that the tenant's obligation to pay rent has been extinguished in whole or in part by the landlord's breach of the implied covenant.

In the final case, *Edwards* v. *Habib*,[40] the District of Columbia court attacked the problem of retaliatory eviction. The tenant in *Edwards* had failed to move out at the end of her term, and her landlord sued for possession. The tenant defended on the ground that her lease had not been renewed because the landlord wished to get back at her for reporting housing code violations to the authorities. The court held that, if proved, this allegation would constitute a good defence to the action. The rationale which commanded a majority of the court was that the legislature clearly did not intend that a statutory remedy, summary eviction, be used to frustrate the purposes of another statute, the housing code.

While it is too early to say whether the doctrines announced in these cases will find acceptance in a majority of the states, there is a discernible trend in both judicial opinions and legislation in the direction of at least some of these doctrines. At least two states seem to have adopted the doctrine of *Edwards* v. *Habib* judicially.[41] Half a dozen states have statutes on the topic, ranging from the marvellously ambiguous Illinois statute which declares that eviction on the ground of complaints of housing code violations is " against the public policy of the state," [42] to Michigan's former statute which prohibited eviction for " any lawful act arising out of the tenancy " and then left the question of the burden of proof of the defence to the statement that defence should " appear by a preponderance of the evidence," [43] to Hawaii's which creates a rebuttable presumption of retaliatory motive if the eviction action is brought within six months of a complaint to a housing inspector.[44]

The opinions and legislation on the topic of the warranty of habitability and/or the covenant to maintain the premises can only be described as chaotic. No state supreme court, to my knowledge, has yet adopted the illegality notion of *Brown* v. *Southall*

[40] 130 App. D.C. 126; 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[41] *Dickhut* v. *Norton*, 45 Wis.2d 389; 173 N.W.2d 297 (1970); *Schweiger* v. *Superior Ct.*, 3 Cal. 3d 507; 476 P.2d 97; 90 Cal. Rptr. 729 (1970).

[42] Ill. Rev. Stat. ch. 80, § 71 (1971).

[43] Mich. Comp. Laws Ann. § 600.564 (4), (5) (Supp. 1972). The statute is now similar to Hawaii's (note 44, *infra*). Mich. Comp. Laws Ann. § 600.5720 (Supp. 1973).

[44] Hawaii Rev. Stat. § 666–43 (Supp. 1971). This is ABF, Model Residential Landlord-Tenant Code § 2–407 (tentative draft 1969) with minor changes. See *Aluli* v. *Trusdell*, — Hawaii — ; 508 P.2d 1215 (1973).

Realty.[44a] Several states have by judicial decision adopted the *Javins* doctrine [45]; others appear prepared to hold at least that there is a warranty of habitability at the commencement of the leasehold.[46] At least two state courts have refused to adopt a *Javins*-like rule,[47] and the Supreme Court of the United States, in an opinion the implications of which are still being debated, has held that the due process clause of the Federal Constitution (roughly the equivalent of the principles of natural justice) does not require that the *Javins* defence be available in a state's summary possession proceedings.[48]

A number of states have changed by legislation the common law rule on the landlord's warranty and/or his responsibility to repair.[49] The remedy for the breach of these statutory obligations is frequently not stated in the legislation, and the statutory obligations are more commonly than not waivable by express contrary agreement, sometimes, however, only in particular kinds of leases. (In Michigan's legislation, for example, the statutory covenant to maintain the premises up to Code can be waived only in leases for terms of one year or more.[50])

Those states which have adopted *Javins* are, of course, also prepared to recognise rent abatement. At least one state, Michigan, has by judicial decision recognised rent abatement as a remedy for breach of its statutory repair covenants.[51] One state in addition to New Jersey appears to be prepared to recognise without legislation a repair and deduct defence under its summary eviction proceedings; one state has expressly refused to do so.[52]

[44a] Two state intermediate appellate courts have: *Longenecker* v. *Hardin*, 130 Ill. App. 2d 468; 264 N.E.2d 878 (Ill. Ct. App. 1970); *King* v. *Moorehead*, CCH Poverty L. Rptr. § 16, 926 (Mo. Ct. App. April 2, 1973). Both cases involve suits for back rent after the tenant had abandoned the premises; in *King* the court expressly noted the availability of *quantum meruit* recovery.

