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THE UNIFORM RESIDENTIAL LANDLORD AND TENANT
ACT: FACILITATION OF OR IMPEDIMENT
TO REFORM FAVORABLE TO THE TENANT?

Three clearly articulated purposes for the Uniform Residential Landlord and Tenant Act (URLTA) promulgated by the National Conference of Commissioners on Uniform State Laws are "to simplify clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants; . . . to encourage landlords and tenants to maintain and improve the quality of housing; and . . . to make uniform the law with respect to the subject of this Act among those states which enact it."¹ The version of the Act to be discussed in this Note is the "Approved Draft," dated January 31, 1973.² Although adoption of this draft with only minor variations in two jurisdictions³ may presage a trend of state action to revitalize the law of residential leases, it has been suggested that enactment of comprehensive legislation in this area will encounter opposition from groups representing tenants' interests because "additional reforms will be achieved by court decisions, and . . . such reforms would be far more extensive than those proposed to be included in this Act."⁴ From the

1. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.102(b) [hereinafter cited as URLTA].

2. The "Approved Draft," the fourth draft of the Act, was submitted to the American Bar Association for its consideration. Subcommittee on Model Landlord-Tenant Act of Committee on Leases, *Proposed Uniform Residential Landlord-Tenant Act*, 8 REAL PROP., PROB. & TR. J. 104 n.4 (1973) [hereinafter cited as Subcommittee]. It subsequently was withdrawn, however, in the face of certain reservations and objections, relating primarily to imprecise draftsmanship. *Id.* at 123-24. Following joint review of these reservations and objections, the Subcommittee and the Commissioner agreed upon changes to be incorporated into the Act, which, as thus amended, was approved by the House of Delegates of the American Bar Association. PROBATE AND PROPERTY, Spring 1974, at 7. This latest version of the Act was not available to the authors at the time this Note was written.

3. ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (1973); Ore. Laws of 1973, ch. 559 (Strum, *The Landlord-Tenant Relationship: 1980 and Beyond*, 9 REAL PROP., PROB. & TR. J. 24 n.56 (1974)). The Act is also the basis of the Virginia Residential Landlord and Tenant Act. VA. CODE ANN. §§ 55-248.2 to -248.40 (Supp. 1974).

4. Subcommittee, *supra* note 2, at 123. This report continues:

They [tenants' interest groups] fear that this Act, if endorsed by the American Bar Association, would exist as a set of standards and guidelines for judges involved in these decisions, even if the Act were not passed by the specific jurisdiction. The result would be that the standards themselves

tenants' point of view, the URLTA thus might be seen as posing a barrier to more sweeping judicial reforms in landlord-tenant law.

Gauging the likely effect of the URLTA on alternative routes of reform in favor of the tenant requires an examination of the judicial developments the Act may supercede, an analysis of the worth of the provisions of the URLTA itself, and an honest evaluation of the reliance that should be placed on the continued expansion of relief for tenants from other sources such as the courts and the legislatures. In addition, this Note will inquire into the extent that ongoing judicial activism was intended by the draftsmen of the URLTA or, at least, is permitted by the Act. For the purposes of specific comparisons, certain provisions of the Model Residential Landlord-Tenant Code⁵ also will be examined.

JUDICIAL REFORM OF LANDLORD-TENANT LAW

Probably in no other area of landlord-tenant law has there been so clear a trend of judicial decisions favoring tenants as in the law governing landlord obligations to deliver and maintain premises which are suitable for human habitation. To grasp the nature of reform in this area and to understand the policy underlying such reform, the common law rules in effect prior to the recent developments must be reviewed.

Common Law Rules and Exceptions

Three basic rules governing landlord-tenant law developed as the result of the early common law view of the lease as a conveyance of an interest in real property.⁶ The first of these was the doctrine of caveat emptor, absolving the landlord of any obligation to deliver premises suitable for the tenant's intended use. Delivery of unfit premises was neither a defense to an action for rent⁷ nor grounds for recovery

would be relied upon by judges searching for appropriate guidelines. These standards would therefore become the limit beyond which any suggested reform would be condemned as unreasonable, if not radical.

Id.

5. AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969) [hereinafter cited as MODEL CODE].

6. 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952) [hereinafter cited as Casner].

7. *Id.* § 3.45. "There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased." *Id.* at 267 (footnotes omitted).

in tort for personal injury or property damages.⁸ A prospective tenant neglected to inspect the premises before execution of the lease at his peril; he was protected only if he obtained an express warranty of fitness from his lessor.⁹ A second early common law rule, logically related to the caveat emptor principle, was that the landlord, absent an express undertaking, owed no duty to maintain the premises or make repairs during the lease term;¹⁰ rather, it was the tenant who was obliged to maintain the premises during his tenancy as an outgrowth of his duty not to commit waste.¹¹

The final early rule, that the covenants in a lease were mutually independent unless expressly made dependent, was founded upon the concept of a lease as a conveyance rather than a contract.¹² Accordingly, breach by the landlord of any covenants given expressly or impliedly neither discharged nor suspended the duty of the tenant to perform under his covenants. Although the tenant ultimately could recover damages, he had to continue rental payments to the landlord, even during the pendency of legal proceedings, and he could not rely upon the landlord's breach as a basis for either abatement of rent or rescission.¹³

The development of these rules was related to the fact that most leases originally involved the conveyance of land. In an agrarian economy, any structures on the land ordinarily were deemed incidental to the primary purpose of the lease because land, not buildings, produced the anticipated rent.¹⁴ Application of the general rules, however, occasionally yielded unacceptably harsh results, and development of exceptions became necessary.¹⁵

Constructive eviction, an exception first enunciated in *Dyett v. Pendleton*¹⁶ in 1826, concerned the landlord's covenant of quiet enjoyment implied in all leases to allow the tenant undisturbed use of the demised

8. *Id.* § 3.45.

9. *Id.*

10. *Id.* § 3.78. "The lessor is under no obligation to the tenant to make repairs to the property in the absence of a covenant or a statute imposing such a duty." *Id.* at 346 (footnote omitted).

11. *Id.* at 347.

12. *Id.* §3.11.

13. Clearly, the tenant could not, at early common law, force the landlord to comply by means of injunctive relief or specific performance, where the tenant had not performed his covenants.

14. *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972).

15. These exceptions later provided precedent for a complete abandonment of the general rules. *See, e.g., Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 838 (Mass. 1973).

