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Revolution in Residential Landlord-Tenant Law: Causes and Consequences

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SYMPOSIUM

THE REVOLUTION IN RESIDENTIAL LANDLORD-TENANT LAW: CAUSES AND CONSEQUENCES

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INTRODUCTION

In the last two decades we have experienced a revolution in residential landlord-tenant law. The residential tenant, long the stepchild of the law, has now become its ward and darling. Tenants' rights have increased dramatically; landlords' rights have decreased dramatically. Part I of this article describes the extent of the revolution, Part II its

causes, and Part III its consequences. Part IV evaluates the desirability of most of these changes.

This article draws several conclusions. First, the structure of the residential landlord-tenant relation has radically changed. A large number of doctrines have been fundamentally revised. Second, most of the changes were caused not by a deepening crisis in rental housing, but rather by social, political, and intellectual currents that emerged in the sixties. One change, however, most rent control legislation, was enacted in response to an economic force—inflation—rather than to social or intellectual developments. Third, the detrimental impact of rent control on tenant welfare predominantly affects future tenants and those persons unable to vote. This explains why over 200 communities have adopted rent control despite its generally adverse effect on housing. Fourth, despite their widespread use, vacancy rates are worthless as indicators of housing shortages. Judges and analysts who have relied on them have been led astray. Finally, each individual change in the law must be judged independently with respect to its effect on the availability and cost of housing. For example, although the warranty of habitability applied to latent defects promotes the efficient provision of housing, the same warranty applied to patent defects retards it. The key question is, Does the law reflect what the parties would have bargained for with full knowledge and experience? To the extent that it does, the law promotes the efficient provision of housing.

I
THE REVOLUTION DESCRIBED

The "transformation" of American landlord-tenant law[1] has intrigued many scholars. Ten years ago, Professor Donahue discerned "an extraordinary ferment" in this area of law.[2] More recently, Professor Berger suggests that the business of providing rental housing has come to be treated like a public utility, but without any provision for the protections that public utilities customarily enjoy.[3] Professor Michelman suggests that the law now often recognizes a property right in a tenant to remain on the premises even after the lease has expired, and argues that this newly fashioned property right is entitled to constitutional protection.[4] In his comprehensive article Professor Cunningham views the

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1 *See* Glendon, *The Transformation of American Landlord-Tenant Law,* 23 B.C.L. REV. 503, 575 (1982) (during past two decades, landlord-tenant law has "escaped from the realm of private ordering, in which the stronger party typically has the advantage, and has become subject to regulation 'in the public interest' ").

2 Donahue, *Change in the American Law of Landlord and Tenant,* 37 MOD. L. REV. 242, 242 (1974).

3 Berger, *The New Residential Tenancy Law—Are Landlords Public Utilities?,* 60 NEB. L. REV. 707 (1981).

4 Michelman, *Property as a Constitutional Right,* 38 WASH. & LEE L. REV. 1097, 1113-14

landlord-tenant relationship as having moved from one based on "contract" to one based on "status."[5] Perhaps Professor Abbott was the first to recognize recent developments in this area for what they are: a "revolution."[6]

The doctrinal changes in landlord-tenant law can fairly be termed "revolutionary" for several reasons. First, some of the more well-known changes strike at the core of the landlord-tenant relationship, both in legal and practical terms. Traditionally, courts considered the landlord's rights to determine the amount of rent, to gain possession at the end of the term, and to choose tenants, and the right of the parties to decide on the extent of landlord services as basic rights that rested on fundamental legal principles. Yet recently lawmakers have significantly modified these basic rights as well as a large number of less central doctrines. Second, both courts and legislatures have significantly participated in the revolution. Third, the change has been rapid (particularly during the brief period from 1968 to 1973) and widespread. Almost every jurisdiction, despite different demographic, economic, and social conditions, has adopted these modifications. Fourth, and most important, almost all of the changes have favored the tenant as against the landlord. What were the causes and consequences of this revolution? Were the changes it created "good" or "bad"? Before addressing these fascinating questions, it is necessary to gain a clear picture of the changes themselves.

A. Recent Limitations on Landlord's Common Law Right to Offer Substandard Units (The "Implied Warranty" of Habitability)

Although the misnamed implied warranty of habitability has been comprehensively discussed elsewhere,[7] a brief summary of the doctrine will be convenient for the reader. I also will make some distinctions not fully developed elsewhere in the literature, but which will help in evaluating the doctrine.

Before 1969 the law in most jurisdictions was simple: caveat lessee. The landlord ordinarily had no duty to repair defects in the premises, regardless of whether they existed at the time of the lease or arose there-

(1981); *see also* Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 994 (1982) (if leasehold is personal residence, law should grant tenure during good behavior, regardless of lease term).

5 Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status,* 16 URB. L. ANN. 3 (1979). Similarly, Professor Glendon concludes that there has been a "publicization" of residential landlord-tenant law in which the legal relation of landlord to tenant depends on an imposed status, rather than on private agreement. Glendon, *supra* note 1, at 575-76.

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

7 *See, e.g.,* articles cited *supra* notes 1-6.

after. Today, at least forty jurisdictions follow the opposite rule.[8] Landlords in these jurisdictions have a duty to repair all defects, regardless of when they arise. At a minimum a "defect" includes any condition that substantially violates the applicable housing code. This duty is usually thought to rest on an "implied warranty" made by the landlord to the tenant that the premises are fit and will be maintained for their intended use as a residence. Under prior law the landlord was not required to repair defects unless he had expressly agreed to do so.[9] The current law of many jurisdictions ordinarily requires the landlord to repair all defects, even if the tenant has agreed to do so.[10]

Although there were precursors,[11] *Javins v. First National Realty Corp.*[12] is the leading case establishing the implied warranty of habitability. In this 1970 case, a District of Columbia landlord attempted to evict several tenants for nonpayment of rent. The tenants defended on the ground that their apartment house contained over 1,500 housing code violations. Although the lower courts held this fact to be irrelevant, the United States Court of Appeals for the District of Columbia upheld the defense in a widely cited and influential opinion by Judge J. Skelly Wright.

The principal substantive issue in *Javins* concerned whether the lessor of an urban multiple dwelling unit owed a duty to the tenant to keep the unit and the apartment house free of substantial housing code viola-

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8 Note, *Recovery Under the Implied Warranty of Habitability,* 10 FORDHAM L. REV. 285, 292 (1982); Note, Knight v. Hallsthammar: *The Implied Warranty of Habitability Revisited,* 15 LOY. L.A.L. REV. 353, 354 n.4 (1982) (citing and summarizing cases and statutes).

9 *See generally* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:13 (1980).

10 *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT, 7A U.L.A. 499 (1978) (last amended 1974) [hereinafter cited as URLTA]. As of February 1982, 13 jurisdictions had adopted URLTA: Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Tennessee, and Virginia. The Act has influenced legislation in many additional states. URLTA § 2.104(c), (d), 7A U.L.A. 529-30 (1978), provides that although landlord and tenant may agree that the tenant will perform certain repairs and maintenance, the agreement is enforceable only if it is "entered into in good faith and not for the purpose of evading the obligations of the landlord." Certain other safeguards are also enunciated, and thus many actual agreements will not be enforceable. *See also* RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977) (enforcing agreements reducing landlord's obligations "unless they are unenforceable in whole or in part because they are unconscionable or significantly against public policy").

In Knight v. Hallsthammar, 29 Cal. 3d 46, 54, 623 P.2d 268, 273, 171 Cal. Rptr. 707, 712 (1981), the court held that "a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." In Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973), the court refused to enforce an explicit waiver of the warranty of habitability given in consideration of a rent reduction. *See generally* Dutenhaver, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases,* 10 LOY. U. CHI. L.J. 41, 60 (1978) (benefit of implied warranty of habitability for tenants who need protections "far outweighs the interest of law in contractual freedom").

11 *See, e.g.,* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

12 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

tions. The court held that such a duty did exist. Although there were several misleading references to an implied warranty of habitability,[13] a careful reading of the case shows that these references were more relevant to the question of remedy than to the substantive issue of the existence of the duty. On the substantive issue Judge Wright clearly held that the source of the duty was the housing code itself, not any agreement of the parties. Thus the parties could not waive or disclaim the so-called implied warranty, regardless of how explicit the attempted waiver was or of how knowledgeable and powerful the tenant was. As Judge Wright stated, the duty was one "implied . . . by operation of law,"[14] regardless of whether the landlord in fact implied it or the tenant understood the landlord to have implied it and regardless of whether the lease purported to waive the warranty.[15] The tenants in *Javins* were on month-to-month written leases.[16] If the duty rested on a contract implied in fact, a court could plausibly have considered tenants who remained for more than one month after discovering the defects to have waived their objections.[17] Because the *Javins* court did not even discuss waiver, the duty it imposed on the landlord must have been based on violations of the housing code, and not on an "implied warranty" made by the landlord. The distinction is important because, as discussed below, the remedies appropriate for breach of a contractual duty are inappropriate for breach of a duty based on a code or statute.[18]

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13 *Id.* at 1077, 1080.

14 *Id.* at 1081 n.56.

15 *Id.* at 1082 n.58. Judge Wright's statement that a waiver of the warranty would be unenforceable was dictum, because no such waiver was attempted in *Javins.* The dictum, however, could not be, and was not, ignored in subsequent cases.

16 Although Judge Wright's opinion notes that written leases were involved, *id.* at 1077 n.29, it does not indicate that the leases created only month-to-month tenancies. Nevertheless, the tenancies were month-to-month. Brief for the Washington Planning and Housing Association as Amicus Curiae at 2, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970). The opinion is confusing because it is based on a warranty implied in law, yet also refers to the supposed justified expectations of the parties or of typical hypothetical parties to support its result. *Javins,* 428 F.2d at 1081 n.56.

Although the *Javins* opinion does not explicitly state that the tenancies were for a fixed term (which they clearly were not) the opinion seems to so imply:

> Since a lease contract *specifies a particular period of time* during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases. Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during *the lease term.* It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Id. at 1079 (emphasis added) (footnote omitted).

17 On the other hand, it could be argued that a month-to-month tenant does not waive the right to object to newly arising defects merely by remaining a tenant. The expenditure in time, effort, and money involved in moving may render the decision to stay involuntary.

The traditional rule in landlord-tenant law was that the tenant's contractual duty ("covenant") to pay rent was independent of the landlord's covenant to maintain the premises in good repair. If this rule were applied to the *Javins* case, the tenants would lose and be evicted because the landlord's breach of its statutory duty would not justify the tenants' refusal to pay rent. Judge Wright held that the independent covenant rule was inappropriate in the modern residential leasing context. Instead, the contract principle of dependent covenants should apply,[19] under which a breach of a substantial covenant by one party justifies nonperformance of a covenant by the other party.

Applying the contract doctrine of dependent covenants to the lease transaction in *Javins* was a big step; extending it to a statutory, as opposed to a contractual, duty was a relatively minor one. Unfortunately, the court's extended discussion justifying the application of general contract principles to leases[20] obscured the central fact that the court based the landlord's duty on the housing code, not on any warranty implied in fact. Consequently, when subsequent courts attempted to measure the aggrieved tenant's damages, they applied contract principles to a duty not based on contract. The result was confusion. Courts attempted to award tenants the difference, measured in dollars, between what was "promised" and what was delivered[21]—ignoring that in most cases involving slum property the landlord delivered exactly what was promised, a unit that did not conform to the housing code. Thus, if courts applied this approach literally, tenants would be entitled to no damages. In recoiling from this undesired result, courts created further inconsistencies. They assumed a fictitious promise by the landlord to provide a code conforming unit and then awarded the tenant the difference between the value of what was fictitiously promised and what was actually

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18 *See infra* notes 19-26 and accompanying text.

19 *Javins*, 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The common law had previously developed the doctrine of constructive eviction, a somewhat rudimentary form of the dependent covenant principle. *See* Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826), the leading constructive eviction case. Under the constructive eviction doctrine, however, the aggrieved tenant could not remain on the premises. Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970). The most significant contribution of *Javins* was its holding that an aggrieved tenant could remain on the premises and still be wholly or partially excused from the duty to pay rent when a landlord wholly or partially breached its duties.

20 Although there was ample discussion in *Javins* of the advisability of applying *general* contract principles to leases, 428 F.2d at 1074-80, there was almost no discussion of the advisability of applying the *particular* contract principle of dependent covenants to leases, *id.* at 1082.

21 *See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 203, 293 N.E.2d 831, 845 (1973); Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 403, 261 A.2d 413, 417 (Law Div. 1970).

promised and delivered—a substandard apartment.[22] This approach, if followed to its logical conclusion, could result in the absurdity of forcing a landlord to pay a tenant for living in a nonconforming apartment that, in fact, fulfilled the expectations of both parties.[23] At least one case approached such a result by allowing a tenant to live rent free in a living unit that may have met the tenant's original expectations.[24]

More recently, several courts have avoided these difficulties by adopting a "percentage reduction in use" method of damage measurement.[25] This method reduces the contract rent owed by the percentage that the code violations diminished the use and enjoyment of the apartment. Whatever its practical or theoretical defects, this method has the virtue of implicitly abandoning the fiction that the contract measure of damages is workable or appropriate when no breach of a contractually based duty has occurred.

Javins involved a landlord's breach of a code imposed duty. If one labels this an "implied warranty" case it is easily confused with a true implied warranty case such as *Lemle v. Breeden.*[26] In *Lemle,* the plaintiff rented a luxury vacation home. Shortly after moving in, the tenant discovered that the home was infested with rats. When attempts at rat control failed, the plaintiff promptly moved out and sued for a return of his rent deposit. The Supreme Court of Hawaii held that the tenant's obligation to pay rent was dependent on the landlord's performance of her implied warranty of habitability. Because the landlord had breached the implied warranty, the tenant was excused from performing his dependent covenant to pay rent. In *Lemle* the covenant was real although unexpressed, and the duty breached was truly a contractual one for which a contractual measure of damages was appropriate.

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22 *See* cases cited *supra* note 21.

23 Suppose a landlord leases a substandard apartment for $200 per month with the express understanding that he will not make any repairs. Suppose also that if all code violations were cured the property would cost the tenant $500 per month. Thus, the difference between the value of the landlord's fictitious promise to provide a code conforming apartment and what he actually promised and delivered is $300. If the tenant pays no rent and the landlord sues to evict the tenant, the tenant can use the fictitious promise theory to counterclaim for $300 in damages compared to the landlord's rent claim against the tenant for $200. A court that applied the tenant's theory would require the landlord to pay the tenant $100. This amount would be awarded despite the tenant's month-long, rent-free occupancy of an apartment that fulfilled his expectations. In effect, the fictitious promise theory awards the tenant a double recovery: a reduced initial rent and damages for code violations.

24 Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972). Although the court referred to an "apparent understanding" that the landlord would repair, *id.* at 858, it seems that the written lease made no reference to such a promise. *See* Diamond Hous. Corp. v. Robinson, 257 A.2d 492 (D.C. 1969) (discussing lease but not mentioning any agreement to repair).

25 *E.g.,* McKenna v. Begin, 5 Mass. App. Ct. 304, 362 N.E.2d 548 (1977); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 487-88, 268 A.2d 556, 562 (Essex County Ct. 1970).

26 51 Hawaii 426, 462 P.2d 470 (1969).

Both *Lemle* and *Javins* created significant new substantive and procedural law. Substantively, *Lemle* recognized that landlord covenants could be implied in fact and that such implied in fact warranties should be enforced. *Javins* recognized that duties imposed by a housing code could be enforced by the tenant. One difference between the two cases is that a *Lemle*-type covenant implied in fact, can be waived or negated by the tenant; a statutory duty such as that found in *Javins* cannot.

On the remedial level, both *Javins* and *Lemle* broke new ground in holding that a tenant's duty to pay rent is dependent on a landlord's substantial performance of its obligations. The two cases differ, however, in that a contractual measure of damages, although appropriate in *Lemle,* was inappropriate in *Javins* where the breach was of a statutory duty.

Other cases and statutes have expanded the principles established by *Lemle* and *Javins.* Some jurisdictions permit a tenant, subject to certain limitations, to repair a defective condition and deduct the cost of the repair from the rent tendered to the landlord.[27] Other jurisdictions permit the premises to be placed in receivership when the landlord has substantially breached his statutory duties.[28]

When a tenant lawfully withholds rent in response to a landlord's breach, the tenant exercises a form of self-help. The tenant judges the landlord's conduct and imposes a sanction, without a judicial proceeding or other semblance of due process.[29] Frequently, the tenant can remain in the apartment without paying rent pending the landlord's eviction proceedings. In the District of Columbia, however, it is customary for the landlord to be awarded a "protective order" requiring the tenant to pay rent into court until the matter is judicially resolved.[30]

In such influential states as New York and California, courts have recently held landlords in breach of their duty to maintain the premises in code-conforming condition even where the defect arose through no fault of the landlord. For example, in *Park West Management Corp. v. Mitchell,*[31] a New York case, the court held that the landlord breached a duty to maintain the property in a clean and habitable condition when a strike by the landlord's employees resulted in the closing of the buildings' incinerators, forcing tenants to deposit refuse on nearby sidewalks. The city garbage collectors refused to cross the picket line to collect the garbage, creating an unhealthy and unpleasant condition. In a California case, *Knight v. Hallsthammar,*[32] a landlord sued to evict tenants who

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27 *See, e.g.,* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

28 *See generally* R. SCHOSHINSKI, *supra* note 9, § 3:44.

29 As indicated, *infra* notes 100-06 and accompanying text, courts have abolished most landlord self-help remedies but have approved tenant self-help remedies.

30 *See* Mahdi v. Poretsky Management, Inc., 433 A.2d 1085 (D.C. 1981).

31 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979).

32 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981).

were not paying their rent. The tenants defended on the ground that the landlord had not made needed repairs. The trial court ruled that the tenants' defense could succeed only if the landlord had failed to make repairs after being given a reasonable time to do so. The Supreme Court of California reversed the trial court and held that rent abatement would be appropriate whenever there was a defect not attributable to the tenant, regardless of the landlord's lack of fault.[33]

In summary, more than forty jurisdictions now impose a duty on the residential landlord to maintain the premises in a habitable code-conforming condition. This represents a dramatic and significant break with the law as it existed before 1968.