[45] *Jack Spring, Inc.* v. *Little*, 50 Ill. 2d 351; 280 N.E.2d 208 (1972); *Kline* v. *Burns*, 111 N.H. 87; 276 A.2d 248 (1971); *Mease* v. *Fox*, — Iowa — ; 200 N.W.2d 791 (1972); *Green* v. *Superior Ct.*, — Cal. 3d —; 517 P.2d. 1168, 111 Cal. Rptr. 704 (1974); *cf. Boston Housing Authority* v. *Hemingway*, — Mass. —; 293 N.E.2d 831 (1973) (*Javins* defence limited to actions for back rent, not allowed in summary proceedings unless state rent withholding statute complied with); *King* v. *Moorehead*, CCH Poverty L. Rptr. § 16, 926 (Mo. Ct. App. April 2, 1973).

[46] See *Reste Realty Corp.* v. *Cooper*, 53 N.J. 444; 251 A.2d 268 (1969); *Pines* v. *Perssion*, 14 Wis.2d 590; 111 N.W.2d 409 (1961).

[47] *Thompson* v. *Shoemaker*, 7 N.C. App. 687; 173 S.E.2d 627 (1970); *Posnanski* v. *Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). (It should be noted that while the courts in both *Thompson* and *Posnanski* were urged to adopt a *Javins*-like rule, neither court had the actual *Javins* decision before it.)

[48] *Lindsey* v. *Normet*, 405 U.S. 56 (1972).

[49] *e.g.* N.D. Cent. Code § 47–16–12 (1960); Cal. Civ. Code § 1941 (West 1954); Okla. Stat. tit. 41, § 31 (1961); R.I. Gen. Laws Ann. § 34–18–16 (1970).

[50] Mich. Comp. Laws Ann. § 554.139 (2) (Supp. 1972).

[51] *Rome* v. *Walker*, 38 Mich. App. 458; 196 N.W.2d 850 (1972). The Michigan legislature has apparently confirmed this decision. See Mich. Comp. Laws Ann. § 600.5741 (Supp. 1973). Minnesota has reached a result similar to *Rome* with regard to the Minnesota statutorily implied warranty of habitability. *Fritz* v. *Warthen*, — Minn. —; 213 N.W.2d 339 (1973).

[52] See note 27, *supra*.

A number of states have adopted legislation authorising some form of rent withholding. The types of rent withholding authorised range from rent abatement, where the tenant need not pay all or part of his rent while the premises are uninhabitable or contain code violations; to rent withholding proper, a suspension of the obligation to pay rent which obligation is retroactively reinstated if the conditions are corrected; to rent receivership, where the receiver collects the rents and uses them to pay for the repairs; to simple repair and deduct, described above.[53]

It is obviously dangerous to attempt to characterise this diversity. American landlord-tenant law is going off in all directions, and some of these changes have affected the common law or legislation of virtually every state. The change has proceeded sufficiently far, however, that it is possible to say something, first, about the relation of contract doctrine to the law of landlord and tenant, second, about the interplay between the law and the socio-economic forces at work in the landlord-tenant field and, third, about the institutional problems which all of this raises.

It is sometimes said that there is nothing wrong with landlord-tenant law that a healthy dose of contract doctrine would not cure. The *Javins* case, for example, purports to be an application of the law of contract to the landlord-tenant relationship. But is this really true? Take the analogy of the sale of goods to which the courts have recently compared the landlord-tenant relationship. Although the notion of a warranty of habitability has some analogy to the warranties for goods, where do we find any counterpart to the implied covenant to repair which lies at the heart of so many