16. 8 Cow. 727 (N.Y. 1826).

premises. A constructive eviction occurred when the landlord's failure to protect the tenant in his quiet enjoyment of the leasehold caused the tenant to be forced off the premises. Such involuntary removal was deemed equivalent to eviction by physical ouster and afforded the tenant the same remedies available upon actual eviction.¹⁷ Before a tenant could be excused from his obligations under the lease, however, it was necessary that he demonstrate¹⁸ that he had abandoned the premises within a reasonable time¹⁹ because of a substantial interference with enjoyment or possession. In abandoning the premises, the tenant acted at his peril.²⁰ If he miscalculated either the severity of the interference with his enjoyment of the premises or the reasonableness of time elapsed between interference and abandonment, his obligation to pay rent continued, notwithstanding that he was no longer on the premises. In addition to the risk assumed by the tenant that he subsequently would be unable to establish the elements of a constructive eviction, the hardship involved in vacating generally militated against this course of action except in the most extreme circumstances.

Two other exceptions to the general common law rules were developed to provide redress when application of those rules produced results which did not comport with their underlying policy. The first involved implication in a short term lease of a furnished dwelling of a warranty that the dwelling was fit for habitation. Due to the short term of the lease, the parties were assumed to have intended immediate occupancy; accordingly, the tenant was deemed not to have had full opportunity for reasonable inspection of the premises before executing the lease.²¹ The other exception arose when a lease was executed while the building demised was still under construction, the justification again being chiefly the lack of sufficient opportunity to inspect.²²

Present Trends of Common Law Reform

Although the rules derived from the common law concept of the lease as a conveyance of land were appropriate to the agrarian economy in which they developed, they "increasingly lost viability in the era of

17. 1 Casner, *supra* note 6, § 3.51, at 279-80.

18. *Id.* at 282.

19. If abandonment was not within a reasonable time, the tenant was held to have waived the defect. *Id.*

20. For a discussion of this "risk" to the tenant, see *Lemle v. Breeden*, 51 Hawaii 426, —, 462 P.2d 470, 475 (1969).

21. 1 Casner, *supra* note 6, § 3.45, at 267.

22. *Id.* at 268.

industrialization with its attendant exploding urban population and housing."²³ Consequently, courts have begun to reject some or all of the old law in order to meet the needs and expectations of the contemporary urban tenant;²⁴ traditional doctrines have been abandoned by several courts as having "outlived their usefulness."²⁵ Moreover, the impact of the old common law rules has been reduced by sporadic statutory reform.²⁶ Even in the many jurisdictions retaining the old rules,²⁷ courts generally have indicated a responsiveness to the problems of the urban tenant, especially the indigent with limited housing alternatives.

These indicia of judicial concern for the plight of the tenant form the basis for the argument that tenant interests will be better served by evolving case law than by a statutory codification of obligations and remedies. Closer examination of the nature and scope of the tenant's predicament, however, indicates that case law developments thus far have only just begun to effectuate the policy that underlies the trend towards affording relief to the tenant.

Policy Considerations

A fundamental policy consideration underlying judicial and legislative reshaping of landlord-tenant law is the difference in the expectations of the modern urban tenant and the eighteenth century agrarian tenant.²⁸ Early common law assumed that the primary interest of the tenant was the land itself, rather than any dwelling or structure thereon, and that the tenant had the ability to repair the relatively simple structures conveyed incidental to the lease of land. The residential tenant's ability to correct defects, however, has declined as the construction of dwellings has become more complex. Moreover, the increased mobility of the modern tenant, with his resultant lack of in-

23. *Mease v. Fox*, 200 N.W.2d 791, 793 (Iowa 1972).

24. These changes are not wholly revolutionary, as earlier cases seem to have foreshadowed the newer rules to some extent. See *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942) (regarding the independent covenants rule); *Delamater v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931) (regarding a warranty of habitability).

25. *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 841 (Mass. 1973); see, e.g., *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

26. See notes 81-84 *infra* & accompanying text.

27. This seems to be the result of the doctrine of *stare decisis* and a judicial desire to refrain from usurpation of the legislative function. See notes 415-17 *infra* & accompanying text.

28. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 (D.C. Cir. 1970).

terest in maintaining someone else's property, further invalidates the assumptions upon which the old common law rules rested.²⁹

Suggestions have been made that landlord-tenant law adopt the "consumer protection" principles operative in other areas of the law.³⁰ Cases involving the sale of chattels,³¹ negotiable instruments,³² and especially the sale of real property,³³ often are cited to illustrate the tendency of modern courts to disregard established legal doctrines in order to protect the consumer who has little opportunity to obtain adequate protection through the normal bargaining process.³⁴

Today, the prospective tenant is in a poor position from which to bargain for desired conditions of habitation. Recent housing shortages, especially for low- and moderate-income tenants, have enabled landlords to select tenants who will accept lease provisions which are often as favorable to the owners as were the early common law rules.³⁵ Thus, the nature of the housing market itself provides an additional reason for reforming landlord-tenant law.

Manifest legislative intent to modernize landlord-tenant law also has induced courts to alter the old rules.³⁶ Such an intent was found

29. *Id.* at 1078.

30. *Id.* at 1079.

31. *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

32. *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

33. *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

34. *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075-76 (D.C. Cir. 1970). The analogy to consumer protection cases in the context of urban residential leases has been criticized. Comment, *Landlord-Tenant—Landlord's Violation of Housing Code During Lease Term is Breach of Implied Warranty of Habitability Constituting Partial or Total Defense to an Eviction Action Based on Non-Payment of Rent*, 84 HARV. L. REV. 729, 732-33 (1971). It is argued that the lease of rental housing is distinguishable from the sale of goods in that there is no substitute product available if the application of consumer protection requirements results in a reduced supply of housing. Use of tenant remedies to improve housing standards may in fact be counter-productive by forcing a necessity off the market. While the consumer protection rules in the chattel sales area also may force goods off the market, there are usually such counterbalancing factors as the availability of substitute goods and increased product safety which will compensate for this result. *Id.* at 733. This argument raises complex questions of the appropriateness of tenant remedies as a means of improving housing standards, questions which can be answered satisfactorily only by an extensive compilation of empirical data. *See* note 39 *infra*.

35. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

36. *See, e.g.*, *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, —, 276 A.2d 248, 251 (1971); *Pines v. Persson*, 14 Wis. 2d 590, —, 111 N.W.2d 409, 412-13 (1961).

initially in the enactment of state and local housing codes, which were seen as an expression of a legislative desire to ensure minimum housing standards for all citizens.³⁷ More recently, this intent has been drawn from statutes which either impose particular obligations on landlords to maintain leased property or provide specific remedies for tenants whose landlords fail to maintain the premises according to the statutory standard.³⁸ Although a legislative mandate may be a reliable indicator of public policy, it raises questions concerning whether such legislation is intended to provide exclusive remedies foreclosing judicial expansion of others.³⁹

The size and complexity of the modern multifamily residence militate against the practicability of the old common law concepts, especially

37. *Pines v. Persson*, 14 Wis. 2d 590, —, 111 N.W.2d 409, 412 (1961).

38. *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 840-41 (Mass. 1973).

39. See notes 415-17 *infra* & accompanying text. The possibility that the remedies are intended to be exclusive raises the broader question of the desirability of tenant remedies as a means of housing code enforcement and as a tool to improve housing standards generally. Reliance upon tenants for housing code enforcement is necessary because of the lack of effectiveness that has typified the normal modes of housing code enforcement. Nevertheless, the anticipated success of tenant enforcement raises the specter of urban landlords abandoning their property rather than complying with strict and burdensome standards of habitability. A concomitant effect would be a slowing of the flow of new investment capital into this type of property, thereby reducing the already inadequate supply of rental housing. See Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971). See also Note, *Current Interest Areas of Landlord-Tenant Law in Iowa*, 22 DRAKE L. REV. 376, 383 (1973) [hereinafter cited as *Current Interest*]; Comment, *Tenant Protection in Iowa—Mease v. Fox and the Implied Warranty of Habitability*, 58 IOWA L. REV. 656 (1973) [hereinafter cited as *Tenant Protection*]; Note, *The Model Residential Landlord-Tenant Code*, 26 RUTGERS L. REV. 647, 655 (1973). See also note 34 *supra*. In NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 286 (1969) [hereinafter cited as *NATIONAL COMMISSION*], it is stated: "Commission studies on this point have led to the conclusion . . . that strict enforcement on a mass basis would lead to mass abandonment of properties by their owners and/or higher rents with resultant occupant displacement. . . . Thus, it is essential that there be an abundance of housing for the low-income population in order to enhance the feasibility of strict housing code enforcement."

In Daniels, *supra*, at 913-20, the normal methods of housing code enforcement, their inadequacy, and the resort to tenant remedies are discussed. Some courts have shown an appreciation for the dilemma of strict housing code enforcement, e.g., *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 495 (D.C. Ct. App. 1969), while others have refused to wield their authority in enforcement of housing codes, e.g., *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). Care must be taken to distinguish between the use of tenant remedies as a means of housing code enforcement and the closely related question of the use of housing codes as a standard of habitability in the enforcement of tenant remedies. The former issue is tangential to the present inquiry while the latter is directly pertinent. See notes 89-111 *infra* & accompanying text for a discussion of the latter issue.

the doctrine of caveat emptor. Due to the character of such structures, the landlord is in a far better position than the tenant to know of most defects, especially since he, not the tenant, will be notified by the public authorities if the defect constitutes a violation of a local housing code.⁴⁰ Furthermore, the tenant cannot reasonably be expected to know of defects or to make repairs, for example, to heating and plumbing systems located in a part of the building into which he has no access.

In reforming the law governing the obligations of the landlord to maintain fit premises, the courts have intended to confer upon the tenant ordinary contractual rights not afforded under classic real property law.⁴¹ New rules are applied in recognition of "the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship."⁴² This premise, articulated in many of the recent decisions, is the basis of an implied obligation of the landlord to provide a habitable dwelling at the inception of the lease and to maintain it as such continuously throughout the duration of the lease term. By conceptualizing the lease as a contract, the tenant's obligation to pay rent is made dependent upon the landlord's fulfillment of his maintenance obligation.

Despite the wide legislative and judicial recognition of the numerous policy justifications for altering the older law, no clear rule of law has been established fixing landlord and tenant rights and duties vis-a-vis habitability. In fact, reliance upon policy considerations by various courts has yielded divergent results. This divergence itself may indicate that only a comprehensive statute can integrate the presently fragmented law into a coherent whole.⁴³

Habitability of Premises: Implied Warranty and Illegal Contract Theories

The first modern approach⁴⁴ to the habitability question was taken by the Wisconsin Supreme Court in *Pines v. Persson*,⁴⁵ in which college

40. See, e.g., *Kline v. Burns*, 111 N.H. 87, —, 276 A.2d 248, 251 (1971).

41. See *Mease v. Fox*, 200 N.W.2d 791, 795 (Iowa 1972).

42. *Id.*, quoting *Lemle v. Breeden*, 51 Hawaii 426, —, 462 P.2d 470, 474 (1969). See generally *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 838 (Mass. 1973), where the lease is conceptualized as "essentially a contract in which the landlord promised to deliver premises suitable to the tenant's purpose in return for the tenant's promise to pay rent."

43. See notes 396-414 *infra* & accompanying text.

44. See note 24 *supra* for cases that possibly were "ahead of the times" in this regard.

45. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

student tenants sought to recover a deposit paid to their landlord for the rental of a furnished house for the nine-month school year. Following several days of occupancy, they had abandoned the house after first attempting to correct its defects themselves and after the local housing department inspector confirmed the existence of several housing code violations. In a rather brief opinion, the court found an implied warranty of habitability⁴⁶ and permitted the tenants to recover the rental deposit, less the portion allocable to the time they had remained in possession, as well as the expenses incurred in the effort to remedy the defects.⁴⁷

In holding that the warranty of habitability and the tenants' covenant to pay rent were mutually dependent, the court stated: "To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor."⁴⁸

Although this broad statement of the rule of implied warranty is the leading precedent for similar rulings in other courts,⁴⁹ two factors are relevant to place *Pines* in its proper perspective. First, the facts in *Pines* could have supported a decision based upon the established common law exception permitting an implied warranty in the case of a short-term lease of a furnished dwelling. The court in *Pines* discussed this exception to the general rule against such warranties but, indicating that it was an exception "to be extended rather than restricted,"⁵⁰ proceeded to base its holding upon a new, broader rule.⁵¹

Second, in Wisconsin the broad *Pines* statement of the doctrine of implied warranty seems to have been emasculated, if not abandoned. In *Posnanski v. Hood*⁵² a tenant defended against his landlord's action for rent with the argument that his obligation to pay was eliminated because the leased premises had several housing code violations

46. *Id.* at —, 111 N.W.2d at 412.