B. Recent Limitations on Landlord's Common Law Right to Set the Offering Price of a Rental Unit (Rent Control)

Rent control, now in use in over 200 cities (including such major cities as Boston, Los Angeles, New York, San Francisco, and Washington, D.C.),[34] affects a substantial percentage of the nation's multifamily rental housing stock.[35] The overwhelming majority of the rent control statutes were passed in the 1970s.[36]

The abandonment by courts of the legal requirement of a housing "emergency" to validate a rent control ordinance opened the door for the increased use of rent control ordinances in the seventies.[37] The United States Supreme Court's last statement on rent control was in *Woods v. Cloyd W. Miller Co.*,[38] decided in 1948. In that case, and in those preceding it,[39] the Court stressed the need for an "emergency" housing situation to sustain a rent control ordinance. In 1969, however, Judge Friendly stated, in dicta, that a housing shortage creating an "emergency" was not necessary to justify a rent control ordinance.[40] As a doctrinal matter Judge Friendly was clearly correct; the emergency

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33 *See also* Berman & Sons v. Jefferson, 379 Mass. 196, 198, 396 N.E.2d 981, 983 (1979) (if dwelling not habitable, "landlord's lack of fault and reasonable efforts to repair do not prolong [tenant's] duty to pay rent").

34 *See* NATIONAL MULTI HOUSING COUNCIL, THE SPREAD OF RENT CONTROL, RENT CONTROL ACTIVITIES THROUGH MAY 31, 1982 (1982) (listing status of rent control in cities throughout United States).

35 U.S. PRESIDENT'S COMMISSION ON HOUSING, REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 91 (1982) [hereinafter cited as PRESIDENT'S COMMISSION].

36 For useful histories of modern rent control legislation, *see generally* M. LETT, RENT CONTROL: CONCEPTS, REALITIES AND MECHANISMS ch. 1 (1976); R. SCHOSHINSKI, *supra* note 9, ch. 7.

37 *See* Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control,* 7 URB. LAW. 447 (1975).

38 333 U.S. 138 (1948).

39 *See, e.g.,* Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922) (upholding New York rent control laws because of reports indicating that insufficient housing supply caused "social emergency" in certain cities).

40 Eisen v. Eastman, 421 F.2d 560, 567 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970).

requirement was no longer consonant with the law as it had developed in other areas. As he noted: "The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that Nebbia v. New York, . . . (1934), was decided."[41]

State courts similarly adopted the Second Circuit's view that an "emergency" housing shortage was not a legal prerequisite of rent control.[42] In *Birkenfeld v. City of Berkeley,*[43] the California Supreme Court rejected the requirement of an emergency, holding that the constitutionality of rent controls depends only upon the "existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure."[44] Although courts give great weight to the legislative determination that a housing shortage exists, this determination is not formally controlling. As the *Birkenfeld* court noted:

> [O]ur task is to review the findings . . . and to sustain the propriety of rent controls under the police power unless the findings establish a complete absence of even a debatable rational basis for the legislative determination by the Berkeley electorate that rent control is a reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage.[45]

The above quotation suggests that the presumption of a shortage justifying rent control is well-nigh conclusive. It does not follow, however, that courts will uphold every rent control ordinance that legislators pass in response to a shortage. In *Birkenfeld,* for example, the court struck down the ordinance because it "drastically and unnecessarily restricts the rent control board's power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings."[46] An ordinance is valid "only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary."[47]

Although constitutional restrictions on rent control ordinances exist, courts have upheld some surprisingly harsh ones. For example, the New Jersey Supreme Court, which has been very influential in this field, has rejected the contention that an ordinance is invalid on its face be-

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41 *Id.*

42 *See* Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976); *see also* Westchester West No. 2 Ltd. Partnership v. Montgomery Co., 276 Md. 448, 463, 348 A.2d 856, 865 (Md. App. 1975); Hutton Park Garden v. Town Council, 68 N.J. 543, 350 A.2d 1 (1975).

43 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

44 *Id.* at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 488.

45 *Id.* at 161, 550 P.2d at 1024, 130 Cal. Rptr. at 488.

46 *Id.* at 169, 550 P.2d at 1029, 130 Cal. Rptr. at 493.

47 *Id.,* 550 P.2d at 1030, 130 Cal. Rptr. at 494.

cause it limits annual rent increases to a fixed percentage of existing rents, or to a percentage of the annual increase in the cost of living.[48] Similarly, the court has upheld ordinances that do not necessarily pass on increases in operating costs to the tenants. "The fact that costs are increasing faster than permissible rents under a particular ordinance, . . . or even that some owners are sustaining operating losses will not *per se* suffice to prove unconstitutional confiscation."[49]

To summarize, the courts' abandonment of the "emergency" requirement has increased the incidence of rent control ordinances. Although there are some limits on the scope of ordinances that will be upheld, the general judicial trend has been to uphold ordinances that impose fairly harsh restrictions on landlords.

C. Recent Expansion of Landlord's Tort Liability

1. *In General*

Under the common law the landlord was generally not liable for personal or physical injuries caused by defects in the leased premises.[50] In 1965 the Restatement (Second) of Torts accepted this position and it remained the majority rule through the early 1970s.[51] Since then, however, most courts that have ruled on the question have rejected the tort immunity of landlords and have imposed a duty of reasonable care.[52] In overruling prior controlling cases, the courts have dramatically increased the landlord's potential liabilities.

In the leading case, *Sargent v. Ross,*[53] the Supreme Court of New Hampshire stated:

> [W]e today discard the rule of "caveat lessee" and the doctrine of landlord nonliability in tort to which it gave birth. . . . Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm. . . . A landlord must act as a reasonable person under all of the circumstances . . . .[54]

In addition, since the landmark case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.,*[55] landlords have also been held liable for the rapes, burglaries, and assaults committed by criminal intruders, when tenants can show that the landlord did not take due care to protect

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48 Hutton Park Gardens v. Town Council, 68 N.J. 543, 571, 350 A.2d 1, 16 (1975); Brunetti v. New Milford, 68 N.J. 576, 592, 350 A.2d 19, 27 (1975).

49 Hutton Park Gardens v. Town Council, 68 N.J. 543, 569-71, 350 A.2d 1, 16 (1975).

50 For an exhaustive treatment, see Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?,* 1975 WIS. L. REV. 19, 48-49.

51 RESTATEMENT (SECOND) OF TORTS §§ 377-379A (1965).

52 *See generally* 2 R. POWELL, REAL PROPERTY ¶ 234[2] (1982).

53 113 N.H. 388, 308 A.2d 528 (1973).

54 113 N.H. at 397, 308 A.2d at 534.

55 439 F.2d 477 (D.C. Cir. 1970).

against such occurrences.[56] Generally, landlord tort liability has rested on negligence, but there is recent support in some lower courts for imposing strict liability on landlords for personal injury or physical damage.[57]

Thus, in a single decade, landlords have lost the tort immunity that had been recognized for centuries, and have even become responsible for the criminal acts of others that they could have prevented with reasonable care. Rarely in the history of American property law has there been such a sudden judicial rejection of well established precedent.

2. *Lease Clause Purporting to Exculpate Landlord for Its Negligent Conduct Generally Held Void*

A typical exculpatory clause in a lease purports to relieve the lessor from liability to the lessee for personal injuries or property damage caused by the negligence of the lessor. In 1959, the Illinois Supreme Court, in upholding such a clause, found only one case in a court of last resort "that has held such clauses invalid in the absence of a statute so requiring,"[58] but cited numerous cases that had upheld such clauses. By 1971 the majority rule continued to be that such clauses were ordinarily valid, but there was substantial precedent to the contrary.[59] By 1976 some twenty-one jurisdictions (compared with the two or three jurisdictions that had such statutes in 1960) had statutorily invalidated such exculpatory clauses.[60] Section 1.403(a)(4) of the Uniform Residential Landlord and Tenant Act (URLTA), adopted in thirteen states, as well as statutes in California, New York, and other jurisdictions took the same position.[61] Significantly, many cases decided since 1970 have refused to enforce such clauses, even in the absence of a controlling statute.[62]

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56 *See, e.g.,* Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981) (tenant raped, assaulted, and robbed in apartment lobby stated good cause of action against landlord); Trentacost v. Brussel, 82 N.J. 214, 412 A.2d 436 (1980) (landlord liable to "mugged" tenant for breach of implied undertaking to provide adequate security). For useful discussions, see R. SCHOSHINSKI, *supra* note 9, ch. 4; Browder, *The Taming of a Duty—The Tort Liability of Landlords,* 81 MICH. L. REV. 99 (1982); Selvin, *Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since* Kline, 9 REAL EST. L.J. 311 (1981).

57 *See, e.g.,* McGuiness v. Jakubiak, 106 Misc. 2d 317, 431 N.Y.S.2d 755 (Sup. Ct. 1980) (leakage); McBride v. 218 E. 70th Assocs., 102 Misc. 2d 279, 425 N.Y.S.2d 910 (App. Term 1979) (flood damage); Kaplan v. Coulston, 85 Misc. 2d 745, 381 N.Y.S. 634 (Civ. Ct. 1976) (kitchen cabinet fell and injured tenant); *cf.* Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972) (strict liability applicable to commercial lessors of personal property).

58 O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 439, 155 N.E.2d 545, 546 (1959).

59 *See* Annot., 49 A.L.R.3d 321 (1973).

60 RESTATEMENT (SECOND) OF PROPERTY § 17.3 statutory note (1977); *see also* Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982).

61 CAL. CIV. CODE § 1953 (West Supp. 1982); ILL. ANN. STAT., ch. 80, § 91 (Smith-Hurd Supp. 1982); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1978); N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1982).

62 *See, e.g.,* Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 465, 143 Cal.

D. Recent Limitations on Landlord's Common Law Right to Choose or Reject New Tenants

1. *Antidiscrimination Laws*

Under the common law, a landlord could arbitrarily select or reject prospective new tenants.[63] Before 1968, only a few states barred discrimination on the grounds of race, creed, or national origin. No state barred discrimination on any other ground. The New York case of *Kramarsky v. Stahl Management Co.*[64] illustrates the common law position. In *Kramarsky,* a landlord refused to rent to a lawyer because the lawyer might prove to be a troublesome tenant, too knowledgeable of her legal rights and too willing to enforce them. The court upheld the landlord on the ground that he had a common law right to refuse to accept a tenant for any reason except insofar as this rule was changed by statute.[65]

In 1968, Congress passed the federal Fair Housing Act.[66] This statute prohibited discrimination in rentals (with certain minor exceptions) on the grounds of "race, color, religion, sex, or national origin."[67] Although a landlord's decision to exclude lawyers, as in the *Kramarsky* case, would not be affected by the federal Fair Housing Act, such a decision would definitely be barred in California. In *Marina Point v. Wolfson,*[68] the

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Rptr. 247 (1978); Cardona v. Eden Realty Co., 118 N.J. Super. 381, 288 A.2d 34 (App. Div. 1972); *see also* RESTATEMENT (SECOND) OF PROPERTY §§ 5.6, 17.6 (1977) (supporting invalidation of such clauses even in absence of statute); *cf.* Taylor v. Leedy & Co., 412 So. 2d 763 (Ala. 1982) (clause does not relieve from liability landlord who may have deliberately concealed known defect); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974) (applying Pennsylvania Consumer Protection Act to rentals of residences).

63 Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, 90 N.Y.S. 2d 201 (1949), *cert. denied,* 339 U.S. 981 (1950); Annot., 14 A.L.R.2d 153 (1950).

64 92 Misc. 2d 1030, 401 N.Y.S.2d 943 (Sup. Ct. 1977).

65 Absent a supervening statutory proscription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim. The only restraints [sic] which the law has imposed upon free exercise of his discretion is that he may not use race, creed, color, national origin, sex or marital status as criteria. So, regrettable though it may be, a landlord can employ other criteria to determine the acceptability of his tenants—occupational, physical or otherwise. He may decide not to rent to singers because they are too noisy, or not to rent to bald-headed men because he has been told they give wild parties. He can bar his premises to the lowest strata of society, should he choose, or to the highest, if that be his personal desire.

Id. at 1032, 401 N.Y.S.2d at 945. Note that in New York a landlord cannot refuse to rent to an unmarried couple. *See* Yorkshire House Assocs. v. Lulkin, 114 Misc. 2d 40, 450 N.Y.S.2d 962 (Civ. Ct. 1982); N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 1982).

66 42 U.S.C. §§ 3601-3619 (1976 & Supp. V 1981).

67 42 U.S.C. § 3604(a) (1976). The prohibition against discrimination on grounds of sex was added in 1974 by Pub. L. No. 93-383, § 527(b)2, 88 Stat. 633, 729.

68 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

landlord discriminated against children—refusing to rent to families with children and insisting that tenants with children move at the end of their lease. The California Supreme Court found the policy irrational and prevented the landlord from enforcing it. The court's decision was based on an antidiscrimination statute, the Unruh Act,[69] that appeared, prima facie, only to bar discrimination on the usual grounds of race, creed, sex, and national origin. Although *Marina* involved a landlord's refusal to renew a lease, it also applies to an initial refusal to rent. The court indicated that it would reject a landlord's policy barring any large class of people, such as lawyers, from becoming tenants. "Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, political affiliation, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination."[70] The court noted that previous opinions of the Attorney General had interpreted the Unruh Act to prohibit discrimination because of student enrollment, receipt of welfare benefits, occupation, or marital status.[71] The court also indicated that excluding, for example, "homosexuals, or alternatively . . . nonhomosexuals" from an apartment complex would be barred by the Unruh Act.[72] It thus appears that in California a landlord may only refuse to rent to a prospective tenant for good cause. Instead of merely being liable if his actions are based on prohibited motives, the landlord shoulders the burden of demonstrating good cause.

Thus, in the last fifteen years the law has changed from permitting discrimination in almost every state on almost any ground to prohibiting discrimination in all states on grounds of race, creed, sex, or national origin, and, in California, on any ground the court deems arbitrary.

2. *Assignment and Sublease*

At common law, if the lease provided that there could be no assignment or sublease by the lessee without the landlord's consent, the landlord had the right to withhold consent arbitrarily.[73] In the early seventies, however, courts began to restrict the landlord's right to act arbitrarily, and several courts held that the landlord may withhold consent only if he acts reasonably.[74] The Restatement (Second) of Property

69 CAL. CIV. CODE § 51 (West 1982); *see also* CAL. GOV'T CODE §§ 12955, 12980-12988 (West 1980) (Fair Housing Act and Enforcement Procedures).

70 Marina Point Ltd. v. Wolfson, 30 Cal. 3d 721, 726, 640 P.2d 115, 117, 180 Cal. Rptr. 496, 499 (1982).

71 *Id.* at 736, 640 P.2d at 124, 180 Cal. Rptr. at 505.

72 *Id.* at 741 n.9, 640 P.2d at 127 n.9, 180 Cal. Rptr. at 508 n.9; *see also* Hubert v. Williams, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (Super. Ct. 1982) (homosexuals protected by Unruh Civil Rights Act).

73 Dress Shirt Sales, Inc. v. Hotel Martinique Assocs., 12 N.Y.2d 339, 190 N.E.2d 660, 239 N.Y.S.2d 660 (1963).

74 *See, e.g.,* Homa-Goff Interiors Inc. v. Cauder, 350 So. 2d 1035 (Ala. 1977); Shakes

takes the position that, absent a freely negotiated provision granting the landlord the right to withhold consent, the landlord must act reasonably.[75] Several states, including Alaska, Delaware, Hawaii, and New York have enacted statutes imposing a reasonableness requirement.[76]

Although URLTA does not expressly address this question, it is possible that section 1.302, which imposes a duty of good faith for the exercise of rights "under this Act" may be construed to impose a good faith requirement on the landlord's exercise of a right to withhold consent to a proposed assignment or sublease of a residential lease. One can argue, however, that the landlord's common law right to withhold consent to an assignment when the lease purports to give that right is not the exercise of a right "under this Act" and, therefore, the good faith requirement does not apply. In contrast, the Model Residential Landlord-Tenant Code, which served as a source for URLTA, imposed an express good faith requirement on the landlord in this context.[77] URLTA's failure to adopt the Model Code's assignment provision suggests that the common law freedom to act arbitrarily has not been affected by URLTA.

The landlord's common law right to reject arbitrarily a proposed assignee or sublessee is related to the landlord's power to act arbitrarily in selecting or rejecting a new tenant. The proposed assignee or sublessee may be objectionable to the landlord for reasons that seem arbitrary but may be important to the landlord. For example, as noted above, the California Supreme Court has held that the exclusion of children from an apartment complex is ordinarily "arbitrary" and illegal. Presumably, the landlord excludes children because it is profitable to do so. The landlord may decide that he can obtain higher rents at less expense by excluding children than by permitting them. The same may be true of morally reprehensible racial or religious discrimination.

E. Recent Limitations on Landlord's Common Law Right to Evict Tenant at Termination of Lease

1. *Retaliatory Eviction*

In the landmark case of *Edwards v. Habib,*[78] Judge Wright held that a landlord could not refuse to renew a lease in retaliation for a tenant's complaint to a housing code authority about code violations. The tenant would be entitled to remain as long as the landlord's motive for refusing to renew remained retaliatory. In *Robinson v. Diamond Housing*

Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 57 Ohio Op. 2d 486, 277 N.E.2d 584 (1971).

75 RESTATEMENT (SECOND) OF PROPERTY § 15.2(2) (1977).

76 *Id.* § 15.2 statutory note 2.

77 MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-403 (Tent. Draft 1969).

78 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969).

Corp.,[79] Judge Wright extended the doctrine to include a tenant who was paying no rent under the doctrine of rent abatement for code violations and who was threatened with eviction because the landlord wanted to take the code-violating property permanently off the market. The court required the landlord to correct the violation and to rent the property to the tenant for an indefinite period, or until he could convince a jury that his motive for nonrenewal was not retaliatory.