[53] The New York provisions are perhaps the most comprehensive and illustrate well the types of provisions which exist in other states. Section 302-a of N.Y. Mult. Dwelling Law (McKinney Supp. 1972) requires large New York cities to publish a list of " rent-impairing " violations of their housing code for multiple dwellings. If a landlord has official notice of such a violation and fails to correct it within six months, the tenant thereafter need not pay rent and the landlord can neither recover it nor evict the tenant for non-payment. Section 755 of N.Y. Real Prop. Actions Law (McKinney 1963, Supp. 1972) allows any tenant to obtain a stay to an eviction action if the landlord has failed, upon notice by the authorities, to repair code violations which the court finds sufficiently grave as to constitute a partial constructive eviction and if the tenant deposits the rent with the clerk of the court. The court may order payments out of the fund for repairs, and the landlord is entitled to the fund when and if he corrects the violations. Section 143-b of N.Y. Social Welfare Law (McKinney 1966) authorises welfare agencies to withhold rent payments made by or on behalf of welfare recipients where the building is on violation of the code and the conditions are hazardous to life or health. The welfare authorities may, but apparently need not, pay the withheld amounts to the landlord upon correction of the violation. Under Article 7-a of the Property Actions Law one-third of the tenants in a multiple dwelling may petition the court to put the building in receivership if it contains conditions " dangerous to life, health, or safety." Upon order of the court the receiver collects all rents from the building and uses them to correct the conditions complained of. This statute is particularly important because it does not require the action of any administrative agency nor is it tied to the provisions of the housing code. Also, unlike the rent abatement or rent withholding statutes, it ensures that the rent not paid to the landlord is used to correct the complained-of deficiencies.

recent cases and legislation? Further, where do we find anything like the remedy of rent abatement? True, under Article 2 of the Uniform Commercial Code, the American equivalent of the Sale of Goods Act, we do find that the buyer who has been shipped defective goods may reject the goods without obligation other than holding them for a sufficient time to allow the seller to remove them.[54] But is not the proper landlord-tenant analogy to this remedy constructive eviction and its requirement that the tenant abandon the premises? The Commercial Code also gives the buyer of defective goods the option of keeping those goods, recovering damages based on their lower value in their defective state,[55] but nothing that I know of in contract law allows the buyer to retain some of the benefits of the bargain and not pay for them; yet this is precisely what rent abatement allows.[56] I think it significant that in none of the cases which I have mentioned, with the possible exception of *Lemle*, is there any suggestion that the fair market value of the premises in question, with all their defects, was much less than the actual lease price.

The proper analogy to what is going on in American landlord-tenant law is not, in my view, to be found in the law of contract, but in its opposite, the law of status. Viewed as a part of the law of status much that is inexplicable about the current changes falls into place. The remedy against the landlord is not a remedy in damages; it is more like a penalty for his wickedness in offering to let below code premises.[57] An implied covenant which cannot be changed by express agreement has no counterpart in the law of contract, but it makes sense as a status rule about the landlord-tenant relationship. The continual reference in the cases to the housing code sounds peculiar as contract law in the absence of evidence that the parties contracted with reference to the code, but it makes some sense if what is going on is viewed as the creation of status rules about the way rental housing must be.

Once, however, these changes are viewed as changes in the direction of a new law of status, then their wisdom becomes more open to question. It is one thing to say that principles of contract should govern what has come to be increasingly a contractual relationship and that the law of landlord-tenant must be brought up to date with those changes which have occurred in other contractual

[54] Uniform Commercial Code, § 2–602. Sections 2–603 and 2–604 give more detail and impose a few more duties on merchant buyers.

[55] *Ibid.* at § 2–714. *Cf. ibid.* at § 2–715.

[56] An occasional case has suggested that the breaching party's right to recover the fair value of the benefits which he has conferred depends on his having acted in good faith. See 5A A. Corbin, *Contracts*, § 1128 (1964), and authorities cited. But the great weight of authority allows the recovery unless there has been absolutely shocking conduct on the part of the breaching party. See *ibid.*; *Restatement of Restitution*, § 109 (1937); Uniform Sales Act, § 44 (1); Uniform Commercial Code, § 2–714.