47. Although the court did not discuss the issue in detail, this latter allowance can be seen as a forerunner for another type of tenant remedy, "repair and deduct," which has been allowed both judicially and by statute in various jurisdictions. *Id.* at —, 111 N.W.2d at 413.

48. *Id.* at —, 111 N.W.2d at 412-13.

49. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076 (D.C. Cir. 1970); *McCase v. Fox*, 200 N.W.2d 791, 794 (Iowa 1972).

50. 14 Wis. 2d at —, 111 N.W.2d 412.

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

52. 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

rendering the lease an illegal contract, therefore unenforceable and void.⁵³ Other cases adhering to the illegal contract theory were distinguished by the court with the observation that they concerned housing code violations which existed at the start of the lease term while the present defects developed after the effective date of the lease. Ruling against the tenant, the court held that it would not sanction rent withholding as a means of housing code enforcement without specific legislative authorization.⁵⁴

Perhaps the failure of the tenant to raise the issue of implied warranty as espoused in *Pines* explains the absence of any discussion of this theory in *Hood*; in any event, the present status of the law in Wisconsin must be considered unclear.⁵⁵ Fortunately for tenants, the restriction of the implied warranty doctrine in the parent jurisdiction has not been carried over into other states which have followed *Pines*.⁵⁶ *Hood* serves to point out a weakness of court-made doctrine, however: it is more susceptible to subsequent judicial limitation than is a well-articulated statutory rule.⁵⁷

The list of other jurisdictions which have, to some extent, followed *Pines* is expanding rapidly.⁵⁸ *Pines* established the implied warranty theory as a means by which the tenant may, in effect, rescind a lease for a breach of the warranty of habitability. Rescission has been permitted in a number of other jurisdictions on the basis of either a narrow holding or dicta when the court was presented with a variant fact situa-

53. The tenant relied upon *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968), in which a tenant employed the illegal contract theory to defeat an action by a landlord for possession premised upon nonpayment of rent.

54. 46 Wis. 2d at —, 174 N.W.2d at 531-33.

55. See notes 396-99 *infra* & accompanying text.

56. E.g., *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973). In these cases the courts relied upon the implied warranty theory under facts similar to those in *Hood*.

57. See notes 396-98 *infra* & accompanying text.

58. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Green v. Sumski*, 42 U.S.L.W. 2397 (Cal. Jan. 15, 1974); *Quesenbury v. Patrick*, 2 CCH Pov. L. REP. ¶ 15,803 (El Paso County Ct., Colo., 1972); *Givens v. Gray*, 2 CCH Pov. L. REP. ¶ 15,412 (Ga. Ct. App. 1972); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y. City Civ. Ct. 1973); *Glyco v. Schultz*, 2 CCH Pov. L. REP. ¶ 16,608 (Sylvania Mun. Ct., Ohio, 1972); *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973).

tion.⁵⁹ In other cases in which the tenant desired to stay in possession, the implied warranty doctrine has been invoked to allow him to deduct his cost of repairs from his rental obligation⁶⁰ or to justify abatement of rent based on the decreased value of premises in defective condition.⁶¹ Abatement often has taken the form of an order permitting the tenant to withhold rent,⁶² the amount withheld usually being paid into court.⁶³ Courts also have awarded damages to tenants for breach of the warranty of habitability.⁶⁴

Avoidance of rent obligations premised upon the separate doctrine of illegal contract was enunciated first by the Court of Appeals for the District of Columbia Circuit in *Brown v. Southall Realty Company*,⁶⁵ which involved a lease of premises by a landlord who knew there were several housing code violations thereon. Applying a provision of the District of Columbia housing regulations which prohibited the leasing of any habitation not in a "clean, safe, and sanitary condition, in repair, and free from rodents or vermin," the court held that the lease was entered into in violation of the regulations and was therefore void and unenforceable;⁶⁶ consequently, the tenant was freed of any obligation to pay rent under the illegal lease. A later decision, *Diamond Housing Corp. v. Robinson*,⁶⁷ clarified the *Brown* rule by holding that the tenant could avoid his obligation to pay rent even where the landlord had no official notice of such violations, provided that the violations existed at

59. E.g., *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

60. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). In effect, this type of recovery also was allowed in *Pines*, since the tenants were permitted to recover the expenses that they had incurred in their initial efforts to repair the premises.

61. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

62. E.g., *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 577, 268 A.2d 556 (Dist. Ct. 1970).

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

64. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973). This remedy results partially from construing the lease as a contract but primarily from the doctrine of implied warranty, since at early common law the tenant could maintain a separate action for breach of promise in the lease by the landlord; it was the lack of such a promise that created the tenant's problem.

65. 237 A.2d 834 (D.C. Ct. App. 1968).

66. *Id.* at 836-37.

67. 257 A.2d 492 (D.C. Ct. App. 1969).

the commencement of the lease-term.⁶⁸ Although the tenant in *Diamond Housing* had entered the premises under an illegal lease, he was held not to have been a trespasser but a tenant at sufferance entitled to remain in possession until given proper notice to quit by the landlord.⁶⁹

Certain limitations inherent in the illegal contract doctrine may account for its secondary importance relative to the implied warranty of habitability doctrine. Technically, the illegal contract doctrine is applicable only if the defects in question were present and known to the landlord at the inception of the lease.⁷⁰ It does not create in the landlord a continuing duty to repair, as does the accepted version of the implied warranty doctrine.⁷¹ In a very technical analysis, one court has refused to apply the illegal contract theory, stating that, although the landlord's leasing of the premises in violation of the local housing code was illegal, the tenant himself was equally guilty of illegal conduct in executing the lease and occupying the premises.⁷²

A second reason for the failure of the doctrine to gain acceptance is that, as with the discarded constructive eviction theory, the tenant eventually must leave the premises if he claims that the lease is void and unenforceable. If the landlord can be prevented from holding the tenant to rental obligations under the voided lease, it would be inconsistent to allow the tenant to remain on the premises under that same lease. One court summarized the situation as follows: "In the present case the tenant does not wish to terminate the lease, but desires to remain in possession of the premises, with the housing code violations repaired. Thus the application of the principle of illegal contract, even if applicable, would be of no help to this tenant."⁷³

Another problem associated with the illegal contract theory concerns

68. *Id.* at 494 (dictum). The court found that the landlord had actual notice of the violations. *Id.*

69. *Id.* at 495.

70. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

71. In *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972), for example, the implied warranty is described as a promise that "at the outset of the lease . . . there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling."