Following the *Edwards* decision, many state decisions and statutes adopted and significantly expanded the retaliatory eviction doctrine.[80] For example, the Hawaii Supreme Court held that a landlord could not retaliate against tenants who expressed opposition to the landlord's development plans for the premises.[81] Other cases have held that statutes barring retaliatory evictions do not prevent courts from developing additional common law protections from other forms of landlord retaliation.[82]

The California retaliatory eviction statute grants very broad protection to tenants.[83] A landlord who violates the statute is liable for (1) actual damages, (2) punitive damages of not less than $100 and up to $1,000 for each retaliatory act, (3) reasonable attorney's fees, and (4) any other remedies provided by statutory or decisional law. Furthermore, the landlord may not refuse to renew a tenant's lease because the tenant "has lawfully and peaceably exercised any rights under the law."[84] This statute resembles a "just cause" eviction statute, a type of statute discussed in the next section.

2. *Just Cause Eviction Statutes*

At common law, a landlord could evict a tenant after the lease terminated for any reason or for no reason. This common law right has been limited in every state by the federal Fair Housing Act, which prohibits discrimination on the grounds of race, religion, national origin or sex,[85] and in most states by the doctrine prohibiting retaliatory eviction.[86] Some landlords, however, have experienced even greater restriction of their common law rights. New Jersey, for example, permits the landlord to evict a tenant at the end of the lease term only for "good

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79 463 F.2d 853 (D.C. Cir. 1972).

80 *See generally* R. SCHOSHINSKI, *supra* note 9, ch. 12.

81 Windward Partners v. Delos Santos, 59 Hawaii 104, 577 P.2d 326 (1978); *see also* Barela v. Superior Court, 30 Cal. 3d 244, 636 P.2d 582, 178 Cal. Rptr. 618 (1981) (eviction after tenant complained to police about child molestation by landlord deemed retaliatory).

82 *See, e.g.*, S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976).

83 CAL. CIV. CODE § 1942.5 (West Supp. 1982).

84 *Id.* § 1942.5(c).

85 42 U.S.C. § 3604 (1976).

86 *See supra* notes 78-84 and accompanying text.

cause."[87] Under such statutes, a landlord may legally evict the tenant only for reasons specified in the statute. In effect, the tenant may arbitrarily terminate the tenancy at the end of the term, while the landlord may terminate only for just cause.

Most jurisdictions that have rent control also limit the grounds on which a landlord may evict.[88] In addition, all tenants in housing that is owned or subsidized by the government are protected by just cause eviction laws.[89] Just cause protection even applies to section 8[90] subsidized tenants in existing privately owned housing.[91] Thus, all tenants in New Jersey, plus tenants in other jurisdictions who (1) are protected by a rent control ordinance that has a just cause eviction provision, (2) live in government owned or subsidized housing, or (3) are subsidized tenants in privately owned housing, cannot be evicted at the end of the lease term, except for reasons that the statute, ordinance, regulation, or courts define as "just."[92]

3. *Ordinances Limiting Landlord's Common Law Right to Convert Rental Units to Condominiums and to Evict Tenants of the Former Rental Units at the End of the Lease Term*

Condominiums[93] can be created in new unoccupied buildings or in buildings that are rental properties with existing tenants. The latter situation concerns us here. When rental properties are converted to condo-

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87 N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1982).

88 *See, e.g.,* Gruen v. Patterson, 55 N.Y.2d 631, 430 N.E.2d 1306, 446 N.Y.S.2d 253 (1981).

89 *See* 24 C.F.R. §§ 866.50-.59, 880.607, 881.607 (1982).

90 *See* 42 U.S.C. § 1437f (1976 & Supp. V 1981) (discussed *infra* note 289).

91 Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir.), *cert. denied,* 103 S. Ct. 302 (1982); Swann v. Gatonia Hous. Auth., 675 F.2d 1342 (4th Cir. 1982); *see also* Heen, *Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard,* 12 CLEARINGHOUSE REV. 1 (1978); Klein & Schrider, *Procedural Due Process and the Section 8 Leased Housing Program,* 66 KY. L.J. 303 (1977); *cf.* Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982) (private landlord cannot act arbitrarily in selecting § 8 tenants). For leases entered into since October 1, 1981, a private landlord must renew a § 8 tenancy unless he has "good cause" not to. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 326(e)(1), 95 Stat. 357, 407; Sarshik, *The Effect of Statutory Changes Upon the Rights of Section 8 Tenants,* 14 URB. LAW. 749 (1982).

92 A landlord who is subject to a just cause eviction rule probably would be extremely cautious about whom he permitted to move into the unit because an unsatisfactory tenant would be difficult to evict. In one disturbing case a landlord was not able to evict a tenant who was a chronically late payer of rents, because the statute did not specify this as cause for eviction. *See* Gruen v. Patterson, 55 N.Y.2d 631, 430 N.E.2d 1306, 446 N.Y.S.2d 253 (1981). A just cause eviction requirement might also tend to make a particular rental project less attractive for desirable tenants because it is more difficult for a landlord to remove undesirable tenants. *See* Fuerst & Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor,* 9 URB. LAW. 496 (1977).

93 Condominiums and cooperatives are two forms of ownership of individual units in a multiple dwelling. Although they have different legal characteristics, for convenience I will refer to both forms as condominiums.

miniums the process is called a condominium conversion. Prior to 1970 condominium conversions were rare, but in the past decade they have increased rapidly.[94]

Not surprisingly, legislation regulating condominium conversions arose when condominium conversions became common in the seventies.

> Conversion related regulations can be categorized as follows: those designed to protect tenants of converted buildings; those intended to protect buyers of converted units; those developed to preserve the supply of rental housing; and those aimed at preserving the supply of low- to moderate-income housing. To date, very few states and localities have passed the latter two types of legislation.
>
> Just under one-half of the states have legislated protections for tenants of converted buildings; and about one-half have laws protecting purchasers of both new and converted condominium units. States which have enacted tenant or buyer protection measures often contain metropolitan areas which are experiencing high levels of conversion.
>
> At the local level, although just over one-third of all jurisdictions have had or still have conversion activity, fewer than one in five of those experiencing conversions has passed a regulatory ordinance. Larger jurisdictions and those with more conversions are more likely to adopt such legislation. About 6 percent of jurisdictions with past or present conversions have at one time or another adopted temporary moratoria halting all conversion activity.
>
> Nearly all local regulatory ordinances provide some protections to tenants in converting buildings. Such ordinances typically require 90 to 180 days notice to tenants of a planned conversion. A few locali-

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94 Very few rental properties were converted to multiple ownership in this country prior to 1970. Since then, 366,000 rental housing units have been converted. Of these, only 18,000 are cooperative conversions. The rate of conversion has been accelerating: in the period 1977 through 1979, 260,000 units were converted, 71 percent of the decade's total. To date, conversion activity has been concentrated in larger metropolitan areas: 76 percent of all conversions have occurred in the 37 largest SMSAs, and 59 percent have taken place in just 12 of these areas. There is some evidence, however, that the conversion phenomenon may be expanding to or increasing in smaller metropolitan areas. Within the largest metropolitan areas of the Nation, a surprisingly large amount of conversion (49%) has occurred in the suburban jurisdictions; the remaining 51 percent has taken place within central cities. By the end of 1979, 1.3 percent of the nation's occupied rental housing stock had been converted. However, there is considerable variation from one metropolitan area to another, as well as within each area. For example, in the New York City and Los Angeles areas, 1 percent of all rental units were converted during the 1970s, compared to 6 percent or more in the Chicago, Denver, and Washington, D.C. areas. There are some atypieal communities and smaller cities where as much as 20 to 30 percent of the rental stock has been converted, and a few sections of cities where more than 30 percent of the rental stock has been converted.

U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, DIV. OF POLICY STUDIES, THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES i-iii (1980) [hereinafter cited as CONVERSION OF RENTAL HOUSING].

ties offer special protections to elderly and handicapped tenants, such as the right to extend their lease period.[95]

Although this suggests that local regulatory ordinances "typically" offer only moderate restrictions on a landlord's ability to convert rental property to condominiums, some localities have temporarily, or even permanently, barred conversions.[96] Other local ordinances have achieved substantially the same effect by prohibiting the eviction of tenants to effectuate a conversion, even at the termination of the lease.

In *Flynn v. City of Cambridge,*[97] for example, the Supreme Judicial Court of Massachusetts upheld an ordinance that prohibited the purchaser of a condominium from using it for his own personal residence, as long as the previous tenant (whose lease had expired) desired to remain there. The court held that as long as the tenant paid a "reasonable rent" as required by the condominium conversion ordinance, the owner of the unit could be barred from using his own property as his residence, even after the termination of the lease in accordance with its terms.

In another recent Massachusetts case, *CHR General, Inc. v. City of Newton,*[98] the plaintiff challenged a city ordinance requiring landlords to wait between two and five years from the issuance of a permit allowing a condominium conversion before a landlord could remove a tenant whose lease had expired. The Supreme Judicial Court of Massachusetts struck down the ordinance because it exceeded home rule authority. The court did not suggest, however, that the ordinance was unconstitutional because it deprived landlords of property without due process or just compensation.

The ordinances involved in the *Flynn* and *CHR* cases represent a significant expansion of tenants' rights and a corresponding contraction of landlords' rights. There are similar condominium conversion ordinances in a number of other jurisdictions.[99]

F. Limitations on Landlord's Common Law Remedies Following Tenant's Breach

1. *Self-Help Remedies to Obtain Possession*

The Restatement (Second) of Property takes the position that the availability of a summary proceeding for evicting a wrongfully occupying tenant bars the use of self-help by the landlord "unless the control-

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95 CONVERSION OF RENTAL HOUSING, *supra* note 94, at viii-ix.

96 *See generally* Snyderman & Morrison, *Rental Market Protection Through the Conversion Moratorium: Legal Limits and Alternatives,* 29 DE PAUL L. REV. 973 (1980).

97 Flynn v. City of Cambridge, 1981 Mass. Adv. Sh. 692, 418 N.E.2d 335.

98 1982 Mass. Adv. Sh. 351, 439 N.E.2d 788.

99 *See, e.g.,* N.J. STAT. ANN. §§ 2A:18-61.1, -61.11; -61.22 to .39 (West Supp. 1982). *See generally* Day & Fogel, *The Condominium Crisis: A Problem Unresolved,* 1981 URB. LAW ANN. 3, 44-54 (describing some of more stringent types of conversion controls).

ling law preserves the right of self-help."[100] In his authoritative work, Professor Schoshinski concludes: "Most courts that have recently reexamined the common law have responded . . . by drastically limiting the degree of self-help permitted or abolishing the remedy altogether. No doubt the trend of modern decisions and recent legislation is to make resort to the legal process the landlord's exclusive remedy."[101]

Landlord self-help includes tenant lockouts and utility, water, or other service cut-offs. In many jurisdictions, the landlord will be liable for punitive damages if he uses such tactics.[102]

2. *Landlord's Right of Distress (Distraint)*

At common law the landlord had a right of distress. Under this right the landlord could seize the tenant's property located on the rented premises and hold it until the rent was paid.[103] As early as 1952, distraint had been abolished in some states and modified in most others.[104] Since then the trend has been to limit further or abolish that right. URLTA, for example, abolished the common law right of distraint for rent.[105] Many courts have held the statutory remedy of distraint unconstitutional because it denies the tenant of his property without due process.[106] It may be that some of these cases should be reconsidered in the light of *Flagg Brothers, Inc. v. Brooks,*[107] which held that the enforcement of a warehouse lien by private sale is not state action subject to constitutional restraint. Nonetheless, it is fair to say that of the minority of states that recognized distraint against residential tenants in 1952, many have abandoned the remedy either by statute or judicial decision.

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100 RESTATEMENT (SECOND) OF PROPERTY § 14.2 (1977).

101 R. SCHOSHINSKI, *supra* note 9, § 6:9, at 408.

102 *See, e.g.,* Kinney v. Vaccari, 27 Cal. 3d 348, 612 P.2d 877, 165 Cal. Rptr. 787 (1980) (applying CAL. CIV. CODE § 789.3 (West 1982)); *see also* URLTA § 4.107, 7A U.L.A. 546 (1978) (authorizing award of treble damages or three months rent, whichever is larger).

103 *See* AMERICAN LAW OF PROPERTY § 3.72, at 332 (Casner ed. 1952).

104 *Id.*

105 URLTA § 4.205(b), 7A U.L.A. 552 (1978).

106 *See* Shaffer v. Holbrook, 346 F. Supp. 762 (S.D.W. Va. 1972); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972); Hold v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971); Brooks v. LaSalle Nat'l Bank, 11 Ill. App. 3d 791, 298 N.E.2d 262 (1973); State *ex rel.* Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972); RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note 5 (1977) (citing Stroemer v. Shevin, 399 F. Supp. 993 (S.D. Fla. 1973)); *see also* R. SCHOSHINSKI, *supra* note 9, § 6:25, at 448 n.56 (citing cases invalidating distress statutes: Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975); Phillips v. Guin & Hunt, Inc., 344 So. 2d 568 (Fla. 1977); Vann Ness Indus. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 342 A.2d 102 (Ch. Div. 1974); Stevenson v. Cullen Center, Inc., 525 S.W.2d 731 (Tex. Civ. App. 1975)).

107 436 U.S. 149 (1978).

3. *Landlord's Duty to Mitigate Damages Upon Tenant's Breach*

According to the majority common law position, the landlord had no duty to mitigate damages upon the tenant's wrongful abandonment of the premises.[108] URLTA rejects that view, providing that if the landlord does not make a reasonable attempt to mitigate the damages caused by the tenant's breach, the lease is terminated "as of the date the landlord has notice of the abandonment."[109] Apparently, a landlord who does not attempt to mitigate loses his right to damages, even if damages would have occurred despite reasonable efforts to mitigate. Other state statutes have also rejected the traditional view.[110]

Recent judicial decisions have tended to reject the common law rule on mitigation.[111] Surprisingly, the Restatement (Second) of Property follows the traditional rule of no duty to mitigate, but its position has influenced few cases.[112]

G. Miscellaneous Increased Landlord Duties and Tenant Protections

1. *Security Deposits*[113]

Because landlord self-help remedies have fallen into disfavor, landlords now rely on security deposits as the most expeditious way to protect themselves against tenant defaults without incurring the expense of litigation.[114] At common law there was no ceiling on the size of the tenant's security deposit. Moreover, under the majority rule, the landlord was not obliged to pay interest on the deposit or to avoid commingling the deposit with his own funds. Thus, the tenants' security deposits provided the landlord with an additional source of income in the form of an interest free loan. If the landlord improperly refused to repay a security deposit, the tenant could sue for its recovery, but normally the tenant could not recover punitive damages or attorney's fees.

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108 *See* R. SCHOSHINSKI, *supra* note 9, § 10:12.

109 URLTA § 4.203, 7A U.L.A. 550 (1978).

110 CAL. CIV. CODE § 1951.2 (West Supp. 1982); MD. REAL PROP. CODE ANN. § 8-207 (1981); WIS. STAT. ANN. § 704.29 (West 1981).

111 Willis v. Soda Shoppes, Inc., 134 Cal. App. 3d 899, 184 Cal. Rptr. 761 (1982); *see also* Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977); R. SCHOSHINSKI, *supra* note 9, at 677 n.99.

112 RESTATEMENT (SECOND) OF PROPERTY § 12.1(3) (1977). No cases are cited in the latest (1982-83) Pocket Supplement as following the *Restatement Second* position. The only case cited is Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977), which explicitly rejected the *Restatement Second*'s position as it appeared in an earlier draft. RESTATEMENT (SECOND) OF PROPERTY § 11.1(3) (Tent. Draft No. 3, 1975).

113 A useful article generally covering the field is Yee, *Tenant Protection Through Security Deposit Legislation,* 8 REAL EST. L.J. 136 (1979). *See also* 2 R. POWELL, REAL PROPERTY ¶ 231[2] (1982); R. SCHOSHINSKI, *supra* note 9, § 6:27-:44; RESTATEMENT (SECOND) OF PROPERTY § 12.1 comment 1 (1977).

114 *See* R. SCHOSHINSKI, *supra* note 9, § 6:27.

During the 1970s, these rules were substantially modified in many jurisdictions. Although URLTA does not require landlords to pay interest on tenants' security deposits, it limits the size of the deposit that a landlord can demand and provides for punitive damages and attorney's fees for the tenant if the landlord wrongfully fails to refund a security deposit.[115] A number of state statutes that preceded URLTA were passed in the late 1960s or early 1970s and had the same general import as the URLTA provisions.[116]

2. *Landlord's Duty to Place Tenant in Actual Possession*

Under the former majority American common law position, a landlord granted a new tenant only the legal right to possession. If the tenant was unable to take possession because a previous holdover tenant was wrongfully in possession of the property, the new tenant, not the landlord, had to resolve the problem.[117] In the last twenty years this so-called American rule has been largely abandoned.[118] Although URLTA is not as clear as it could be, it seems that both URLTA and the Restatement (Second) of Property impose a duty on the landlord to place the tenant in actual possession.[119] Under the *Restatement Second,* the landlord is liable to the tenant for damages if actual possession is not available at the proper time.[120] Recently, most courts that have ruled on the question have taken the same position.[121]

II
CAUSES OF THE REVOLUTION

In Part I, I refrained, for the most part, from evaluating the changes described. Many of them were highly desirable and simply corrected a legal bias favoring landlords. Nevertheless, the question remains why these changes occurred when they did. Although the revolution has continued to develop to this day, it took its greatest strides in the period from 1968 to 1974. Therefore, to find an answer to the question of why the revolution occurred when it did, we must examine conditions and attitudes in the sixties and early seventies.

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115 URLTA § 2.101(a), (c), 7A U.L.A. 524 (1978).

116 *See* URLTA § 2.101 comment, 7A U.L.A. 524-27 (1978) (citing statutes and dates). The early modern security deposit acts were passed as follows: New Jersey (1968) (amended 1973); Calfornia (1971) (amended 1977); Texas (1973); Colorado (1971). Yee, *supra* note 113, at 139. New Jersey requires the payment of interest on deposits. *Id.* at 139 n.18.

117 *See* Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

118 *See* R. SCHOSHINSKI, *supra* note 9, § 3:1-:2.

119 URLTA § 2.103, 7A U.L.A. 528 (1978); RESTATEMENT (SECOND) OF PROPERTY § 6.2 (1977).

120 RESTATEMENT (SECOND) OF PROPERTY § 6.2(2)(a) (1977).

121 *See generally* Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform,* 46 U. CIN. L. REV. 937 (1977).