[57] See generally Sax and Hiestand, " Slumlordism as a Tort," 65 Mich. L. Rev. 869 (1967).

areas; it is quite another thing to say that the landlord-tenant relationship should be set apart from all other normal commercial relationships of society and governed by a set of rules which the parties cannot contract out of and which are enforced by penal remedies. Thus, we must distinguish among various elements in the cases and statutes. It is hardly a great step to say that a person who pays $800 a month for a grass shack in Hawaii expects that it will be habitable, and that in the absence of express agreement to the contrary, the landlord should bear the risk that it is not. Nor is it much more of a step to say that the modern urban tenant expects that the landlord will perform at least structural repairs on the premises. The rub comes when these provisions are made binding even in the presence of express contrary agreement and are enforced by remedies which do more than make the tenant whole or give him the benefit of his bargain.

There is one other branch of law to which we might instructively look for analogies—labour law. Like labour law, current American landlord-tenant law seems to be imposing rules on the parties of which the parties cannot contract out. Like labour law, current American landlord-tenant law seems to be allowing one of the parties to the agreement to engage in what would otherwise be an an illegal act, the strike in one case, rent withholding in the other, in order to equalise the bargaining power between the two parties. Labour law statutes, however, were passed after a legislative judgment, right or wrong, that labour needed more bargaining power to face the strength of powerful and organised employers. No such legislative judgment has been made in the case of landlord and tenant, and I doubt that as a general matter such a judgment could honestly be made. What evidence there is concerning the imposition of onerous lease terms indicates that they are the product of tenant ignorance not that tenants are being forced unwillingly into contracts of adhesion.[58] To the extent that ignorance is the cause of the problem, a milder solution could be found in the provision of more information to tenants rather than in required lease terms and the authorisation of rent strikes.

There is no doubt that the sad prospect of unit upon unit of slum housing is one of the chief elements in galvanising the judiciary and the legislatures into action. But the application of these new rules has by no means been confined to the indigent. The case which led the Michigan courts to grant the *Javins* remedy for the breach of Michigan's statutory implied covenant to repair was the product of a University of Michigan students' rent strike.[59] The most spectacular case under New York's receivership law was brought by the tenants of luxury flats who complained that the absence of a doorman endangered their safety.[60] Most new and

[58] See Mueller, "Residential Tenants and Their Leases: an Empirical Study," 69 Mich. L. Rev. 247 (1970).

[59] *Rome* v. *Walker*, 38 Mich. App. 458; 196 N.W.2d 850 (1972).

[60] *DeKoven* v. *780 West End Realty Co.*, 48 Misc. 2d 951; 266 N.Y.S.2d 463

proposed landlord-tenant legislation applies to all residential tenants without regard to their income level, circumstances, or bargaining power. It is doubtful whether any set of status rules can make much sense if they are made to apply to rural, suburban, and urban tenancies; entrepreneurs who rent out thousands of units and little old ladies who rent out the third floor; week-to-week tenants in hovels and long term leases of luxury flats.[61]

Let us focus for a moment on urban low income housing and try to draw a sketchy socio-economic picture of this market.[62] The patterns of ownership are extraordinarily diverse. Some of this housing is owned by the classic slumlord with a large cigar and a long shiny Cadillac. Some slum housing, however, (and the statistics are vague on this, but it may be even the majority) is owned by persons little better off than the tenants, by persons who live in the area, if not in the building, or who are one generation removed from the area. The book returns on slum housing are generally high, but the costs and risks are even higher. Rent payments are irregular; damage to the buildings occurs constantly. Large profits may have been made on this housing at one time, during the period of its decline, but it is purely fortuitous if the current owner is the same person as the one who reaped these profits. A most significant piece of evidence supporting the proposition that the earnings from slum housing are not greater than the normal returns on investments of comparable sums elsewhere is that no one in America, except governmental units or those receiving government subsidies, builds low income housing.

Enter now the *Javins* rules. Initially, these rules, if they are enforced, will reduce the value of the landlord's investment (because his stream of income is even more uncertain than it was before), but his costs remain substantially the same. His mortgage payments are unaffected and his taxes are likely to be based on the value of the premises prior to *Javins*. In the very short run the tenant benefits because he can pocket some or all of the rent which he was previously paying to the landlord. The quality of the housing, however, again in the short run, remains the same, unless the tenant chooses to spend the money he has saved

(N.Y.C. Civ. Ct. 1965). The tenants were unsuccessful in this action. Middle-class New York tenants have, however, successfully invoked the receivership law in order to have a bell and buzzer system in their building repaired. *Tynan* v. *Willowdale Commercial Corp.*, 69 Misc. 2d 221; 329 N.Y.S.2d 695 (N.Y.C. Civ. Ct. 1972).