72. *Golden v. Gray*, 2 CCH Pov. L. REP. ¶ 15,295 (N.Y. Sup. Ct., Monroe County, 1971).

73. *Hinson v. Delis*, 26 Cal. App. 3d 62, 68, 102 Cal. Rptr. 661, 664 (1972) (rejecting the illegal contract doctrine in favor of the doctrine of implied warranty of habitability). Although the tenant becomes a tenant at sufferance under the illegal contract doctrine, it has been said that the landlord is under a duty to terminate such an illegal tenancy. *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 495 (D.C. Ct. App. 1969).

the tenant's obligation for rent for the period of occupancy. *Brown* indicated that there would be no such liability, but the question was not fully discussed. In the only reported decision that clearly faces the issue, *King v. Moorehead*,⁷⁴ a Missouri court held that the landlord is entitled, for the period the tenant remains in possession,⁷⁵ to the reasonable rental value of the premises in their defective condition.⁷⁶

King also raises the issue of the necessity for electing between the illegal contract theory and the implied warranty theory when the tenant attempts to plead both. They clearly are inconsistent, since the illegal contract theory denies the existence of a valid lease while the implied warranty theory not only recognizes its validity but inserts an additional term, creating a right of recovery under the added provision.⁷⁷ The monetary results under either theory probably will be identical, at least where the landlord is allowed to recover the reasonable rental value of the premises while the tenant was in possession;⁷⁸ nevertheless, because the implied warranty theory allows the tenant to remain in possession for the balance of the lease term, it would seem to be preferable for tenants, especially where substitute housing is not readily available.⁷⁹

Consonant with the judicially developed implied warranty and illegal contract theories,⁸⁰ some state legislation has abrogated the com-

74. 495 S.W.2d 65 (Mo. Ct. App. 1973).

75. *Id.* at 78-79. This case also expanded the original statement of the illegal contract theory in *Brown* by holding that the housing code violation need not be a "knowing violation at the time of letting," thereby indicating that any violation at any time during the tenancy would render the lease void. *Id.* at 78.

76. *Id.* at 79.

77. *Id.*

78. If the implied warranty doctrine is invoked to allow the tenant an abatement in rent while he was in possession of the premises, the amount of such abatement will be measured by the difference between the value of the premises as warranted and their actual value in the defective condition. The tenant in effect would pay rent equal to the reasonable value of the premises in their defective state, which is presumably the amount that the tenant also would owe under the *King* version of the illegal contract doctrine.

79. A hybrid of the two theories apparently was utilized in *Posnanski v. Department of Agric.*, 2 CCH Pov. L. REP. ¶ 17,054 (Wis. Cir. Ct., Dane County, 1973), in which the court upheld a state administrative agency cease and desist order preventing a landlord from leasing premises which had been cited by municipal authorities for housing code violations. Although the unfair trade practice alleged was misrepresentation premised upon advertising the premises for rent without full disclosure, the court relied upon the implied warranty doctrine in upholding the order which itself sought to prevent the formation of illegal contracts.

80. In addition to the implied warranty and illegal contract theories, there is a third which apparently has not received a great deal of attention in the courts as a means

mon law rule against the implied warranty of habitability. As with the judicial remedies, the statutory developments have been erratic, with no manifest legislative intent to reshape entirely the landlord-tenant relationship. Instead, the legislatures appear to have intended only specific, limited remedies to ameliorate the harshness of the common law, possibly in response to political pressures from organized tenant interest groups. Thus, some states have enacted statutes which allow rent withholding,⁸¹ while others have enacted "repair and deduct" statutes granting the tenant a right to make repairs and deduct their cost from rental payments;⁸² other miscellaneous remedies, such as rent strike-receivership,⁸³ have also been developed. In the District of Columbia, the statutory effort codified previous judicial reforms.⁸⁴

Because the statutory remedies are substantially identical to those developed in comparable case law, a detailed discussion of their policy and provisions would not be helpful. For present purposes, the significance of the various statutes lies in their influence upon the development of case law. Specific instances of simultaneous judicial and legislative response to the need for alteration of the common law rules provide perhaps the most reliable indication of the possible effects of the URLTA on judicial reform of landlord-tenant law.⁸⁵

of protecting tenant interests. This theory is based upon express warranty and involves an analogy to section 2-313(1)(b) of the Uniform Commercial Code. The Iowa Supreme Court in *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972), suggested by way of dictum that a landlord's representation that he was leasing a "house," "home," or "apartment" would create an express warranty by description and justify the tenant's expectation that the premises would be reasonably suitable for occupancy. *Id.* at 796. Absent any statutory enactment creating such a warranty or rules regarding permissible disclaimer, this theory does not seem to possess any advantages over the more widely used implied warranty doctrine. These limits on the express warranty doctrine, in addition to the fact that the implied warranty doctrine does have some precedents in the common law exceptions to the old "no warranty" rule, are the most plausible explanations for the lack of acceptance by the courts of an express warranty theory.

81. CONN. GEN. STAT. ANN. § 19-347b (1968); MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1973); MICH. COMP. LAWS ANN. § 125.530(3), (4) (Supp. 1973); N.J. REV. STAT. §§ 2A:42-85 *et seq.* (Supp. 1973); N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1973); PA. STAT. ANN. tit. 35, § 1700-1 (1970).

82. CAL. CIV. CODE § 1942 (West 1954); MONT. REV. CODES ANN. § 42-202 (1947); N.D. CENT. CODE § 47-16-13 (1960); OKLA. STAT. ANN. tit. 41, § 32 (1951); S.D. COMP. LAWS ANN. § 43-32-9 (1967).

83. N.Y. REAL PROP. ACTIONS §§ 769-782 (McKinney Supp. 1973).

84. See Daniels, *supra* note 39, at 933. This article discusses attempts to incorporate prior judicial decisions in the District of Columbia into statutory reform in the hope of retaining the advantages of flexible judicially developed rules.

85. The judicial and statutory trend that has been discussed indicates the current inclinations of the majority of courts which have been confronted with the habitabil-

REFORMS UNDER THE URLTA

The URLTA accomplishes its reform of landlord-tenant law primarily through a broad statement of landlord obligations and corresponding tenant remedies. All obligations and remedies are made subject to the Act's good faith⁸⁶ and unconscionability⁸⁷ provisions which, the official comments indicate, have been adapted from the Uniform Commercial Code. Moreover, no tenant waiver of rights or remedies under the Act will be given effect.⁸⁸ Central to the landlord's obligations is the concept of habitability, the parameters of which have troubled the judicial reform of landlord-tenant relationships.