A. Housing Conditions and Trends in the Sixties

1. *The Physical Reality*

By any measure, the American people were better housed in 1968 than they had ever been before. Rich and poor, tenants and homeowners, had shared in the benefits of the substantial improvements that had occurred over the previous decades. Table I shows that between 1950 and 1970 the proportion of the nation's housing stock that was "dilapidated" decreased by more than fifty percent; the proportion lacking complete plumbing decreased by more than eighty percent; and the proportion that was overcrowded decreased by almost fifty percent. The proportion that was over thirty years old decreased from 45.7% in 1950 to 40.6% in 1970.[122]

A significant improvement in housing conditions occurred even in central city slums:

> Overall, the changes in the 50 low-income neighborhoods indicate some surprising results. The neighborhoods were selected with an expectation of neighborhood decline, yet it was found that for virtually all neighborhoods studied, housing conditions and real incomes actually improved. All indices, however, still revealed relatively poor housing conditions.[123]

122 U.S. DEP'T OF HOUS. AND URBAN DEV., NATIONAL HOUSING POLICY REVIEW, HOUSING IN THE SEVENTIES 166 (1974) [hereinafter cited as HOUSING IN THE SEVENTIES].

123 *Id.* at 175.

TABLE I[124]
MEASURES OF HOUSING INADEQUACY

	1940	1950	1960	1970	1974	1977
Percent of all units lacking some or all plumbing	45.2	35.4	16.8	6.5	4.0	3.1
Percent of all units dilapidated or needing major repairs	17.8	9.8	6.9	4.6	NA	NA
Percent of all units substandard: dilapidated, or lacking plumbing	49.2	36.9	18.2	9.0	NA	NA
Percent of occupied units with 1.51 or more per room	9.0	6.2	3.6	2.0	1.1	0.9
Percent of occupied units with 1.01 or more persons per room	20.2	15.8	11.5	8.0	5.3	4.4
Percent of occupied units with one or more subfamilies	NA	NA	NA	NA	1.5	1.4

Between 1960 and 1970 housing had also become more affordable. Although the rent-to-income ratios for each income class had risen from 1960 to 1970, this rise is misleading. If one adjusts for inflation and for changes in the quality of rental housing, income ratios fell from 1960 to 1970. For example, someone earning about $3,500 in 1960 had the same real income as someone earning $4,500 in 1970.[125] That individual's rent-to-income ratio was 22.3% in 1960 and had risen to 26.7% in 1970.[126] However, he or she was eight times more likely to have air-conditioning, one-third less likely to be overcrowded, and half as likely to lack plumbing.[127] Thus, in constant dollars and in terms of comparable quality, rental housing rent-to-income ratios had become more

124 U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 1980 NATIONAL HOUSING PRODUCTION REPORT 24 (Sources: U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, DECENNIAL CENSUSES OF HOUSING; U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, ANNUAL HOUSING SURVEYS; U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, ANNUAL HOUSING SURVEYS).

125 *See* HOUSING IN THE SEVENTIES, *supra* note 122, at 234-37, especially 237, table 15.

126 *Id.* at 237, table 15.

127 *Id.*

favorable for tenants in 1970 than they were in 1960.[128]

I do not suggest that in 1968 there were no renters living in poor housing, for millions were. I merely argue that any suggestion of a growing crisis was mistaken. Housing conditions had improved steadily and substantially over the decade. The general perception of housing conditions, however, was very different.

2. *As Perceived at the Time*

a. *The Douglas Commission.* In March 1965, President Johnson called for a commission to study the causes of slums and urban blight, and to make appropriate recommendations.[129] Congress subsequently authorized such a study, to be completed by December 31, 1968.[130] Although the Commission report made passing pro forma reference to the "great gains in our housing stock,"[131] the dominant message of the report concerned the existence of a housing crisis of great proportions. The report stated that the complex problem of racial segregation in housing remained "critical."[132] The accomplishments of subsidized housing were "extremely inadequate"[133] and a "squeeze on low-income families seeking decent housing" existed.[134] The Commission recognized a "need [for] a new generation of housing codes embracing higher standards and tied in with environmental standards."[135] There was also a "need for a real political commitment to solve our problems,"[136] which constituted an "urban crisis."[137] Indeed, the Commission stated in its summary: "The solutions we call for are a tall order, but they are in proportion to the enormity of the problems of our urban areas."[138]

The Commission recommended a startling increase in housing construction. It recommended annual housing production of from 2.0 to 2.25 million housing units per year; 500,000 of those units to be designed

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128 *See id.* at 236, table 14. This table indicates that for most types of families (e.g., male-headed, female-headed, over 65, etc.) rent-to-income ratios had not changed between 1960 and 1970. Because the quality of housing improved significantly during this period (by 27%, *id.* at 234), the rent-to-income ratio for the same quality housing would have decreased during the same period. As the report concludes, for the half of low income families who were renters, "the available data indicate that rent increases have not adversely affected them." *Id.* at 237.

129 U.S. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 34, 91st Cong., 1st Sess. VII (1978) [hereinafter cited as BUILDING THE AMERICAN CITY].

130 *Id.*

131 *Id.* at XI.

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

specifically for low and moderate income families (exclusive of the elderly).[139] Because the Commission's own statistics indicated that in the 1960s only 15.3 million units were built[140] (1.53 million per year on average), the Commission's recommendation would have meant an annual average increase of 33% in the number of units constructed over the previous comparable period. It is impossible to sum up a report of 500 pages in a few sentences. Yet the general perception of the Douglas Commission can be summarized by the following quotation:

> At the present levels of family income and at present rentals and mortgage rates, about a third of the families in the Nation cannot buy or rent decent housing at market rates by paying a reasonable proportion of their income for shelter (no more than 20 to 25 percent at most).[141]

b. *The Kaiser Committee.*[142] The Kaiser Committee submitted its report to the President only one day before the Douglas Commission submitted its report.[143] The Committee first received its charge in June 1967[144] and participated in the development of the Housing and Urban Development Act of 1968[145] (passed in August of 1968).[146] The Kaiser Report, like the Douglas Report, generally saw a crisis in housing:

> [T]his Committee reached a fundamental conclusion: . . .
> There is an immediate and critical social need for millions of decent dwellings to shelter the nation's lower-income families.
> Overlying this need is one raising an unprecedented and challenging production problem. The nation is heading toward a serious shortage of housing for the total population, unless production is sharply increased.[147]

To meet the need described above, the Kaiser Committee recommended producing twenty-six million new and rehabilitated units by 1978, including between six and eight million subsidized units.[148] The report acknowledged the enormity of this goal, calculating that it required 70% more housing production in the next decade than the total production of the 1950s.[149] A staff study appended to the Kaiser Committee report

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139 *Id.* at 180-81.

140 *Id.* at 70, table 1.

141 *Id.* at 74 (footnote omitted).

142 PRESIDENT'S COMM. ON URBAN HOUS., A DECENT HOME (1968) [hereinafter cited as A DECENT HOME].

143 The Kaiser Committee Report was submitted on Dec. 11, 1968. *Id.* at i. The Douglas Commission submitted its report on Dec. 2, 1968. BUILDING THE AMERICAN CITY, *supra* note 129, at III.

144 A DECENT HOME, *supra* note 142, at i.

145 Pub. L. No. 90-448, 82 Stat. 476.

146 A DECENT HOME, *supra* note 142, at i.

147 *Id.* at 8.

148 *Id.*

149 *Id.* at 8-9.

acknowledged that housing conditions had improved in the previous few decades,[150] but concluded that "without a major National effort, there is little prospect for any substantial net gains in the condition of substandard metropolitan area housing in the decade ahead."[151] In President Johnson's June 2, 1967, statement, forming appendix A to the Kaiser Committee Report, he described the problem as follows: "No domestic task facing this Nation today is more demanding or more urgent than reclaiming the corroded core of the American city. A substantial part of that task is the rebuilding of the slums—with their 7 million dilapidated dwellings—which shame this Nation and its cities."[152]

Just as the Douglas and Kaiser Reports perceived a housing problem requiring heroic solutions, so too did judges see a need for brave new theories and approaches. In the landmark *Javins* case Judge Wright referred to the "increasingly severe shortage of adequate housing" to justify his new approach.[153] In support of this reference to an "increasingly severe shortage," he cited the Kaiser Committee Report, and on related issues cited the Douglas Commission Report.[154] Other leading cases simply assumed that the growing housing shortage was so self-evident as not to warrant extended discussion or citation.[155]

3. *Reconciling the Perception and the Reality*

The substantial improvement in the quantity, quality, and affordability of housing in the fifties and sixties is not inconsistent with the view that heroic measures were urgently needed to improve housing conditions. The 1968 House Report that accompanied the historic Housing and Urban Development Act of 1968 implicitly took this position when it recognized prior achievements, but simultaneously deprecated them:

> While we can take pride in these accomplishments, they have fallen far short of today's needs. . . . A basic factor in the magnitude and urgency of our present housing problems has been the failure to include all parts of our population in the general rise in incomes and wealth. . . . Because of this contrast and the unrest it has created, the task of our housing and urban development programs is more critical

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150 *Id.* at 43.

151 *Id.* at 44.

152 *Id.* at 222.

153 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.) (footnote omitted), *cert. denied,* 400 U.S. 925 (1970).

154 *Id.*

155 *See, e.g.,* Green v. Superior Court, 10 Cal. 3d 616, 625 & n.8, 517 P.2d 1168, 1173 & n.8, 111 Cal. Rptr. 704, 709 & n.8 (1974) (referring to "a scarcity of adequate low cost housing in virtually every urban setting"); Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970) (referring, without elaboration, to "these days of housing shortage").

than ever.[156]

It is not possible, however, to reconcile completely the reality of steadily improving housing conditions with the perception of an increasingly severe shortage of housing. In 1968, the public consensus seemed to hold that housing conditions were actually getting worse, whereas in fact, they were getting better. Smaller shortcomings loomed larger in the eyes of the observer in 1968 than larger shortcomings had loomed in the eyes of earlier observers. We had developed an increased sensitivity to the gap between the reality and the ideal; a reduced tolerance for imperfections.

4. *The Practical Effect of the Decreased Tolerance for Shortcomings in the Nation's Housing*

In enacting the landmark Housing and Urban Development Act of 1968,[157] Congress explicitly adopted as a national goal the Kaiser Committee's recommendation to produce or rehabilitate 26 million housing units over the next ten years.[158] Although the goal was not fully achieved, Congress vastly increased housing expenditures, and housing programs proliferated in the years following the 1968 Act.[159] Similarly, the general perception of a housing crisis contributed to the development of new judicial doctrines and to the drafting of the Model Code of 1969. The Model Code served as the basis for URLTA, which in turn became an important force for change in the seventies.

B. What Made Formerly Tolerable Housing Conditions Now Intolerable?

1. *The Civil Rights Movement*

A major thesis of this article is that the civil rights movement of the sixties was the dominant force behind the changes in landlord-tenant law in the late sixties and early seventies.[160] It created a climate of ac-

156 H.R. REP. NO. 1585, 90th Cong., 2d Sess. 1-2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2873, 2873-74.

157 Pub. L. No. 90-448, 82 Stat. 476.

158 Housing and Urban Development Act of 1968, § 1601, 42 U.S.C. § 1441(a) (1976); *see supra* note 148 and accompanying text.

159 Federally subsidized low and moderate income occupancy of unrehabilitated living units rose from 48,620 in 1971 to 149,030 in 1979. The high point was reached in 1978 when 287,710 such units were subsidized. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., THE TENTH ANNUAL REPORT ON THE NATIONAL HOUSING GOAL 29 (1979).

160 That the Canadian province of Ontario passed legislation embodying many of the changes discussed in this article even before most of the American changes took place seems to refute this proposition. *See* The Landlord and Tenant Amendment Act, ch. 58, 1968-69 Ont. Stat. 441, discussed in Gorsky, *The Landlord and Tenant Amendment Act, 1968-69—Some Problems of Statutory Interpretation,* in RECENT DEVELOPMENTS IN REAL ESTATE LAW 439 (Law Society of Upper Canada, Special Lectures 1970). Because Canada was not as affected by the civil rights movement or the Vietnam War as was the United States, it would seem that the move-

tivism that demanded prompt, dramatic changes. Judges and legislators responded accordingly.

Although the post World War II civil rights struggle started as a movement against segregation and blatant racism in the South, by the early 1960s, it had assumed a more national character. The national character of the movement perhaps had its symbolic beginning on January 1, 1963, when Martin Luther King, Jr., made his immortal "I have a dream" speech to commemorate the centennial of the Emancipation Proclamation.[161] On August 28, 1963, some 200,000 people, black and white, from the North and South, marched on Washington to demonstrate their support for racial justice.[162] In March 1964, President Johnson declared a "national war on poverty"[163] and in July 1964, he signed the Civil Rights Act of 1964 into law.[164] These efforts, however, did not succeed in halting the militant phase of the civil rights movement, which had already begun. There were riots in black sections of New York and Philadelphia that summer.[165]

Violent civil rights protests escalated dramatically in the summer of 1965. The riots in the Watts section of Los Angeles left thirty-four persons dead and $40 million in property destroyed.[166] In the summer of 1967, there were race riots in Cleveland, Chicago, and Atlanta.[167] In the summer of 1967, there were riots in 127 American cities, killing at least 77 and injuring at least 4,000 people.[168] In Detroit the disturbances were so severe that federal troops were called in—the first use of federal troops to maintain order since 1942.[169] Significantly, in view of the leading role the courts in Washington, D. C. were to play in landlord-tenant law, there was also an episode of arson and rock throwing in that city.[170]

No judge sitting in Washington in 1968 could fail to have been affected by the civil rights movement unfolding before him—least of all Judge J. Skelly Wright. James Skelly Wright was born and raised in

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ment for change in landlord-tenant law generated from other sources in Canada. Although this might suggest that change in landlord-tenant law would have occurred in the United States even without these two social forces, I still would argue that the *catalyst* for change in the United States was the civil rights movement and the Vietnam War. I freely concede, however, that if these two events had not occurred other events probably would have precipitated these changes in landlord-tenant law. The anachronistic law of landlord-tenant was a tinderbox waiting to be ignited by a spark that could originate from any number of sources.

161 J. TRAGER, THE PEOPLE'S CHRONOLOGY 1096 (1979).
162 *Id.*
163 *Id.* at 1102.
164 *Id.* at 1101.
165 *Id.*
166 *Id.* at 1108.
167 *Id.* at 1114.
168 *Id.* at 1120.
169 *Id.*
170 *Id.*

New Orleans and received his college and law school education at Loyola University in that city.[171] After practicing law first as an assistant U.S. Attorney and then as a U.S. Attorney, he was appointed a United States District Judge in 1949.[172] In his work in the federal courts in New Orleans, he was intimately involved in desegregation law, and from his earliest days on the bench had shown a sensitivity to the demands of black citizens for equal treatment.

Even before *Brown v. Board of Education*[173] was decided in 1954, Judge Wright twice ordered Louisiana State University to admit black students to its programs.[174] In 1960, he became known in New Orleans as the "integration judge" when he became the first judge in the deep South to order desegregation of the public schools.[175]

Judge Wright was elevated to the United States Court of Appeals for the District of Columbia by President Kennedy and began sitting there in 1962.[176] The court during that period heard, among other matters, appeals involving landlord-tenant disputes that arose in the District of Columbia.[177] Only six years after his appointment, Judge Wright wrote his important opinion barring retaliatory evictions.[178] And only two years later, he wrote his landmark *Javins* opinion. During the years immediately preceding these opinions many significant events had occurred including the march on Washington, the race riots throughout the country, the passage of the Civil Rights Acts of 1964[179] and 1968,[180] and the assassination of Martin Luther King, Jr. In a candid letter to me, Judge Wright acknowledged that his opinions in the landlord-tenant area were influenced by sympathy for the black struggle of those

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171 J. BASS, UNLIKELY HEROES 113 (1981).

172 *Id.* at 113-14.

173 347 U.S. 483 (1954).

174 J. BASS, *supra* note 171, at 114.

175 *Id.* at 114-15.

> By the end of 1960, Skelly Wright had become the most hated man in New Orleans. Pairs of federal marshals alternated in eight-hour shifts at his home to ensure his physical safety, and they escorted him to and from work. With few exceptions, old friends would step across the street to avoid speaking to him.

Id. at 115.

176 *See* Letter from Judge Wright to author (Oct. 14, 1981), *infra* p. 549.

177 *Id.* After February 1, 1971, Judge Wright's court no longer heard appeals in District of Columbia landlord-tenant cases. *See* D.C. CODE ANN. §§ 11-102, 11-301 (1981); *cf.* Davis v. Bruner, 441 A.2d 992, 997 (D.C.), *vacated,* 441 A.2d 1000 (D.C. 1982).

178 Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

179 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 240 (1965).

180 Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1969).

years. It is reasonable to assume that other judges were similarly influenced.

UNITED STATES COURT OF APPEALS
WASHINGTON, D.C. 20001-2867

J. Skelly Wright
United States Circuit Judge

October 14, 1982

Professor Edward H. Rabin
School of Law
University of California, Davis
Davis, California 95616

Dear Professor Rabin:

Why the revolution in landlord-tenant law is largely traceable to the 1960's rather than decades before I really cannot say with any degree of certainty. Unquestionably the Vietnam War and the civil rights movement of the 1960's did cause people to question existing institutions and authorities. And perhaps this inquisition reached the judiciary itself. Obviously, judges cannot be unaware of what all people know and feel.

With reference to your specific question, I was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions.

I came to Washington in April 1962 after being born and raised in New Orleans, Louisiana for 51 years. I had never been exposed, either as a judge or as a lawyer, to the local practice of law which, of course, included landlord and tenant cases. I was Assistant U.S. Attorney, U.S. Attorney, and then U.S. District Court judge in New Orleans before I joined the U.S. Court of Appeals in Washington. It was my first exposure to landlord and tenant cases, the U.S. Court of Appeals here being a writ court to the local court system at the time. I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.