[61] This criticism applies equally to the ABF, Model Residential Landlord-Tenant Code (tentative draft 1969) and the Uniform Residential Landlord and Tenant Act. The Code has not been adopted in full by any state legislature. The Act has been adopted in Arizona and is under consideration in a number of other states.

[62] Perhaps the most careful study done of this topic is G. Sternlieb, *The Tenement Landlord* (1969). See also L. Friedman, *Government and Slum Housing: A Century of Frustration* (1967); Note, " Tenant Unions: Collective Bargaining and the Low Income Tenant," 77 Yale L.J. 1368, 1374–1383 (1968).

in rent on improving the housing, a highly unlikely event considering the short-term nature of most slum tenants' leases.

Nor is there any assurance that the building will ever be improved, for in some cases it may be more advantageous for the landlord to withdraw the building from the housing market and convert it or the underlying land to some other use. Even if only some landlords take this action, the overall supply of housing will be reduced without any change in the demand, and thus the rents on the remaining buildings will rise.[63]

In other cases, it will be worth the landlord's while to bring the building up to code in order to ensure a continued stream of income (particularly if the potential income is rising due to the withdrawal of other buildings from the housing market). Once the landlord has repaired the building, however, he will seek to recover his additional costs. He may engage in forms of price discrimination with his existing tenants, charging higher rents to those who can be made to pay it, or he may seek new tenants, for he now is no longer a slum landlord, but a landlord of middle class housing in a slum area.

Thus, although it is theoretically possible that the result of the *Javins* rules will be a shift of income in the form of better housing from slum landlords as a class to slum tenants as a class without any increase in the cost of housing to the tenants, the net result, in my view, is more likely to be a loss to the landlords without any corresponding long-run benefit to the tenants or a forced contribution by the tenants to better housing, the net situation of the landlords remaining the same.[64]

[63] If the public law (*e.g.* zoning regulations) prevents the landlord from converting his land to other uses or if there is in fact no profitable use for the land granted the fixed charges of mortgage and taxes and the costs of the code enforcement programme, the landlord may simply abandon his property, in fact, if not legally. This has happened with sufficient frequency in New York City that the City, as the result of tax defaults, is now a major owner of slum housing within its boundaries. Indritz, *supra*, note 18, at p. 125. Abandonment does not have the immediate effect of reducing housing supply that conversion does, but it frequently leaves the building in such bad shape that within a short time the authorities have little choice but to raze it. *See ibid.* at pp. 123–126.

[64] Ackerman, "Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy," 80 Yale L.J. 1093 (1971), arrives at a substantially different conclusion from that of the text. Ackerman suggests that a programme of concentrated code enforcement or a general enforcement of the *Javins* rules will have the effect of redistributing income from landlords as a class to tenants as a class without any increase in the cost of housing to the tenants. His suggestion is theoretically possible granted that many, if not all, slum buildings are earning economic rents from which the repairs could be funded without any necessarily resultant change in price. The implausibility of some of Ackerman's assumptions, however, make it, at least in my view, unlikely that the result he suggests would occur. In the first place, Ackerman assumes that it is politically and administratively possible to single out the marginal buildings, those which would be abandoned or converted in the face of an enforcement of code standards, and to provide the owners of those buildings subsidies sufficient to make them keep those buildings on the housing market. He concedes that if this is not possible the supply of housing will be reduced

My own view is that the problem of slum housing is not susceptible to a private solution. The cause of the difficulty is that approximately one-fourth of the people in the United States cannot afford what at least the middle class regards as minimally decent housing, or perhaps it would be more accurate to say, that left to their own devices, one-fourth of America's population chooses to spend what little money it has on things other than what the middle class regards as minimally decent housing. The theoretical solution to the problem is easy to devise: America can either redistribute income in the form of cash payments so that those in the lower quartile of the income distribution can spend more money on housing if they so choose, or it can make this choice for them and provide the housing directly either in kind or through earmarked subsidies. So far America has chosen neither course because of its seeming inability to tax itself to do so, and because of its peculiar preference for private law solutions for public law problems.