The Standard of Habitability Under the URLTA

Habitability is an elusive concept, both as an abstract definition and in its application to an actual case. To reduce the uncertainty inherent in determining habitability, a few courts have resorted to the specific and detailed requirements of housing codes as a standard. Because of the deficiencies in exclusive reliance upon such codes, however, the

ity issue. There have, however, been cases in which, for various reasons, courts have refused to part completely with the older doctrines. See, e.g., cases cited in note 425 *infra*. See also *McAuvic v. Silas*, 190 Pa. Super. 24, 151 A.2d 662 (1959); *Wilkinson v. Searls*, 184 S.E.2d 735 (W. Va. 1971). A tenant, therefore, cannot rely with any certainty upon a court to adopt one of the newer theories and discard the old rules.

86. URLTA § 1.302 provides: "Every duty under this Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under this Act imposes an obligation of good faith in its performance or enforcement."

87. *Id.* § 1.303 provides:

(a) If the court, as a matter of law, finds

- (1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or
- (2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

88. URLTA § 1.403(a)(1). Section 1.403 is a general prohibition of waiver of a

URLTA attempts to compromise code standards with an element of discretion.

Some of the implied warranty of habitability cases have stated that the housing code requires compliance or substantial compliance by the landlord in order for his premises to be deemed habitable.⁸⁹ Others have attached less significance to a housing code violation, stating that it is only one of several factors to be considered in determining whether the implied warranty has been breached.⁹⁰ Referring to the habitability

tenant's rights and remedies, providing not only that rights of the tenant, including fitness of premises, cannot be waived, but also, in section 1.403(b), for limited punitive damages for deliberate use by a landlord of a provision known to be unenforceable by virtue of section 1.403(a)(1).

Prohibition of waiver is a feature of the URLTA which crystallizes an otherwise unsettled area of the case law. Several cases had stated that the tenant's right to habitable premises could not be waived. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081-82 (D.C. Cir. 1970); *Buckner v. Azulai*, 251 Cal. App. 2d 1013, —, 59 Cal. Rptr. 806, 807-08 (1967); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973); cf. *Cardona v. Eden Realty Co.*, 118 N.J. Super. 381, 288 A.2d 34 (App. Div. 1972). Other cases, however, have indicated that there can be such a waiver. *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, —, 276 A.2d 248, 252 (1971); *Berzito v. Gambino*, 63 N.J. 460, —, 308 A.2d 17, 22 (1973). The split appears to result from a failure to distinguish between a waiver of a tenant's general right to habitable premises and a waiver of the tenant's right to rely upon a specific defect or breach of the landlord's duty in order to enforce a tenant remedy. Those cases holding that there can be a waiver seem to indicate that the waiver is of a specific defect, e.g., *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972), while those holding that there can be no waiver seem to be discussing the more general duties of the landlord, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081-82 (D.C. Cir. 1970).

Waiver in both of these situations is eliminated under the URLTA by prohibiting the use of a provision in a rental agreement by which the tenant "agrees to waive or forego rights or remedies under this Act." URLTA § 1.403(a)(1). The logical interpretation of this language would be that the tenant cannot be forced by the rental agreement to waive either his "right to habitable premises" or his "remedies" under the Act when those remedies are necessitated by a specific defect.

The Act is not clear, however, regarding whether the tenant can waive a defect by his conduct, since section 1.403(a)(1) applies by its terms to a waiver in the rental agreement. The comment to section 2.104 states that the landlord's "obligations" under this section "may not be waived." *Id.* § 2.104, Comment. Although this statement might support an argument that there can be no waiver, even by conduct, the comment also refers the reader to section 1.403, indicating an apparent intent to point out the relationship between sections 1.403(a)(1) and 2.104, rather than to create an additional limitation.

89. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972).

90. E.g., *Mease v. Fox*, 200 N.W.2d 791, 796-97 (Iowa 1972); *Kline v. Burns*, 111 N.H. 87, —, 276 A.2d 248, 252 (1971). The fact that the same case, *Mease*, may be cited for both propositions serves to point out the confusion that is likely to occur from such a

warranty, one court stated: "It is a mere matter of semantics whether we designate this covenant one 'to repair' or 'of habitability and livability fitness.'"⁹¹ Nevertheless, as has been pointed out by separate opinions in two recent decisions, the distinction is not to be ignored.

In *Boston Housing Authority v. Hemingway*,⁹² the majority relied upon a statewide sanitary code to imply a warranty of habitability in a residential lease, stating that the code provided the threshold requirements for habitability and that proof of a violation would be "compelling evidence that the apartment was not in habitable condition."⁹³ A concurring opinion argued that the majority's holding was overly broad and imprecise, providing no guidance as to what might constitute a breach of the warranty;⁹⁴ instead, it asserted, the covenant should require compliance with the applicable housing regulations which were "mandatory, detailed, precise and easily understandable minimum standards of fitness of dwelling units for human habitation."⁹⁵ Furthermore, the opinion asserted that the use of an ill-defined warranty of habitability would result in unnecessary litigation as courts sought to establish the limits of the warranty.⁹⁶ Similarly, in *Jack Spring, Inc. v. Little*,⁹⁷ a dissenting opinion labeled a warranty of habitability implied by the majority "pure and simple legal fiction,"⁹⁸ arguing that an "implied covenant to repair" based upon a housing code should be utilized instead of the broader doctrine of implied warranty of habitability, especially where the case concerns defects arising during the lease term, rather than those present at the inception of the lease.⁹⁹

Although the housing code standard lends a degree of certainty to the habitability warranty, use of the explicit housing code standard presents at least three problems. Initially, a defect may not be covered

misunderstanding. In *Mease*, the court stated that the warranty includes "a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein." 200 N.W.2d at 796. Three paragraphs later the court listed such a violation as "one . . . circumstance" to be considered in resolving the factual question of whether there has been a breach. *Id.* at 796-97.

91. *Marini v. Ireland*, 56 N.J. 130, —, 265 A.2d 526, 534 (1970).

92. 293 N.E.2d 831 (Mass. 1973).

93. *Id.* at 844 n.16.

94. The concurring opinion noted the majority's use of phrases such as "livable" and "fit for human occupation." 293 N.E.2d at 851.

95. *Id.*

96. *Id.* at 851-52.

97. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

98. *Id.* at 373, 280 N.E.2d at 220.