Sincerely,

s/J. Skelly Wright

2. *Other Causes*

No historical event has a single cause. Although the civil rights movement was primarily responsible for breaking the precedents that had encased landlord-tenant law for centuries, other forces were also at work.

a. *Resistance to the Vietnam War.* During the sixties, opposition to the Vietnam War occupied a dominant place in American political consciousness. By the end of 1966 the American death toll in Vietnam had reached 6,407.[181] By April of 1967 antiwar demonstrations had attracted over 100,000 people in New York and 50,000 people in San Francisco.[182] By March of 1968 opposition to the war had become so intense that President Johnson had been compelled to announce that he would not run for reelection.[183]

Although foreign policy appears to have little to do with landlord-tenant law, the antiwar protestors' dramatic victory over the authority and legitimacy of the "Establishment" influenced the American political atmosphere. Landlords represented the Establishment, and the existing rules of landlord-tenant law, archaic and one-sided as they were, represented as much a legitimate target of protest by lawyers and judges as did the perceived wrongheadedness of the Vietnam military adventure. This theme of unrest and change reflected itself in our culture, music, mores, and laws. It was a time of flower children in the Haight, of student riots in the universities, and of rent strikes in our cities.

b. *Institutional Changes.* Reapportionment decisions eased the way for statutory changes in the state legislatures.[184] As state legislatures increasingly reflected their urban constituencies, the grievances of urban tenants received a more respectful hearing in the legislatures. Without the reapportionment of state legislatures that occurred in the sixties, some of the ameliorative legislation, particularly URLTA, might not have been passed.[185] Yet, reapportionment merely removed an obstacle in the way of reform. It did not provide the underlying motivation. After all, neither the drafting of the original Model Residential Landlord-Tenant Code nor the adoption of URLTA by the National Commissioners on Uniform State Laws was affected by the composition of the state legislatures.

The establishment and relatively generous funding of legal services

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181 L. OBST, THE SIXTIES 166 (1977).

182 J. TRAGER, *supra* note 161, at 1119.

183 *Id.* at 126.

184 *See, e.g.*, Mahan v. Howell, 410 U.S. 315 (1973); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

185 *See* Donahue, *supra* note 2, at 242.

offices, supported by the Office of Economic Opportunity (OEO) in most urban areas represented a more important institutional development.[186] These offices, staffed by idealistic and energetic lawyers, participated in most of the test cases establishing tenants' rights.[187] It is doubtful whether many of these cases would have been brought without the support of legal services. A glance through the *Clearinghouse Review*[188] indicates the extent to which landlord-tenant law occupies legal service lawyers, and the high level of legal talent and expertise these lawyers offered tenants in the sixties and seventies.

c. *Developments in Legal Theory, Precedents, and Legislation.* Every revolution has roots that lead us further back into the past; every discovery its portents, every event its heralds. Cases like *Javins* and *Edwards v. Habib* were not totally without precedent. They had been preceded by a large literature of legal articles criticizing the outmoded nature of landlord-tenant law,[189] by cases that had taken similar paths,[190] and by the increased use of housing codes that could be used to establish a definition of habitability.[191] These pre-1968 factors were important in facilitating change, yet all of them had existed before the start of the revolution in 1968. They had all prepared the way for change, but the revolution in landlord-tenant law could not have occurred without the emotional force generated by the civil rights movement, particularly by the violent confrontational phase that developed in the sixties. Nevertheless, a review of these earlier developments is essential to a full understanding of the reasons for the breakthrough of the late 1960s.

The first influential American housing code was passed in New York in 1867.[192] By 1956, approximately fifty-six communities had housing codes, but by 1968 the number had grown to 4,904 communities, not including statewide housing codes.[193] One can trace the sudden change from the glacial pace of growth in local housing codes from 1867 to 1956, to the extraordinary growth from 1956 to 1968, directly to the passage of the federal Housing Act of 1954. The Act required local jurisdictions to enforce housing codes if they were to qualify for federal

186 The key statute establishing the OEO was the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

187 For example, the reported decisions for *Javins, Edwards v. Habib, Green,* and *Marini* indicate that "public interest" lawyers filed briefs for all of these leading cases.

188 The *Clearinghouse Review* is a national journal serving poverty lawyers.

189 *See, e.g.,* Lesar, *Landlord and Tenant Reform,* 35 N.Y.U. L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change,* 54 GEO. L.J. 519 (1969).

190 *See infra* notes 195-201.

191 *See generally* L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING (1968).

192 *Id.* at 26.

193 Abbott, *supra* note 6, at 44.

aid.[194] Hence, local ordinances were more a response to a need perceived in Washington, than to the impetus of local forces. Whatever the motivation for the adoption of local housing codes, by the time *Javins* was decided in 1970, housing codes were widespread, detailed, and familiar enough to serve as a ready standard with which to judge the habitability of rental units.

Despite the existence of housing codes before 1954, few courts used them to define the rights of tenants. Although a few decisions founded tort liability for personal injury on a landlord's breach of a housing code,[195] this was a far cry from the use of housing codes to define the contractual rights of landlords and tenants. One early case, *Delamater v. Foreman,*[196] found an implied warranty of habitability in a modern apartment, but did not rely on, or even mention, any housing code.

In *Pines v. Perssion,* a 1961 case, the Wisconsin Supreme Court relied on a building code to find an implied warranty of habitability, and thus reject that "obnoxious legal cliche, *caveat emptor*."[197] The tenants in *Pines* had a reasonable good faith belief that the property would be habitable when they moved in. When it proved otherwise, they moved out. Although the court found several building code violations, the plaintiffs' most compelling argument was the failure of the property to meet their justified expectations. Nevertheless, the court formally rested its decision on the landlord's failure to fulfill the implied warranty of habitability as defined by the building code. *Pines* was important because it was one of the first cases to find an implied warranty of habitability based on a building code. Moreover, it expressly held that the obligation to pay rent and the landlord's implied warranty of habitability were "mutually dependent"[198] and that a "breach of the latter . . . relieved [tenants] of any liability under the former."[199] The tenants were thus relieved of any liability under the lease and the "only liability [was] for the reasonable rental value of the premises during the time of actual occupancy."[200] The tenants actually vacated the premises only a few days after they moved in, and thus the court was not confronted with the critical issue which came to play a central role in subsequent cases: When a landlord breaches an implied warranty of habitability, can a tenant remain on the premises, refuse to pay rent, and successfully defend against an eviction action brought by the landlord? The clear ma-

194 *Id.* at 43.

195 *See, e.g.,* Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 950 (D.C. Cir. 1960); Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 246 N.E.2d 798 (1969).

196 184 Minn. 428, 239 N.W. 148 (1931).

197 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

198 *Id.*

199 *Id.*

200 *Id.* at 597, 111 N.W.2d at 413.

jority view today is that the tenant can, but prior to 1968 there was little authority to support such a position.

The *Pines* case never achieved the influence of *Javins*. The time was not yet ripe. The civil rights movement had not developed sufficient force to compel other judges to follow *Pines*. Some inkling of the relative unimportance of *Pines* in the overall slum housing context is exhibited by the failure of Professor Lawrence M. Friedman, who was a professor of law at Wisconsin when he wrote his classic study, *Government and Slum Housing,* to mention or cite *Pines* (a Wisconsin case) at any point in his book. Indeed, he gave scant attention to the possibility that a reformation of landlord-tenant law could significantly improve the housing of poor tenants. Nevertheless, *Pines* was not entirely without impact. It was cited and quoted with approval in *Javins,*[201] and no doubt made the writing of the *Javins* opinion somewhat easier than it would have otherwise been. Nevertheless, one suspects that *Javins* would have been decided the same way even if *Pines* had never been written. As Judge Wright has acknowledged, "[I]f you don't take it to extremes, I think that it's good to come out with a fair and just result and then look for law to support it."[202]

Legal developments in areas other than landlord-tenant law also made it easier to imply a warranty in rental housing.[203] Courts previously had found implied warranties in the sale of real and personal property.[204] To deny implied warranties in rental housing, courts would have had to retain a doctrine that had become an exception to a general rule recognizing implied warranties in other contexts. If the courts had wished, however, they could have logically defended the exception. Courts could have distinguished the rental of used housing, which might be assumed to have certain defects, and the sale or rental of new real or personal property, which might logically be presumed to lack such defects. That Judge Wright chose not to draw such a distinction does not suggest that he decided *Javins* illogically. It suggests rather that his desire to respond to a perceived necessity of the time was a more important motivating factor than any instinct for logic-chopping.

d. *Economic Causes.* During the fifties and sixties the United States experienced rapid growth and prosperity. In constant 1972 dollars, per

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201 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 & n.60 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

202 J. BASS, *supra* note 171, at 116.

203 *See generally* Backman, *Tenant as Consumer: Comparison of Developments in Consumer Law and in Landlord/Tenant Law,* 33 OKLA. L. REV. 1 (1980).

204 *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 370-84, 161 A.2d 69, 76-84 (1960) (implied warranty in new automobile); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (implied warranty in new house). Both of these cases were cited in *Javins,* 428 F.2d at 1076 nn.19, 22.

capita income had risen from $3,069 in 1960 to $4,265 in 1970.[205] Poor families had shared in the dramatic rise in living standards. In 1950, 50.4% of all families had had an income of less than $10,000, stated in constant 1979 dollars.[206] By 1960, the percentage had fallen to 32.4%,[207] by 1970, to only 21.3%.[208] At the upper end of the income scale, only 1.1% of all families had an income of over $50,000 in 1955 stated in constant 1979 dollars, whereas 3.7% of all families had such income in 1970.[209] Against this background of rising affluence, the continued existence of slums seemed shameful and unnecessary.[210] The general prosperity made it seem feasible to launch and win a "war against poverty" that would have been unthinkable in a period of economic stringency. Judges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord's economic position, like that of everyone else, was improving.

C. Summary

Many factors contributed to the revolution in landlord-tenant law that arose in the late sixties. The primary factor, however, was the civil rights movement of the sixties, the turbulence of which impelled judges and legislatures to do "something" about poor housing conditions in the slums. The federal government responded to those societal forces with the Fair Housing Act of 1968 and the Housing and Urban Development Act of 1968. The courts and state legislatures responded by changing existing legal doctrines, in particular by recognizing an implied warranty of habitability in rental housing.

D. The Special Cases of Rent Control and Condominium Conversion Legislation

1. *Rent Control*

Infiation is the primary force stimulating the passage of rent control ordinances. Rent control ordinances attempt to protect tenants from inflation. Legislatures are unlikely to consider rent control until inflation becomes a problem. Typically such ordinances freeze rents with

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205 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1981, at 429 [hereinafter cited as STATISTICAL ABSTRACT 1981].

206 *Id.* at 439.

207 *Id.*

208 *Id.*

209 *Id.*

210 John Kenneth Galbraith's influential book, *The Affluent Society,* written in 1958 could not have been written in earlier decades, nor indeed at the present time. Yet in 1958 Dr. Galbraith could justifiably write about the "great and quite unprecedented affluence" of his time. J. GALBRAITH, THE AFFLUENT SOCIETY 1 (1958). The major theme of Galbraith's book was that there was sufficient wealth in the country to make poverty unnecessary. Thus, it prepared the intellectual ground for the "war on poverty" that started a decade latter.

increases permitted only under narrowly circumscribed conditions. In the absence of infiation, or more specifically in the absence of any rise in rents, no need or purpose for rent control would exist. Although, to be constitutional, rent control laws must permit the landlord to achieve a fair return on his investment, rent control ordinances do not establish rents by calculating the rents needed to earn a fair return. Instead, they assume that market rents at some previous time were fair and reasonable, and then use these market rents as the starting point for calculating permitted rents. The formula equates earlier market rents, as adjusted, with permitted rents. The rapid inflation of the late 1960s and early 1970s led Congress to impose federal rent controls from August 15, 1971, through January 12, 1973.[211] State and local rent control ordinances became popular at about this time, in some cases designed to replace the expired federal statute.

The popularity of rent control is puzzling in view of the virtual unanimity among professional economists that rent control is, in the long run, bad for all concerned—tenants as well as landlords. As Ludwig von Mises explained in 1949:

> Economics does not say that isolated government interference with the prices of only one commodity or a few commodities is unfair, bad, or unfeasible. It says that such interference produces results contrary to its purpose, that it makes conditions worse, not better, *from the point of view of the government and those backing its interference.*[212]

Despite such views on rent control, tenants continue to vote for it. Are renters who vote for rent control simply shortsighted and ill-informed? I think there is a better explanation. Although rent control is bad for renters taken as a whole, it is good for the particular subgroup of tenants that votes on the measure and bad for the subgroup of tenants that does not vote. Rent control benefits those of the "tenant class" who are now tenants, at the expense of those who will become tenants later. These include nonresidents, those who are too young to establish independent households, and those who are currently homeowners and plan to become tenants.

Siguificantly, the two groups most adversely affected—nonresidents and those too young to be tenants—are not voters when such measures are passed by a local government. Consequently, their interests are ignored. Seen in this light, rent control bears a startling resemblance to exclusionary zoning, which often masquerades as environmental protection.[213] Similarly, rent control is often deceptively portrayed as protection for the poor or as a restraint on exorbitant landlord profits.

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211 *See generally* R. SCHOSHINSKI, *supra* note 9, at 503.

212 INST. OF ECONOMIC AFFAIRS, VERDICT ON RENT CONTROL 61 (1972) (quoting von Mises) (emphasis in original).

213 *See generally* B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979).

However, both exclusionary zoning and rent control operate, in effect if not in intent, against the interests of those who cannot vote and in favor of the interests of those who can and do vote. For the current tenant, the immediate and certain advantage of rent control usually outweighs the speculative future disadvantages, particularly when the future disadvantages are discounted to present value.

When viewed from the perspective of those who vote for and are benefited by rent control ordinances, the reasons for certain common features of these ordinances become clear. Consider, for example, the common provision that allows a landlord to increase rents on a decontrolled apartment after the original tenants vacate.[214] If an ordinance is concerned with preventing exorbitant profits for landlords at the expense of tenants, it should protect new tenants as much as existing tenants. But because such ordinances are passed at the request or by the vote of existing tenants, protection of new tenants is not an issue central to the supporters of rent control. In those instances where vacancy decontrol is opposed, the opposition is mainly to protect existing tenants from landlord pressure to vacate and thus decontrol their unit. The new tenant's need for protection is distinctly secondary. Similarly, most of the modern "second generation" rent control ordinances exempt from control living units constructed after the ordinance. Legislators give short shrift to the interests of future residents because they are unlikely to be voters in the election adopting the rent control ordinance.

Considering that rent control benefits that class of tenants who are likely to be voters—current tenants—at the expense of those who are not presently voters—the young and nonresidents—the popularity of rent control in the last ten years is not surprising.

2. *Legislation Restricting Condominium Conversions*

To find the causes of condominium conversion legislation, we must first investigate the causes of condominium conversions. Some condominium conversions are inspired by rent control. Landlords seeking to escape the strictures of rent control may try to convert their rental properties to condominiums. The same voters, current tenants, who used political power to enact a rent control ordinance will seek to prevent condominium conversions that threaten the gains they previously won.[215]

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214 *See, e.g.*, LOS ANGELES, CAL. MUN. CODE § 151.06.C (1981); SAN FRANCISCO, CAL. ADMIN. CODE § 37.3(b) (1980); SAN JOSE, CAL. SAN JOSE MUN. CODE § 5703.3(b) (1979).

215 As the court in Flynn v. City of Cambridge, 1981 Mass. Adv. Sh. 692, 699, 418 N.E.2d 335, 339 (1981), observed:

> Even if the conversion rate did no more than level off, the power conferred by [the statute] to control rents would steadily and irreversibly be transformed into the power to control nothing. The power to control rents and evictions is not so illusory that it does not comprehend the right and responsibility of

Often, a conversion is a defensive move by a landlord who fears enactment of rent control and accompanying condominium conversion legislation. Condominium conversions, however, may occur even in the absence of rent control legislation or the threat of it.

Condominium conversions occur when they are profitable for the converter. This happens when the anticipated discounted value of the net after-tax income stream from the operation of a rental property is less than the anticipated discounted value of the net after-tax income that will flow from a conversion. Thus, anything that tends to depress rents or increase the price of condominiums will encourage conversions.

A recent report closely studied the causes of condominium conversions.[216] The report concluded that most condominium conversions arose in response to a strong demand by purchasers for condominium units, rather than to depressed rent levels.[217] During the seventies, the advantages of home ownership (including condominiums and coops) over tenancy became stronger. The change in advantage was

> largely a result of actual and expected future inflation (including future appreciation of housing values and the greater tax advantages of ownership for households pushed by inflation into higher marginal income tax brackets). Inflation of housing prices has, at the same time, placed traditional single-family homes beyond the financial reach of more middle income households. Thus, inflation—combined with Federal tax laws—works both to increase ownership demand and to reduce the ability of many households to purchase single-family homes. Condominiums and cooperatives—including those converted from rentals—offer a less expensive ownership alternative at a time when more are seeking to own rather than to rent. For this reason, if for no other, demand for converted condominiums and cooperatives would be expected to grow and to create new profit opportunities for converters.[218]

The above discussion explains why condominium conversion legislation and rent control legislation arose at about the same time. Both were responses to inflation. Conversions became popular when inflation made condominium purchases attractive to housing consumers. Dramatic rises in rents and in the costs of home purchases came with the inflation of the seventies. Renters responded to the rent rises by sponsoring rent control legislation, and to the conversions by sponsoring condominium conversion legislation. Housing consumers who were hurt by condominium conversion legislation were politically disorganized as

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> preventing removals from its reach. We conclude that the power to control removals from the rental housing market is essential to the operation of [the statute,] and is therefore conferred by implication in the rent control statute.

216 CONVERSION OF RENTAL HOUSING, *supra* note 94.

217 *Id.* at V-3, -15, -19, -30.

218 *Id.* at V-30 (footnotes omitted).

compared to tenants who could work together easily because they lived in the same apartment house or neighborhood. Consumers thus could do little to voice their disapproval.

III
EFFECT OF THE REVOLUTION IN LANDLORD-TENANT LAW ON HOUSING CONDITIONS

The revolution in landlord-tenant law was one in which courts and legislatures attempted to improve housing conditions for tenants. Many critics of the revolution argued that regardless of intent, the revolution would hurt tenants more than it would help them. This Part examines this proposition.