This brings us to the institutional problem. It is sometimes said that the chief cause of judicial activism in the United States is legislative inertia. Given a legal heritage in common with the United States, England has a far less active judiciary, at least in part, because Parliament, in comparison to the creaky state and federal legislatures, is a highly efficient governmental instrument. The American school desegregation decisions, for example, come at the end of almost fifty years of legislative refusal to do anything about a crying social problem. This characteristic of American governance is not without its costs, as the present awkward involvement of the courts in educational policy amply illustrates. The recent explosion of activity in the housing area illustrates the same phenomenon and its costs. Public housing in the United

and rent levels will go up (*ibid.* at pp. 113–119). Second, Ackerman assumes that competition for the marginal tenant will keep the price of housing for all tenants at the pre-enforcement level, that is, he assumes that the improvement of the housing will not have the effect of shifting the entire demand curve upward because of greater demand for the new product (in Ackerman's terms (*ibid.* at pp. 1104–1110) that there are a significant number of " lukewarm " families—those who will not pay more for better housing) or of shifting the entire demand curve outward because of new consumers entering the market. (This latter assumption rests on Ackerman's assertion that it will not happen (*ibid.* at pp. 1140–1141), a questionable assertion to anyone who has witnessed the current developments in Islington and Notting Hill.) Further, Ackerman asserts (*ibid.* at pp. 1106–1107) that competitive forces would prevent price discrimination, an assertion which in turn rests on assumptions of a relatively free flow of information, of a relatively comprehensive and even enforcement of the *Javins* rules (the argument has considerably more force when it is applied to a government-initiated code enforcement programme), and of relatively low transaction (*e.g.* moving) costs. Relax these assumptions and the result is at best indeterminate, and there is, I believe, a stronger probability that the results suggested in the text will occur. Obviously, this is an area in which more empirical research is needed. See Komesar, " Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor," 82 Yale L.J. 1175 (1973); Ackerman, " More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar," *ibid.* at p. 1194.

States is inadequate, income redistribution generally only slightly less so, and the legislatures had done nothing about landlord-tenant law for over fifty years. The courts felt compelled to act, but in doing so they have got themselves into a situation with which they are institutionally quite unable to cope. If the suggestions made above are correct, the principal beneficiaries of the new decisions will not be the slum tenants whom these decisions were by and large designed to protect, but middle class tenants for whom a far less radical solution would have done the job. For the slum tenant the decisions may make him worse off and almost certainly will not make him better off because of economic factors which the courts know little about. Real improvement can only come with massive outlays of public money, and in the American governmental system this is one thing which the courts cannot do.

Despite the picture which I have painted above, however, I do not think that the legislatures, at this time, should become any more involved in the private law of landlord and tenant than they already have. Legislative involvement could have two purposes. The legislatures could reverse the current trend of decisions, but if they did so, they would do so at the possible cost of reversing portions of the trend which could have highly beneficial effects. I am thinking here particularly of those genuinely contractual elements which are now finding their way into the law. Legislative involvement, on the other hand, might try to codify the current trend, and for this we probably are not yet ready. Landlord and tenant is too diverse a relationship for legislation, particularly any legislation as broadly conceived as the proposed Uniform Residential Landlord and Tenant Act, to deal with satisfactorily. There are too many theories floating about; their effects are unknown, their ambit is ill-defined. One of the advantages of having fifty separate sovereignties is, as Justice Brandeis once remarked, that individual states may, if they choose, serve as laboratories in which we can try novel social and economic experiments without risk to the rest of the country.[65] Without hasty legislative action, the courts can move along on a case by case basis working out a new law of landlord and tenant. It is going to be a fascinating process.

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[65] *New State Ice House* v. *Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis J., dissenting).

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