99. *Id.* at 374-75, 280 N.E.2d at 221.

by the applicable housing code, although it concerns a fundamental item in the tenant's bargain for his lease. Enjoyment of air conditioning or a swimming pool might be denied because of a malfunction, but a strict housing code standard would most likely afford the tenant no relief.¹⁰⁰ In such a case, neither the warranty of habitability nor a covenant to repair in accordance with the housing code would be breached, since the absence of a swimming pool or of air conditioning would not render a dwelling uninhabitable. Nevertheless, closer cases might present defects which, though not actionable under a housing code type covenant, would breach a warranty of habitability by making the premises unfit in which to live.¹⁰¹

A more serious difficulty with the use of a housing code standard arises from the fact that, although housing codes are common, they have not been adopted by all localities;¹⁰² moreover, some municipalities are not empowered to enact them. Obviously, where there is no housing code, one cannot be incorporated into the habitability standard; it is equally obvious, however, that any legislature which enacts a statutory habitability standard also has the power to provide for housing codes by either statewide enactment or local enabling legislation.

Finally, a habitability standard tied closely to a housing code may be rigidly applied and leave courts no room for exercise of their discretion in expanding the standard or modifying it to fit circumstances.¹⁰³ Con-

100. Even though the tenant may be unable to rely upon an underlying housing code, the URLTA provides relief in such a case, affording relief pursuant to section 4.101 for any failure of the landlord to comply with the terms of the lease or of section 2.104, including the requirement in section 2.104(a) (4) that air conditioners be properly maintained. If the lease stipulates that swimming facilities be furnished, failure to do so will invoke the sanctions of section 4.101.

101. One court following the broad implied warranty doctrine attempted to specify certain defects which would constitute a breach and those which clearly would not. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, —, 268 A.2d 556, 559 (Dist. Ct. 1970). Heat, hot water, garbage disposal, and elevator service were denominated "bare living requirements," as contrasted with "amenities," and failure to supply any of these would violate the covenant of habitability. Malfunctioning venetian blinds, water leaks, wall cracks, and minor painting deficiencies were not defects justifying an abatement of rent on the basis of uninhabitability. *Id.*

102. "Hundreds of thousands of people live in jurisdictions which do not have a housing code which establishes minimum standards of health, safety and welfare in all existing housing." NATIONAL COMMISSION, *supra* note 39, at 22. Code standards in many areas are said to be "surprisingly low." *Id.* "[H]undreds of cities and counties, most States, and virtually all rural areas do not have housing codes." *Id.* at 275.

103. Not only is the housing code used as a standard by the URLTA, the Act also lists several specific items for which the landlord is responsible. URLTA § 2.104(a). Section 2.104(b), however, makes clear that if the housing code standard is more rigorous

versely, the "all facts and circumstances" test employed by some courts permits greater flexibility in molding remedies that meet the particular needs and expectations of the parties, a desideratum which led to the abandonment of the old common law rules in the first instance.¹⁰⁴

Lest it be concluded that the broad discretion associated with most judicial versions of the habitability standard benefits tenants, a cautionary note should be sounded. That a flexible standard produces uncertainty concerning what constitutes a breach of the standard can have serious implications for tenants. Several notable cases have been criticized for stating a broad general rule granting trial courts wide discretion to decide the factual question of whether the warranty has been breached without establishing adequate standards for the exercise of such discretion.¹⁰⁵ Although granting wide discretion to the trial court need not directly harm tenants, it may cause tenants to be hesitant to use a remedy such as withholding rent for fear that the supposed breach of warranty will be found insufficient to justify such action.¹⁰⁶ In addition, the landlord may delay making repairs in the hope that the breach will be found insubstantial if a resulting dispute is litigated.¹⁰⁷

Thus, neither the housing code standard nor the more flexible judicial standard of habitability is indisputably superior, either objectively or from the tenant's viewpoint. In seeking a compromise incorporating both standards, the URLTA places basic reliance upon the housing code standard, section 2.104 requiring that the landlord comply with applicable housing codes materially affecting health and safety.¹⁰⁸ Courts are invited to expand on this basic requirement by a subsequent provision which obligates a landlord "to put and keep the premises in a fit and habitable condition."¹⁰⁹ In addition to this general mandate, specific duties are imposed on the landlord by section 2.104, including a provision that, if the local housing code standards are more stringent than

than the Act's other standards, the housing code must be used as the yardstick of the landlord's compliance.

104. See *Tenant Protection*, *supra* note 39, at 672.

105. See *Current Interest*, *supra* note 39, at 386-87, where the *Javins* and *Mease* decisions are discussed. A similar criticism of *Hinson v. Delis*, 26 Cal. App. 3d 162, 102 Cal. Rptr. 661 (1972), is found in 77 DICK. L. REV. 185, 193 (1972).

106. *Current Interest*, *supra* note 39, at 387. See also 84 HARV. L. REV. 729, 737-38 (1971). An analogy is made to the old constructive eviction doctrine, under which the tenant was forced to vacate with the risk that the alleged interference with his enjoyment of the premises would be found insufficient to have constituted an eviction.

107. *Current Interest*, *supra* note 39, at 387.

108. URLTA § 2.104(a)(1).

109. *Id.* § 2.104(a)(2).

the duties imposed by the Act, the housing code standards shall control.¹¹⁰ The comment to this section points out that housing code standards involve an exercise of the public police power, not limited to landlord-tenant or contractual relationships. Hence, the section only "establishes *minimum* duties of landlords consistent with the public standards."¹¹¹ Standards beyond the minimum are left to judicial development.

Although the Act's two-layered standard of habitability does not eliminate the shortcomings of the component standards entirely, neither does it take from the landlord and tenant any advantage that might have been gained by independent judicial development of the standards.

Landlord Obligations and Tenant Remedies

Habitability

Section 2.104 of the Act explicates the functions the landlord must perform to fulfill his primary obligation of maintaining the premises. He must comply with "applicable building and housing codes materially affecting health and safety,"¹¹² "make all repairs and do whatever else is necessary to put and keep the premises in a fit and habitable condition,"¹¹³ "keep all common areas . . . in a clean and safe condition,"¹¹⁴ maintain utilities and appliances "in good and safe working order,"¹¹⁵ provide receptacles and removal service for garbage and other waste,¹¹⁶ and supply running water, including ample hot water, and necessary heat.¹¹⁷ Section 2.104 contains provisions which allow the landlord to agree with the tenant that the latter shall perform certain repair and maintenance duties,¹¹⁸ but adequate safeguards are supplied to prevent abuse of this privilege.¹¹⁹ Further protection is afforded the tenant by

110. *Id.* § 2.104(b).