A. The Literature[219]

1. *Theoretical Studies and Predictions*

a. *Mainstream Analyses.* It is arguable that each increased tenant protection and landlord duty must ultimately be paid for by the consumers of rental housing, the tenants.[220] Those least able to pay increased rents will lose more than they gain from additional protections. Illustrative of this view is an influential article by Charles Meyers.[221] Professor Meyers addressed the following fact pattern, adapted from one posed by the Restatement (Second) of Property:[222]

> Landlord leases an apartment to Tenant on a month-to-month basis for $30 per month. The apartment is located in a slum and does not comply with the housing code in several important respects. Both Landlord and Tenant are aware of the violations but agree to enter into the lease anyway.[223]

Under the *Restatement Second* rule, as ultimately adopted, the landlord

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219 I have not attempted to review the periodical literature addressed primarily to economists. Enough has been written in legal periodicals and in general works to furnish food for thought.

220 If landlords enjoy greater than average profits, the costs of increased tenant protection, even in the long run, may be borne by landlords. Moreover, even if the rental housing business is competitive and landlords enjoy only average profits, the suppliers of the factors of production such as the owners of raw land, might bear some of the costs of increased tenant protection. Such owners might find that the prices they can command are reduced when landlords have additional expenses due to greater tenant protection. Thus, the costs of increased tenant protections may fall most heavily on landlords in the short run, on tenants in the medium run, and on the suppliers of the factors of production (land, capital, supplies) in the long run.

221 Meyers, *The Covenant of Habitability and the American Law Institute,* 27 STAN. L. REV. 879 (1975).

222 The quoted fact pattern was derived from the RESTATEMENT (SECOND) OF PROPERTY § 5.1 comment c, illustration 2 (Tent. Draft No. 2, 1974). The final version of the *Restatement Second* on this point is identical. *See* RESTATEMENT (SECOND) OF PROPERTY § 5.1 comment c, illustration 2 (1977).

223 Meyers, *supra* note 221, at 879.

would still have a duty of providing habitable premises. If the landlord breaches this duty, the tenant would be entitled to the usual contract remedies resulting from an agreement that is "unconscionable or significantly against public policy."[224] Professor Meyers summarized his objections to the *Restatement Second*'s position as follows:

> In summary, the economic consequences of the *Restatement* rules on habitability are likely to be the following:
>
> 1) Some proportion of the substandard rental housing stock would be upgraded and rents would be raised to cover the added costs. Tenants formerly occupying the housing would either be forced out or be required to pay a higher proportion of their income for rent. Those tenants who are unable or unwilling to pay for the upgraded housing will move out, creating an increased demand for lower-priced, lower-quality housing.
>
> 2) For some proportion of the substandard rental housing stock, rents could not be raised, but landlords could still upgrade the housing without incurring a deficit. In these cases the tenants would enjoy a short-term wealth transfer, for they would enjoy better housing at no increase in rent. But low-income tenants as a class would not benefit in the long run, for the covenant of habitability will retire this component of the housing stock sooner than would otherwise be the case and will discourage new investment in low-rent housing.
>
> 3) The third portion of the substandard housing stock will be abandoned as soon as the owner determines that income will not cover the expenses of *Restatement* repairs and concludes that this deficit is likely to persist.[225]

Other commentators have held similar views.[226]

b. *Dissident Theories.* Perhaps the most ambitious attempt to demonstrate that under certain conditions code enforcement could improve housing conditions without leading to increased rents was an article by Professor Bruce Ackerman.[227] The Ackerman article was the subject of an extremely critical review by Professor Komesar.[228] It is

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224 RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977); *see also id.* § 5.1 comment c.

225 Meyers, *supra* note 221, at 893.

226 *See, e.g.,* Hartman, Kessler & LeGates, *Municipal Housing Code Enforcement and Low-Income Tenants,* 40 J. AM. INST. OF PLANNERS 90 (1974), *reprinted in* HOUSING URBAN AMERICA 560 (J. Pynoos, R. Schafer & C. Hartman eds. 2d ed. 1980); L. FRIEDMAN, *supra* note 191, at 174 (1968); Berger, *supra* note 3, at 749 ("To a great extent the laws are self-defeating. It is likely that as a result of them there will be less rental housing and that certainly means higher rents.").

227 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) [hereinafter cited as Ackerman, *Regulating Slum Housing*]; *see also* Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar,* 82 YALE L.J. 1194 (1973).

228 Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor,* 82 YALE L.J. 1175 (1973).

unnecessary to repeat here the substance of the criticism. It is sufficient to note that even Professor Ackerman recognized that poor tenants would benefit from housing code enforcement only given certain assumptions. Among the more questionable of these is the assumption that non-slum-dwellers will refrain from moving into former slum buildings after they are brought up to code standards.[229] This assumption is crucial because if upgrading a slum building attracted persons who would not otherwise live in the building, rents would rise and the original slum-dwellers might be harmed rather than helped by the upgrading. Even if Professor Ackerman's assumption is valid in some cases, he ignores the possibility that existing residents of a slum area, who might otherwise choose to leave when their income permits, would be more likely to stay if the area or building were brought up to code. If this latter possibility occurred—as it surely has in some cases[230]—rents in the slum area would rise due to increased demand, and the poorer slum-dwellers still might be injured rather than helped by the code enforcement program.

Another article, written by Professor Markovitz, also defends housing codes.[231] Markovitz argued that a code enforcement program would normally benefit tenants more than it would hurt them. Markovitz's analysis, however, is fatally flawed. At most, he proves only that certain tenants will be helped by a code enforcement program more than certain other tenants will be injured. His model measures the magnitude of the benefit by the dollars that benefited tenants would have paid for the improvement had payment been required. The model measures the magnitude of the detriment by the dollars that would be necessary to compensate the injured tenants for the detrimental effects of code enforcement. Assuming that Markovitz's analysis is correct and that the dollar amount of the former is greater than the dollar amount of the latter, this still leaves the injured tenants worse off than before code enforcement because code enforcement programs do not provide a mechanism by which benefited tenants compensate injured tenants. In Markovitz's model, the injured tenants are the poorest tenants, and the benefited tenants are the wealthier tenants. In fact, the poorer the tenant, the more he will be injured by the code enforcement program. Code enforcement programs presumably attempt to ameliorate the housing deficiencies faced by the poorest members of society.[232] Because

229 Ackerman, *Regulating Slum Housing*, *supra* note 227, at 1102-03.

230 The process of affluent people returning to slum areas is so widespread that it has received a name: gentrification. *See generally* D. BRYANT & H. MCGEE, GENTRIFICATION AND THE LAW: COMBATTING URBAN DISPLACEMENT (1980). If gentrification is as widespread as this work suggests, then Ackerman's assumption is clearly unfounded.

231 Markovitz, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

232 It is possible to argue, of course, that code enforcement programs are not meant pri-

Markovitz's analysis implicitly recognizes that the poorest tenants are hurt rather than helped by such programs, his article hardly provides powerful support for code enforcement programs. Although Professor Markovitz would surely argue to the contrary, his article tends to support the mainstream position that code enforcement policies will hurt more than help poor tenants.

B. An Alternative Analysis

The mainstream analysis was undoubtedly correct in predicting that vigorous code enforcement would *tend* to discourage the preservation or production of housing and thus tend to create a scarcity of rental housing. This tendency, however, was outweighed by other factors that improved rental housing conditions. During the seventies all income classes of tenants enjoyed more spacious accommodations with better facilities and lower rents, after adjusting for inflation and differences in quality. Rental housing improved because during the seventies housing consumers developed a heightened preference for ownership status over rental status.[233] This benefited those consumers who remained as tenants because less competition existed for rental housing. Conversely, the change in consumer preferences discouraged landlords from building new unsubsidized housing units,[234] and tended to depress rents and

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marily to help the poor, but rather to benefit the middle class, by reducing the negative externalities generated by slum housing. Similarly, it can be argued that code enforcement primarily benefits the middle class by requiring the conversion of housing for the poor into middle class housing, thus increasing the supply of the latter, and benefiting the middle class at the expense of the poor. Indeed, it has been suggested that this may in fact be the covert purpose of much code legislation. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 357 (2d ed. 1977).

233 From 1970 to 1977 the percentage of all households that were owned (as opposed to rented) increased from 62.9% to 64.8%. More important, all of the increase took place in the top three quartiles of income. In the lower quartile of income the percentage of homeowners actually fell from 49.9% to 46.5%. The greatest increase in home ownership occurred in the highest quartile of income, from 78.7% in 1970 to 85.5% in 1977. U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF PLANNING AND RESEARCH, 1980 NATIONAL HOUSING PRODUCTION REPORT 34 (1980). The flight of high income people from renter to owner status reduced the effective demand for rental units, thus tending to depress rents, to the benefit of those persons who remained renters.

The increased preference for ownership as opposed to renter status was caused partly by growing affluence. Generally, people prefer to be owners rather than renters, and will purchase when they can afford it. The high inflation rate of the seventies was also an important factor encouraging ownership status. During the seventies a greater precentage of the population entered higher income tax brackets ("bracket creep"), thus making the income tax advantages of home ownership for them more pronounced. Moreover, because owners could profit from inflation and renters could only suffer from it, inflation encouraged ownership as opposed to rental status.

234 The percentage of all multifamily starts that were federally subsidized rose from 22% in 1972 to an estimated 44% in 1979. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS, RENTAL HOUSING: A NATIONAL PROBLEM THAT NEEDS IMMEDIATE ATTENTION 24 (1979).

profits of landlords.[235]

Regardless of any change in consumer preferences, the long-term trend toward improved housing conditions and living standards continued. Also, during the seventies there was a massive increase in housing subsidies for the poor.[236] If the revolution in landlord-tenant law affected the supply of rental housing detrimentally, the countervailing combination of generally improving living standards, increased housing subsidies, and changes in consumer preferences provided a more significant beneficial effect.

On the other hand, four facts *seem* to support the prediction of mainstream analysts that increased tenants' rights would tend to cause a shortage of rental housing, with a concomitant increase in average rents. During the seventies: (1) tenants' average rent-to-income ratios increased significantly; (2) the rental housing business became less profitable; (3) construction of unsubsidized rental housing units fell, relative to construction of other housing; (4) vacancy rates decreased. If interpreted properly, however, none of these facts indicates a growing shortage of rental housing. The rise in rent-to-income ratios and the fall in profitability and construction of rental housing were primarily the result of a reduced demand for rental housing by the more affluent segment of housing consumers. Similarly, the decrease in vacancy rates during the seventies is not a positive indicator of a growing housing shortage.

1. *Increased Space Per Person and Falling Rents Indicate that Demand Did Not Grow as Rapidly as Supply*

During the seventies, rents rose more slowly than inflation.[237] Between 1970 and 1979, the constant quality gross rent index rose 81%,[238] whereas the consumer price index rose from 116.3 to 217.4, or 87%.[239] The average 1979 unit was superior to the average 1970 unit. It was less likely to be overcrowded,[240] to lack some or all plumbing,[241] or to be

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235 *See id.* at 16 (operating costs rose more rapidly than rents from 1972 through 1978).

236 For example, the number of starts of subsidized rental apartment units was 40,000 in 1975, but had increased to 130,000 units in 1978. This constituted an increase of 225%, whereas starts of unsubsidized units had increased only 90% during this same period. NAT'L ASSOC. OF HOME BUILDERS, RENTAL HOUSING IN THE 1980'S at 63 (1983) (report prepared by Uriel Manheim for the NAHB).

237 I. LOWRY, RENTAL HOUSING IN THE 1970S: SEARCHING FOR THE CRISES IN RENTAL HOUSING: IS THERE A CRISIS? 23, 37 (1981).

238 PRESIDENT'S COMMISSION, *supra* note 35, at 10. The "constant quality gross rent index" compares the gross rents (contract rents plus utilities) for units of equal quality over a number of years. *Id.* at 9-10.

239 STATISTICAL ABSTRACT 1981, *supra* note 205, at 467, table 779.

240 *See infra* p. 566, table IV.

241 *See infra* p. 564, table II.

otherwise inadequate.[242] Table II shows that renter occupied units lacking some plumbing dropped from 8.3% in 1970 to 3.6% in 1979. In 1970, as Table III illustrates, the average age of private nonfarm units in buildings of five or more units (presumably predominantly rentals) was 18.4 years; by 1979 it had dropped to 17.7 years. Table IV shows that renters enjoyed more spacious quarters per capita in 1977 than in 1970.[243] Thus, renters occupied more space, in newer quarters, with better facilities. Comparable units rented for less in 1980 than in 1970 (after adjusting for infiation).[244] These factors indicate that supply grew faster than demand in the seventies, thereby depressing rents. No doubt the increased tenant protections that were developed in the late sixties and early seventies tended to discourage the preservation or construction of rental housing and to encourage demand for rental housing. Their effect, however, was not powerful enough to cause supply to lag behind demand.

242 For example, in 1970 only 28% of renter occupied units had warm-air furnaces or heat pumps whereas 38% had these facilities by 1980. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, AND U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, ANNUAL HOUSING SURVEY: 1980, PART A, GENERAL HOUSING CHARACTERISTICS 3 (issued Feb. 1982).

243 I. LOWRY, *supra* note 237, at 26 (providing figures to the same effect: "The average number of occupied rental rooms per person in rental households rose from 1.32 in 1970 to 1.73 in 1978. The percentage of rental dwellings with more than one person per room fell from 16.1 to 5.9.").

244 From 1967 to 1980 average gross rent, adjusted for changes in quality, rose 227.2% whereas the Consumer Price Index (All Items) rose 247.6% for the same period. *See* I. LOWRY, *supra* note 237, at 37.

TABLE II

YEAR ROUND HOUSING UNITS LACKING SOME OR ALL PLUMBING

	Units (in thousands)				Percentage of Units Lacking Plumbing			
	1960	1970	1978	1979	1960	1970	1978	1979
Total Number of Units	56,551	67,699	82,833	84,586				
Lacking Some Plumbing	8,992	4,672	2,503	2,353	15.9%	6.9%	3.2%	2.8%
Renter Occupied Units	20,226	23,560	26,884	27,160				
Lacking Some Plumbing	4,315	1,963	1,073	984	21.3%	8.3%	4.0%	3.6%

Sources: U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, table 1375; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, table 1406.

TABLE III

AVERAGE AGE (IN YEARS) OF RESIDENTIAL HOUSING STOCKS 1950-1979

Year	1950	1955	1960	1960	1965	1970	1973	1974	1975	1976	1977	1978	1979
Gross Stocks	32.1	30.0	28.7	27.9	26.4	25.8	24.8	24.9	25.0	25.1	24.9	24.8	24.8
Private nonfarm:													
1-4 units	31.5	29.0	27.7	27.5	26.7	26.8	26.4	26.6	26.7	26.6	26.4	26.2	26.2
5 or more units	27.0	29.0	28.8	27.9	21.4	18.4	16.0	16.0	16.4	19.9	17.2	17.5	17.7

Sources: U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, table 1402; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, table 1211.

TABLE IV

MEASURES OF OVERCROWDING IN HOUSING
(in thousands)

	All Households		Renter Households Only				
	1960	1970	1970	1973	1975	1976	1977
Persons Per Room*							
1.00 or less	46,910	58,239	21,066	22,951	23,934	24,475	24,871
1.01 to 1.50	4,211	3,802	1,714	1,214	1,305	1,205	1,224
1.51 or more	1,903	1,408	780	518	416	421	421
Renter Households with:							
2 or more bedrooms, 1 or more bedrooms, lacking privacy:†				2,393	2,130	2,167	2,092
All Renter Occupied Units				24,684	25,656	26,101	26,515

*Sources: U.S. DEP'T OF HOUS. AND URBAN DEV., 1974 HUD STATISTICAL YEARBOOK, 241, table 239, 1975 HUD STATISTICAL YEARBOOK, § XI, table 38, 1976 STATISTICAL YEARKBOOK, 277, table 38, 1977 STATISTICAL YEARBOOK, 349, table 16, 1979 STATISTICAL YEARBOOK, 262, table 13.

†Sources: U.S. DEPT. OF HOUS. AND URBAN DEV., 1975 HUD STATISTICAL YEARBOOK, § XI, table 27, 1976 STATISTICAL YEARBOOK, 267, table 27, 1977 STATISTICAL YEARBOOK, 356, table 29, 1979 STATISTICAL YEARBOOK, 269, table 26.

2. *The Significant Increase in Rent-to-Income Ratios During the Seventies Was Due Primarily to the Change in Status of Richer Tenants from Renter to Owner*

Even though rents did not rise as fast as the cost of living, median rent-to-income ratios increased from 20% of income in 1970 to 25% in 1978.[245] Constant quality gross rent rose 81% during this period while median income of renters rose only 59%.[246] The increasing rent-to-income ratio resulted from the higher proportion of low income renters. As one study observed:

> Higher income renters have disproportionately become homeowners, reducing the average income of those who remain renters. Low-income people have always had difficulty paying for rent, evidenced by high rent-to-income ratios for that group in all time periods. The fact that low-income renters (with high rent-to-income ratios) are a larger fraction of the total renter population than formerly has led to a large part of the apparent decline in the affordability of rental housing.[247]

Middle and upper income classes represented a larger proportion of the total renter population in 1970 than in 1980. Table V shows that in 1970 the median income of a renter household was 65% of the average income of an owner household and that by 1980 that percentage had fallen to 53%.

TABLE V[248]

RENTER AND OWNER MEDIAN INCOME COMPARED

Household Median Income	1980	1970
Owner	$19,800	$9,700
Renter	$10,500	$6,300
Renter Income as % of Owner Income	53%	65%

Another factor also explains the growth in tenants' rent-to-income ratios. More of the income for low income tenants came from food stamps and medicare payments in 1980 than in 1970. These items are not counted as income when computing average rent-to-income ratios. If they were, the average rent-to-income ratio for 1980 would decrease more than would the ratio for 1970.[249]

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245 G. STERNLIEB & J. HUGHES, THE FUTURE OF RENTAL HOUSING 66, exhibit 3 (1981).

246 PRESIDENT'S COMMISSION, *supra* note 35, at 10, table 1.3. See *supra* note 238 for an explanation of "constant quality gross rents."

247 PRESIDENT'S COMMISSION, *supra* note 35, at 9.

248 Source for Table V: U.S. DEP'T OF COMMERCE AND U.S. DEP'T OF HOUS. AND URBAN DEV., ANNUAL HOUSING SURVEY: 1980, PART A, GENERAL HOUSING CHARACTERISTICS 8-9 (Current Housing Reports, Ser. H-150-80, issued Feb. 1982).

249 J. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 24 (1980). Weicher also suggests another factor that contributes to the rising rent-to-income ratio:

> [A] rising proportion of the elderly have chosen to live apart from their chil-

Although rent-to-income ratios have increased for the average tenant, reflecting an income mix containing a higher proportion of poor tenants in 1980 than in 1970, as Table VI illustrates, these ratios have decreased from 1970 to 1977 for the lowest income quartile of renters. Thus, if development of the warranty of habitability tended to increase rental costs for the poorest quartile of society, the effect was not strong enough to adversely affect their rent-to-income ratios.

To summarize, the rise in rent-to-income ratios from 1970 to 1980 does not indicate a growing shortage in rental housing. Rather, the increase is the result of several other factors, the most significant being the shrinking proportion of tenants in the upper and middle income brackets.

3. *The Substantial Decrease in Vacancy Rates for Rental Housing During the Seventies Does Not Indicate a Growing Shortage of Rental Housing*

a. *Vacancy Rates Do Not Measure the Magnitude of Unfilled Housing Needs.* (i) *Theoretical Analysis.* The United States Department of Housing and Urban Development found that "[t]he gross rental vacancy rate in the nation reached a 23 year low in 1978, of 5.0 percent. . . . It had moved steadily downward since 1974, and, except for 1977, was significantly lower than any annual U.S. rate since data became available in 1956."[250]

Housing professionals have frequently taken the percentage of vacant housing units as a reliable indicator of the degree of housing shortage or surplus.[251] To many observers, a falling vacancy rate suggests increasing shortage; a vacancy rate of less than 5% suggests a housing problem that justifies strong "remedial" measures, such as rent

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dren and families when they retire. The elderly typically have higher expense/income ratios for housing than those of the rest of the population, in part because they are able to finance their current expenditures on housing out of past savings.

Id. at 23-24.

250 U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 1980 NATIONAL HOUSING PRODUCTION REPORT 43 (1980).

251 *See, e.g.*, H. SELESNICK, RENT CONTROL xvi (1976) ("A low vacancy rate—perhaps less than five percent—indicates that a serious shortage exists."); G. STERNLIEB & J. HUGHES, *supra* note 240, at 75 ("In general, vacancy rates were far lower at the end of the decade of the 1970s than at the beginning, suggesting that rental demand was growing faster than supply."); U.S. COMPTROLLER GEN., REPORT TO THE CONGRESS OF THE UNITED STATES, RENTAL HOUSING: A NATIONAL PROBLEM THAT NEEDS IMMEDIATE ATTENTION 5 (1979); *see also* DEPARTMENT OF HOUSING, STATE OF CONNECTICUT, CONDOMINIUM CONVERSIONS: THE IMPACT OF THE CONDOMINIUM ACT OF 1980 ON TENANTS AND DECLARANTS 5 (Mar. 1, 1982) ("While completely accurate vacancy rates will be unavailable until data is released by the census, almost every Connecticut community stated a shortage of rental housing.").

TABLE VI*

PROPORTION OF INCOME PAID FOR RENT BY LOWEST INCOME QUARTILE AND TOTAL OF ALL RENTER HOUSEHOLDS†
(Renter Households in Thousands)

	1960		1970		1976		1977	
Total: all renter households	17,493.3		20,577.6		23,982.0		24,366.0	
Paying:								
Less than 25%	11,326.8	64.7%	12,432.9	60.4%	12,814.0	53.4%	12,506.0	51.3%
24-34%	2,430.2	13.9	2,935.6	14.3	4,301.0	18.0	4,476.0	18.4
35% +	3,736.3	21.4	5,209.1	25.3	6,867.0	28.6	7,384.0	30.3
		100.0%		100.0%		100.0%		100.0%
Total in Lowest Quartile	4,373.3		5,144.4		5,995.5		6,091.5	
Paying:								
Less than 25%	674.3	15.4%	458.0	8.9%	846.8	14.1%	814.0	13.4%
24-34%	715.9	16.4	700.0	13.6	876.5	14.6	750.5	12.3
35% +	2,983.1	68.2	3,986.4	77.5	4,272.2	71.3	4,527.0	74.3
		100.0%		100.0%		100.0%		100.0%

*Adapted from U.S. DEP'T OF HOUS. AND URBAN DEV., 1978 STATISTICAL YEARBOOK 307, table 10.
†Incomes are for 1959, 1969, and the 12 months preceding November 1, 1976 and November 1, 1977.
Sources: U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1960 AND 1970 DECENNIAL CENSUSES OF HOUSING; U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1976 AND 1977 ANNUAL HOUSING SURVEYS; U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 1976 AND 1977 ANNUAL SURVEYS.

control.[252] In my view, this interpretation of vacancy rates is unfounded.

When the government accumulates large wheat supplies to implement a farm support program, does this suggest that the people of the world have enough to eat? If all of the wheat were distributed to the poor, would this suggest that the poor were hungrier than when wheat stockpiles existed? If the answer to these questions is negative, as it obviously is, then surely it is equally obvious that the existence of large "stockpiles" of vacant apartments does not necessarily indicate whether there are many ill-housed people. Suppose that a city had 1,000 living units of which 100 were vacant (a 10% vacancy factor) and that 100 of the city's families were homeless. If the 100 vacant units were provided to the 100 homeless families, the vacancy rate would plummet from 10% to 0% and the housing problem would disappear. The zero vacancy factor would reflect good housing conditions, and the high vacancy factor would coexist with poor housing conditions.

(ii) *Empirical Evidence.* Ample empirical evidence supports the proposition that vacancy rates do not measure unfilled housing needs.

(a) *Aggregate National Figures.* Between 1970 and 1979, vacancy rates for rental housing fell from 6.8% to 5.5%.[253] Yet, during approximately the same period the number of rental units and rooms grew faster than the population. Although the renter population increased only 1%, the number of dwellings available for rent grew by 13.6%, and the average number of rooms per occupant grew by 12.6%.[254] In 1970 the median number of persons per renter occupied unit was 2.3;[255] by 1979 it had fallen to 2.0.[256] At the same time, rents (after adjustment for inflation) fell, although landlord expenses were increasing (even after adjusting for inflation).[257]

All of the above factors, with the exception of the vacancy rate, suggest that supply increased faster than demand. If the vacancy rate were truly an indicator of the degree of tightness in supply, it would have risen during the seventies; that it fell strongly suggests that it is not a useful indicator of the degree of shortage.

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252 *See, e.g.,* Lowe, *Los Angeles Faces Up to Rent-Curb Issue,* in RENT CONTROL, A SOURCE BOOK 126, 127 (J. Gilderbloom ed. 1981) ("The proposed (rent) controls should stay in force as long as the city's low vacancy rate—currently about 2.5%—allows landlords to dominate the market.").

253 STATISTICAL ABSTRACT 1981, *supra* note 205, at 760, table 1372.

254 I. LOWRY, INFLATION, HOUSING COSTS, AND HOUSING CONSUMPTION 1970-80, figure 3 (Rand Corp. Apr. 1981) (on file with author).

255 STATISTICAL ABSTRACT 1981, *supra* note 205, at 760, table 1372.

256 *Id.*

257 *See* I. LOWRY, *supra* note 254, figure 1.

(b) *Regional Studies*.

TABLE VII[258]
RELATION OF CHANGES IN RESIDENTIAL VACANCY RATES TO CHANGES IN RENTS

Region	Percent Change in Vacancy Rates, 1978-80	Percent Change in Residential Rent Index, 1978-80
Northeast	−19	13.5
North Central	21	15.5
South	13	17.6
West	10	21.4

If falling vacancy rates truly indicated growing shortages, rent increases for the Northeast should have been greater than for other regions because the Northeast was the only region with a falling vacancy rate.[259] In fact, as indicated by Table VII, the rent increase for the Northeast was smaller than for the other regions, thus suggesting that vacancy rates do not measure degrees of shortage. The figures for the other three regions, however, suggest an inverse correlation between the size of rising vacancy rates and the size of the increase in rents. With the figures for three regions suggesting an inverse correlation, and those for one region not supporting such a correlation, the Table VII figures must be deemed equivocal.[260]

(c) *Standard Metropolitan Statistical Areas (SMSAs) and Central Cities.* A 1980 study found as follows:

> There is no consistent relationship between vacancy rates and the proportion of the rental stock that has been converted [to condominiums] across the 37 largest SMSAs. This means that on an SMSA-wide basis, levels of conversion may not be associated with either high or low vacancy rates. . . . [T]here was virtually no difference in average rental vacancy rates between central cities with high and low volumes of conversion activity.[261]

Because conversion activity is associated with strong housing de-

258 Adapted from I. LOWRY, *supra* note 237, at 34. Sources for Table VII: U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CURRENT HOUSING REPORTS, ser. H-111-79-5, table 1, ser. H-111-80-02, table 2; U.S. BUREAU OF LABOR STATISTICS, CPI DETAILED REPORT, JUNE 1978, table 25, CPI DETAILED REPORT, June 1980, table 23.

259 Rising real rents do not necessarily indicate a growing shortage of rental housing. They may simply indicate more available real income in the hands of renters or a change in consumer preference, favoring rental of residential units over other possible expenditures. In the discussion in the text I have assumed, however, that rising rents indicate a growing tightness in the supply of housing.

260 The large change in the Residential Rent Index for the West and the relatively small change for the Northeast may simply reflect more new construction and thus higher average rents in the West, and less new construction and thus lower average rents in the Northeast.

261 CONVERSION OF RENTAL HOUSING, *supra* note 94, at V-11.

mand[262] and is not correlated with vacancies, it appears that vacancy rates are not correlated with demand.

(d) *Local Studies.* (1) *The Gilderbloom and Applebaum Study.*[263] Gilderbloom and Applebaum chose at random fifty small cities, fifty medium-sized cities, and fifty large cities for their study. Within each city they determined the vacancy rate and the mean rent. The results of their study are summarized in Table VIII.[264]

TABLE VIII

EFFECTS OF CITY SIZE AND RENTAL VACANCY RATE ON MEDIAN RENT LEVELS: CALIFORNIA CITIES; 1970, U.S. CENSUS

Size of City	Low Vacancy Rate (under 5%)	High Vacancy Rate (over 5%)
Small (2,500-10,000) (n50)	$ 78	$ 82
Medium (10,000-50,000) (n50)	$124	$103
Large (over 50,000) (n50)	$125	$126
Means	$111	$ 99

(Means are weighted averages which correct for the effects of sampling within city-size categories.)

Table VIII indicates that, for small and large cities, rents were higher in cities with high vacancy rates than in cities with low vacancy rates. If low vacancy rates truly indicated the degree of tightness of supply, precisely the opposite correlation should occur. The association of a high vacancy factor with lower rents in medium-sized cities simply serves to emphasize the absence of any correlation between scarcity and vacancy rates.[265]

(2) *The Davis, California Study.*[266] Davis, California, is a town of approximately 30,000 located in northern California. Most of its resi-

262 *See also id.* at V-32 (correlating condominium conversions with proportion of affluent renters).

263 Gilderbloom & Applebaum, *Why Rents Rise: A Reconsideration,* in RENT CONTROL, A SOURCE BOOK 42 (J. Gilderbloom ed. 1981).

264 *Id.* at 44, table 1.

265 *See also* I. LOWRY, *supra* note 237, at 34 ("[I]t appears that relative vacancy rates have virtually no effect on market rents . . . .").

266 F. Costello, Davis Apartment Vacancy and Rental Rate Report (Oct. 28, 1982) (an-

dents are either employees or students of the University of California, or their dependents. Of those renting in a major residential structure (four or more units) about 80% are students or their dependents.[267] Thus, the demand for these units is closely related to the student population. In the fall of 1981, the off-campus student population was approximately 15,660, and the vacancy factor was 0.7%,[268] conventionally considered a very low figure. In the fall of 1982, the off-campus student population grew to about 15,700, but the vacancy factor also grew to 2.8%.[269] Only one additional living unit of this type (located in structures of four or more units) was made available during the period in question. In fact, very few new housing units of any type were built during this period. Thus, while "housing need" in terms of student population remained substantially unchanged, vacancies quadrupled despite the lack of construction of new units.

Two phenomena can explain the "puzzle" of increased vacancies from 1981 to 1982 despite an increased number of students and a construction slowdown. First, reduced effective demand due to generally depressed economic conditions in the fall of 1982 led to less student income that could be spent on housing.[270] Second, a rise in the mean rental rate for apartment houses of 14.4%[271] encouraged students to rent single family houses or to live outside of Davis. Had landlords lowered their rents sufficiently instead of raising them, the apartment vacancy rate undoubtedly would have been reduced instead of quadrupling. The fourfold increase in the vacancy factor did not indicate less need, but only less demand in the face of higher rents. Lower than normal vacancy rates simply indicate asking prices that are lower in relation to demand compared to some other "normal" time or place.

As indicated in Table IX,[272] although the density of students per apartment bedroom was slightly higher in 1976 than in 1979, the vacancy rate was 13.5 times greater. Thus, when students were more over-

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nual report of the Student Housing Office of the University of California, Davis) [hereinafter cited as Davis Report].

267 Telephone interview with Fred R. Costello, Associate Director, Student Housing Office, University of California, Davis (Dec. 16, 1982). The 80% figure is a rough estimate by Mr. Costello.

268 Davis Report, *supra* note 266, at 4, table III. See *infra* p. 574, Table IX reproducing Table III of Davis Report.

269 Davis Report, *supra* note 266, at 4, table III.

270 In 1982 rental vacancy rates also rose nationwide, from a post World War II low of under 5% in 1981 to about 5.4% in March 1983. Apparently more people were forced to share apartments because of the recession. *See* Guenther, *Rental Vacancies Start Rising Despite Drop in Construction,* Wall St. J., Mar. 9, 1983, at 29, col. 1.

271 Davis Report, *supra* note 266, at 4. The number of nonstudent renters may have decreased, thus leading to increased vacancies, but there is no reason to believe that this in fact happened.

272 Table IX reproduces, without change, Table III of the *Davis Report, supra* note 266, at 4.

TABLE IX

FALL QUARTER UNIVERSITY OF CALIFORNIA, DAVIS ENROLLMENT AND OFF-CAMPUS APARTMENT OCCUPANCY

Year	Total Enrollment	Approximate Total Students Off Campus	Total Off-Campus Apartments	Total Off-Campus Apartment Bedrooms	Ratio of Off-Campus Students to Apartment Bedrooms	Davis Area Apartment Vacancy Rate %
1976	17,193	13,580	5,258	8,543	1.59	5.4
1977	17,256	13,643	5,392	8,750	1.56	7.1
1978	17,511	13,898	5,478	8,886	1.56	5.4
1979	17,948	14,335	5,772	9,502	1.51	0.4
1980	18,887	15,274	5,796	9,546	1.60	0.4
1981	19,276	15,663	5,972	9,893	1.58	0.7
1982	19,310	15,697	5,973	9,945	1.58	2.8

crowded the vacancy rate was 13.5 times greater than when they were less overcrowded. It is difficult to imagine a clearer case to demonstrate the uselessness of vacancy rates as an indicator of housing need.

b. *What Vacancies Measure.* Although vacancy factors do not measure housing needs, they reflect, and can serve as a measure of, the average gap between landlords' asking prices (AP) and the market equilibrium (EP) or clearing price. The more AP exceeds EP, the greater the vacancy factor will be. When EP exceeds AP, the vacancy rate will approach zero. A third figure, market price (MP), is the actual rental price to which the parties finally agree. In the normal case, where AP exceeds EP, MP will fall somewhere below AP and above EP.[273]

The falling vacancy rate in the seventies suggests that the gap between AP and EP narrowed during that decade. Several possible scenarios could explain the narrowing between AP and EP: (1) AP fell faster or rose more slowly than EP; (2) AP fell while EP rose; (3) EP rose while AP remained stable; or (4) AP fell while EP remained stable. Regardless of which was actually the case, the falling vacancy rate in the seventies indicates that landlords grew more cautious in setting their asking prices, relative to the equilibrium price.

c. *Reasons for Landlord Caution in Establishing Asking Price.* During the seventies the landlords' legal remedies against defaulting tenants weakened and their ability to evict or reject "undesirable" tenants eroded. These developments created an increased incentive for landlords to pick their tenants more carefully, while simultaneously limiting their ability to do so legally. The consequences, with the benefit of hindsight, are now clear. Landlords, barred from overtly discriminating against "undesirable" or "troublesome" tenants, started to do so covertly.[274] Landlords could accomplish this by charging existing desirable tenants below market rates in an attempt to keep them and to avoid the necessity of covertly using impermissible criteria in choosing new tenants. On average, landlords asked less than the maximum obtainable rents, in the hope that this would increase their ability to select and retain desirable tenants.[275] This narrowed the gap between asking price and equilibrium price, and consequently reduced vacancy rates.[276]

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273 When EP exceeds AP (as in a jurisdiction with rent control), MP will equal AP.

274 *See* Bishop, *"Creative" Rules for Adults-Only Rentals,* 14 CALIF. J. 126 (1983) (describing various strategies widely used by landlords to circumvent legal ban on adults-only rentals).

275 Even when offering a vacant apartment to prospective tenants, a landlord is more likely under modern landlord-tenant law to shave the price in order to attract a "desirable" tenant than under the pre-1970 law. By asking a lower rent the landlord will have a wider array of applicants from which to choose. The weakening of the landlord's ability to deal quickly and efficiently with tenants who prove troublesome has heightened a landlord's incentive to pick a desirable tenant.

276 Two additional factors contributed to narrowing the gap between asking price and equilibrium price. First, rent control in many communities forced landlords to ask less than

d. *Summary of Vacancy Rate Discussion.* The increased tenant protections developed in the late sixties and early seventies did not result in an increased shortage of rental housing. The shrinking vacancy rates of this period, properly interpreted, do not indicate that rental housing shortages became more severe. The proposition that increased tenant rights discouraged landlords from constructing or maintaining as much housing as they otherwise would have is plausible but has been neither validated nor invalidated by the evidence discussed in the text.[277] I have argued, however, that these increased protections (including rent control) caused landlords to moderate their asking prices, which led to lower vacancy rates—a result not particularly disadvantageous to tenants.

4. *During the Seventies the Rental Housing Business Became Less Profitable, and Construction of Rental Housing Units Fell Relative to Other Types of Housing*

From 1970 to 1980 the operating costs of urban rental properties rose 240%, while rental revenues for such properties rose only 185%.[278] The consequence, of course, was that ownership of rental property became increasingly unprofitable. In constant dollars, net operating return dropped more than 30%.[279] The ratio of operating expenses to rental revenue rose from 49.7% in 1970 to 64.1% in 1980.[280]

During the seventies, rental housing starts constituted a diminishing proportion of all housing starts. From 1970 to 1977 the rental stock grew only half as fast as the owner-occupied stock.[281] The percentage of all occupied units that were renter occupied fell from 37.1% in 1970 to

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the market equilibrium price. Second, in an inflationary period rents probably increase more slowly than other items due to leases and consumer resistance.

277 Based on sophisticated statistical analysis, Professor Werner Hirsch has concluded that although most habitability laws have not had a measurable effect on the cost of housing, laws which place grossly substandard apartment houses into receiverships do have a measurable effect. *See* W. HIRSCH, LAW AND ECONOMICS, AN INTRODUCTORY ANALYSIS 43-58 (1979). See also the excellent pioneering study, Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rents; An Empirical Observation on the Ackerman-Komesar Debate,* 63 CALIF. L. REV. 1098 (1975). I make no pretense of being competent to discuss the statistical methods used by Professor Hirsch. Several other studies have also concluded that habitability laws have had little discernible effect on the overall quality of housing. *See, e.g.,* Brakel & McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation,* 1980 AM. B. FOUND. RESEARCH J. 555; Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court,* 7 U. MICH. J.L. REF. 8 (1973). It is possible that all of these studies were premature in that they were conducted before there was sufficient time for the effects of the new legal rules to be reflected in actual housing conditions.

278 I. LOWRY, *supra* note 254, figure 7.

279 *Id.* figure 8.

280 I. LOWRY, *supra* note 237, at 38.

281 U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 1980 NATIONAL HOUSING PRODUCTION REPORT, 2 (1980).

34.4% in 1980.[282]

The reduced profitability and associated reduced production of rental units had several causes. The principal cause was the increasing preference of high income people for ownership rather than rental status. Many people in the seventies were attracted to ownership because it offered protection from inflation and had significant tax advantages, especially for those in higher income brackets who could deduct mortgage interest from income. After-tax mortgage interest rates were low compared to inflation, thus offering the practical equivalent of very low-interest loans.[283]

Legal developments of the early seventies may have also contributed to reduced profitability. To the extent that it became more difficult to evict nonpaying tenants, rental revenues may have been reduced. Similarly, the inability of a landlord to evict or exclude troublesome tenants quickly, might reduce the rents he could obtain from other tenants. In many communities rent control also depressed rents. If the landlord sought to retain control over the selection of his tenants he would, as explained above, lower his asking price. In addition, the landlord's increased duties of maintenance and repair and increased tort liability exposure might increase operating expenses and reduce profits. I suspect, however, that the magnitude of these factors on overall profitability was small compared with the basic fact that wealthier persons, who could afford to pay high rents, were increasingly leaving rental housing for ownership housing.

C. Summary and Conclusion

The legal developments of the seventies reduced the growth in supply of rental housing less than the inflation of that period reduced the growth in demand; supply grew faster than demand despite legal developments that discouraged some construction. Reduced demand, not changes in legal doctrine, caused reduced profits.

The declining rental vacancy rate in the seventies requires a different explanation. Vacancy rates do not indicate the degree of tightness in the housing market. The decline in vacancy rates indicates that landlords moderated their asking prices in relation to market equilibrium prices. This moderation was caused, at least in part, by the deteriorating legal position of landlords. Thus, it appears that through a unique

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282 Derived from U.S. DEP'T OF COMMERCE & U.S. DEP'T OF HOUS. AND URBAN DEV., ANNUAL HOUSING SURVEY: 1980, PART A, GENERAL HOUSING CHARACTERISTICS 1, table A-1 (Current Housing Reports, Ser. H-150-80, issued Feb. 1982).

283 In 1974, 1975, and 1979, for example, the rate of inflation, as measured by the Consumer Price Index, equaled or exceeded the average mortgage rate for conventional new home loans. *Compare* STATISTICAL ABSTRACT 1981, *supra* note 205, at 459, table 767 (CPI) *with id.* at 523, table 876 (mortgage rates).

concatenation of historical events, the major statistically measurable effect of the previous decade's legal developments has been a lowering of the vacancy rate. This reflects an increased landlord predisposition to favor existing tenants whom landlords deem desirable over new tenants who might have characteristics that landlords deem undesirable. It is doubtful that the legal reformers of the seventies would have welcomed this bittersweet result.

In short, although certain statistics appear to suggest that changes in housing conditions resulted from changes in legal doctrine, they in fact offer little support for this proposition. The highly plausible theory that increased tenant protections, other things remaining equal, would reduce the supply of rental housing has been neither proved nor disproved by the evidence discussed in this article. Other things did not remain equal.

IV
EVALUATION

Was the revolution in landlord-tenant law good or bad for low income tenants? The empirical data discussed in Part III of this article provides no basis upon which to make a judgment. The supply of rental housing would probably have been greater had none of the changes occurred.[284] It is uncertain, however, how much greater it would have been. Did the loss of an unknown quantity of rental units outweigh all or some of the benefits accruing from the revolution in landlord-tenant law? Lacking a satisfactory empirical basis to resolve this question, one must rely on theory.

A. Competition in the Rental Housing Industry

I start with the proposition that the rental housing industry is intensely competitive. More than half of all living units offered for rent are in buildings with fewer than five units.[285] Ownership of such units is surely diffuse. Even as regards larger apartment buildings, few landlords wield any significant degree of monopoly power.[286] In addition to competing with other rental units, landlords compete with ownership

284 Increased tenant protections probably reduced the profitability of rental housing and thus the supply. It is conceivable, however, that without these protections, tenants would have fled rental housing to become owners at an even faster rate than they did. If this happened the supply of rental housing might have grown even more slowly.

285 As of 1978, 14.6 million of the nation's 26.9 million rental units were in structures containing less than five units. G. STERNLIEB & J. HUGHES, *supra* note 245, at 59.

286 In New York City no private owner owns as much as five percent of the rental apartments in the city. Hazlett, *Rent Controls and the Housing Crisis,* in RESOLVING THE HOUSING CRISIS 277, 293 (M. Johnson ed. 1982) (quoting Roger Starr, member of the *New York Times* editorial board). The Hazlett article is a brief, cogent, and recent analysis of the weaknesses of rent control.

units and mobile homes. In a strongly competitive market, a laissez-faire policy will normally obtain maximum efficiency in the use of economic resources. This general rule has, however, a well-known exception: the doctrine of social cost.

B. Social Cost

Although a rental agreement between landlord and tenant that injures others may reflect an optimum arrangement for the parties involved, the costs imposed on others may make the transaction inefficient for society. *Because of transaction costs,* those injured by the arrangement may not be able within reasonable economic limitations to persuade landlord and tenant to modify their arrangement. At least one economist, Weitzman, has used the social cost argument to justify enforcing an implied warranty of habitability with a repair and deduct remedy.[287] He argues that slums impose a social cost in terms of increased crime, accidents, and disease. Therefore, even if a landlord and tenant freely and knowingly agree to lease a slum, the transaction is not efficient when one accounts for the cost to society. The weakness of this argument is that little evidence exists that under modern American conditions slums actually produce crime, disease, or other negative externalities. That slum-dwellers suffer from these ills to a greater degree than other people scarcely proves that poor housing is the major source. The few available studies do not suggest a clear causative connection between substandard housing and social or physiological pathology.[288]

Although the free market in rental housing promotes economic efficiency, this does not mean that the law as it existed in 1960 was better than that which exists today.

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287 Weitzman, *The Impact of Repair and Deduct Legislation: An Economic Analysis,* 11 CLEARINGHOUSE REV. 985, 989 (1978); *see also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir.) ("[P]oor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum."), *cert. denied,* 400 U.S. 925 (1970).

288 *See generally* Glazer, *The Effects of Poor Housing,* in HOUSING URBAN AMERICA 164 (J. Pynoos, R. Schafer & C. Hartman 2d ed. 1980). Grossly inadequate housing, such as housing that lacks major facilities or that is not weathertight, clearly does have an adverse effect on the health, behavior, or attitude of the inhabitants. A. SCHORR, SLUMS & SOCIAL INSECURITY 20 (1964). But as indicated, *supra* p. 542 Table I, such housing is relatively rare in the United States. It is less clear whether poor, but not grossly deficient, housing has such adverse effects on the inhabitants. *Id.* It is even less clear whether such housing has a substantial deleterious effect on neighboring communities, or on society in general. This is not to suggest that a slum community does not have an adverse effect on a neighboring community. I only question whether a neighboring community would benefit substantially if slum housing were replaced by standard housing, but all other conditions remained the same.

C. Warranties of Habitability Based on Implied Agreement in Fact

An efficient and just legal system protects the reasonable expectations of the parties to a contract. When government polices the honesty of the weights and measures that a merchant uses, it is fulfilling this role. Similarly, when the parties to a lease reasonably expect that the landlord will make needed repairs, courts should enforce this expectation even if it is based on an agreement implied in fact rather than expressed. If a landlord shows premises without mentioning that they are infested with vermin, he is impliedly representing that there are no vermin and this representation should be enforced.[289] If a landlord shows premises with a toilet, he is impliedly representing, under modern American conditions, that it is in working condition and that he will keep it in repair.[290] Courts should enforce this representation.

D. Warranties of Habitability Not Based on Implied Agreement in Fact

A very different situation arises, however, when the law enforces a duty on which the parties did not in fact agree, and on which they would not have agreed if the question had been posed to them directly. For example, if the tenant agrees to rent an apartment with patent code violations, and there is no implied agreement that the landlord will repair these violations, enforcing a duty to repair despite the implied agreement of the parties to the contrary would not serve the tenant's welfare. Denying the tenant the option of renting a substandard unit at a substandard price is not a benefit to the tenant if standard units at rents he can afford are unavailable. During the seventies, the expanded rent subsidy program known as section 8 shielded many low income tenants from the adverse effects of a vigorous code enforcement program.[291] As such subsidy programs are cut back, the desirability of vigorous code enforcement may become more doubtful.

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289 Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).

290 *See* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

291 The § 8 program was enacted by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201, 88 Stat. 633, 662-66 (codified as amended at 42 U.S.C. § 1437f (1976 & Supp. V 1981)). The § 8 program provides rent subsidies to low and moderate income families. These subsidies cover the difference between what the family can afford for rent and the market price for rental units in the locality. Under the Existing Housing Program of § 8, tenants find rental housing in the private market and a government agency makes the subsidy payment to the landlord on behalf of the tenant. Under the New Construction and Substantial Rehabilitation Programs the federal government guarantees to private developers, prior to construction or rehabilitation, that it will provide subsidies to eligible households seeking to rent the new or rehabilitated units.

E. Rent Control

The theoretical and practical objections to rent control laws have been ably and thoroughly explained elsewhere. However, a word or two may profitably be directed to some of the leading defenders of modern "second generation" rent control. These writers claim that modern rent control laws that allow moderate increases in rents are unobjectionable to reasonable landlords and beneficial to tenants.[292] Of course, "moderate" rent control ordinances allowing some rent increases do less harm than "immoderate" rent control laws allowing no rent increases. The less the rent control law controls rent, the less harm it does. If there were no rent control law, no harm at all would be done. By depressing prices, rent control increases demand and restricts the supply of rental housing, thereby exacerbating the very shortage the effects of which it was designed to ameliorate.

Some modern rent control laws do not attempt to control the rents of units constructed after the passage of the ordinance. It has been asserted that new construction in jurisdictions with such laws proceeds as rapidly as in comparable jurisdictions without rent control.[293] Assuming that this is true, the explanation hardly constitutes a basis for enacting rent control. Residential rental construction in towns neighboring a rent control town may be discouraged by the possibility that the neighboring town will adopt similar rent control laws and apply them to rental property built shortly before the passage of the ordinance.

The most well-known study arguing that rent control does not discourage housing construction is the Harbridge House study of 1974.[294] The Harbridge House study has been severely criticized both for its method and its conclusions.[295] Even if one were to accept its central conclusion that new rental construction is not discouraged by rent control, this sheds no light on whether rent control tends to exacerbate a housing shortage. A shortage of rental housing is just as severe whether the cause is artificially depressed prices resulting in increased demand or decreased supply.

Exempting new construction from rent control may actually lead to more new construction than there would be in the absence of rent control. By depressing the price of living space, rent control encourages

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292 *See, e.g.,* E. ACHTENBERG, THE SOCIAL UTILITY OF RENT CONTROL (1971); H. SELESNICK, RENT CONTROL (1976); Gilderbloom, *Rent Controls [sic] Impact on the Quality and Quantity of the Housing Stock,* in RENT CONTROL, A SOURCE BOOK 137 (J. Gilderbloom ed. 1981).

293 *See* H. SELESNICK, *supra* note 292, at 30-38; Gilderbloom, *supra* note 292, at 140-41.

294 This has been published as H. SELESNICK, *supra* note 292.

295 *See* J. KAIN, EVALUATION OF THE STERNLIEB AND HARBRIDGE HOUSE REPORTS ON RENT CONTROL IN MASSACHUSETTS, POLICY NOTE 74-2 (Dep't of City & Regional Planning, Harvard Univ. 1974); G. STERNLIEB, THE REALITIES OF RENT CONTROL IN THE GREATER BOSTON AREA (1974).

tenants to use more space than they otherwise would. This waste of space will create a demand for new construction that would not exist without rent control. Because the key objection to rent control is its creation of shortages by encouraging waste, that these shortages may actually stimulate new construction is hardly a recommendation.[296]

F. Condominium Conversions

Condominium conversion laws are another example of laws that do not protect any real agreement, implied or express, of the parties. Because condominium living imposes no greater negative externalities than rental living, condominium conversion laws cannot be justified by a social cost argument.

Condominium conversion legislation is class legislation, benefiting existing tenants at the expense of condominium buyers and landlords. Even if one ignores the interests of landlords, it is difficult to justify most condominium conversion legislation. It is true, of course, that some tenants who would be displaced by condominium conversion legislation are old and disabled and would find it a hardship if forced to move, but many do not face such difficulties. In addition, many condominium purchasers may themselves be old or disabled. There is no apparent reason why the class of condominium purchasers are any less worthy of consideration than the class of tenants.

Even if one wished to prefer the welfare of tenants to the exclusion of any other consideration, it is difficult to justify condominium conversion laws. In many cases, a developer builds an apartment house intending first to rent it to tenants and then convert it to condominiums. Condominium conversion legislation makes this process more difficult and sometimes impossible. Closing off this avenue of profit will mean fewer new buildings offered for rentals, a result hardly beneficial to tenants in the long run.

G. Exculpatory and Other Clauses in Leases

The most difficult area for evaluation is that of exculpatory and waiver clauses in leases. Suppose a form lease offered by the landlord contains clauses in which the tenant waives his right to a habitable apartment and to sue for personal injuries caused by the landlord's negligence. Although one might be tempted to conclude that if the tenant read, understood, and signed the lease the repugnant clause should be enforced, this conclusion is erroneous.

The key factor here is the existence of heavy transaction and information costs. A potential tenant searching for an apartment to rent typ-

296 Because rent control causes a housing shortage, the rents charged for units in the new construction will be higher than they would be for comparable units without rent control.

ically spends several days comparing price, physical facilities, and required duration of the lease. During this period, he rarely sees a written lease. Only when he finally decides on an apartment will he actually see the lease. At this point, the prospective tenant has no ready means of shopping for lease terms. He does not know, and cannot readily find out, what types of leases other landlords are offering. Because of the widespread use of printed lease forms, a prospective tenant is fully justified in suspecting that most landlords will be offering identical lease clauses on identical lease forms. The cost of searching and finding more favorable lease clauses, and of weighing their value as against other factors contributing to the value of a proposed apartment, will usually exceed the benefits to be gained.

Standard form leases are usually drawn to appeal to the landlords who purchase such forms, and their widespread use constitutes, in effect, a severe impediment to competition for renters on the basis of different lease clauses. Moreover, most rental agents are not authorized to modify the lease clauses used.

The tenant seeking to modify such clauses thus faces heavy transaction and information costs and a practical absence of competition among landlords concerning the terms of such clauses. There are also heavy costs in time and energy that have been expended in choosing a particular apartment before the prospective tenant has an opportunity to examine the lease. Given these market defects, courts should refuse to enforce unfair exculpatory clauses or waivers of legal rights that are not the product of truly effective bargaining.

SUMMARY AND CONCLUSION

Certain types of legislation, such as rent control and condominium conversion legislation, are undesirable. They reject the bargain that the parties actually entered into with full knowledge of the facts and impose another bargain to which at least one of the parties would never have agreed. Included in this category are warranties of habitability that are implied in law but to which the parties did not agree and to which they would not have agreed had their attention been drawn to the issue.

Other reforms of the seventies, such as the enforcement of implied in fact warranties and promises to repair, were desirable. In these cases, the law is simply enforcing the actual but unexpressed agreement of the parties.

Exculpatory clauses and waivers of tenants' rights in leases raise more subtle problems. The parties have apparently agreed on these clauses. Yet, because of the institutional framework surrounding the leasing transaction, the bargaining is illusory, and courts should not enforce the clause.

Finally, landlords often oppose legislation prohibiting discrimina-

tion against women, children, homosexuals, students, or racial minorities. Such statutes may reduce the profits of landlords and to this extent discourage the production or preservation of rental housing. Yet their cost in these terms is justified by the noneconomic goals that they achieve. Justice, after all, has never been costless.