111. *Id.* § 2.104, Comment (emphasis supplied).

112. *Id.* § 2.104(a) (1).

113. *Id.* § 2.104(a) (2).

114. *Id.* § 2.104(a) (3).

115. *Id.* § 2.104(a) (4).

116. *Id.* § 2.104(a) (5).

117. *Id.* § 2.104(a) (6).

118. *Id.* § 2.104(c), (d).

119. Such an arrangement must be "entered into in good faith and not for the purpose of evading the obligations of the landlord." *Id.* § 2.104(c), (d) (1). No such arrangement may be entered into to cure a building or housing code violation. *Id.* § 2.104(d) (2). No such arrangement may be entered into which will "diminish or affect the obligation of the landlord to other tenants in the premises." *Id.* § 2.104(d) (3). The performance of

section 1.404, which forbids the conveyance or assignment of the landlord's right to receive rents to a party who does not undertake to maintain the premises as required by section 2.104.¹²⁰

In the event of a breach of the landlord's obligations, the tenant has available a variety of remedies, some of which are available generally and others of which are designed to redress specific types of landlord default. A fundamental tenant remedy found in section 4.101 confers on the tenant the right to terminate a rental agreement for material noncompliance by the landlord with terms of the rental agreement or noncompliance with section 2.104 "materially affecting health and safety."¹²¹ At least 30 days before termination, the tenant must notify the landlord of the breach, and the landlord is given 14 days to correct it. An exception to this provision arises when substantially the same noncompliance was the subject of similar notice by the tenant within the preceeding six months; in such case the tenant need give only 14 days notice, the landlord apparently having lost his right to cure the defect.¹²² In addition to terminating the lease, the tenant may recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or with section 2.104.¹²³

The tenant is authorized to employ self-help measures to remedy minor defects.¹²⁴ Specifically, if there is a breach of the landlord's obli-

duties by the tenant under such an arrangement will not be treated as a condition precedent to the performance of any duty by the landlord. *Id.* § 2.104(e).

120. This provision is amplified by the statement in the official comment that "the rights and remedies of the tenant under Articles II and IV cannot be defeated or thwarted by the assignment of rents." *Id.* § 1.404, Comment.

121. *Id.* § 4.101(a).

122. *Id.* The termination right is akin to rescission, which has been criticized as being of little assistance to the tenant. *See* Daniels, *supra* note 39, at 927-28. Such remedies are said to be "of virtually no advantage to the low-income tenant," conferring "illusory benefits of little more value to the low-income tenant than the municipal code enforcement remedy of an order to demolish" and representing only a marginal improvement over common law constructive eviction. *Id.* It is claimed that the indigent tenant will be unable to utilize such a remedy where there is a critical housing shortage. *Id.* Were this the only remedy provided by the URLTA, the validity of such criticism would be beyond question; however, termination is only one of several options available to the aggrieved tenant. It is the preferable option, however, in cases involving a severe breach of the landlord's obligations when an opportunity to obtain other housing exists.

123. URLTA § 4.101(b). Although it would appear from the language of this section that termination of the lease, actual damages, and injunctive relief are cumulative remedies, logic would indicate that termination and injunctive relief must be mutually exclusive. For a discussion of the possible implications of this section, see note 393 *infra* & accompanying text.

124. URLTA § 4.103.

gations under terms of the lease or section 2.104 and the reasonable cost of compliance is less than 100 dollars or one-half the periodic rent, whichever amount is greater, the tenant may cause the repairs to be made and deduct their cost from his rent,¹²⁵ provided he first notifies the landlord of his intention and allows the landlord a reasonable opportunity to repair.¹²⁶ Some uncertainty may arise concerning this remedy because it is unclear whether the dollar limitation is per defect, per month, or per tenancy.¹²⁷ Although some clarification would be advisable, the substance of the remedy is plain; it furnishes a simplified method by which the tenant can correct minor defects on his own initiative without resort to more drastic measures such as termination of the lease or institution of legal proceedings.¹²⁸

Section 4.104 provides a specific remedy where the landlord willfully or negligently fails to supply heat, utilities, or other essential services.¹²⁹ After notifying the landlord, the tenant may procure these services himself and deduct their cost from the rent;¹³⁰ alternatively, he may recover damages based upon the diminution in fair rental value of the premises due to lack of these services¹³¹ or procure substitute housing at the landlord's expense during the period of the landlord's noncompliance.¹³² Relief under section 4.104 cannot be used to supplement

125. *Id.* § 4.103(a).

126. *Id.*

127. Subcommittee, *supra* note 2, at 116-17; Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP., PROB. & TR. J. 495, 500 (1973).

128. Daniels, *supra* note 39, at 939, states that a dollar limitation on this type of remedy is not necessary: "[A]s a practical matter, the remedy will be used to make only minor repairs and not for correcting badly run-down properties, since tenants and tenant organizations simply do not have ready capital to finance major repairs." This assessment seems to ignore the *possibility* that there could be instances in which tenants will attempt major repairs. For the landlord to retain some control over what is done to his property, it seems reasonable to impose some limitation. See Subcommittee, *supra* note 2, at 116.

129. URLTA § 4.104.

130. *Id.* § 4.104(a) (1).

131. *Id.* § 4.104(a) (2).

132. *Id.* § 4.104(a) (3). The tenant is also excused from paying rent during the period of noncompliance. *Id.* Since the tenant is so excused and can recover the reasonable cost of substitute housing as long as it is not greater than the periodic rent, *id.* § 4.104(b), the question is raised whether these two "costs" to the landlord are meant to be cumulative. The plain language of section 4.104 suggests an affirmative answer; the landlord is, in effect, liable for a form of punitive damages, being deprived of his rent and, during the same period, being required to pay the cost of the tenant's substitute housing. Conversely, the tenant can "live for free" during this period, at the landlord's expense. This remedy is viewed in one commentary as a form of rent withholding. Note, *The Uniform*

relief under the general termination, damages, and self-help provisions.¹³³ Like the other forms of tenant redress in the Act, this remedy is not available until the landlord has been notified or in situations in which the defective condition resulted from the tenant's deliberate or negligent actions.¹³⁴

The Act also provides a limited remedy to the tenant who is the victim of unlawful ouster or exclusion from the premises, including ouster caused by the willful interruption of essential services by the landlord.¹³⁵ In such a case the tenant can recover possession or terminate the lease and, in either case, recover a limited amount of punitive damages, plus attorney's fees.¹³⁶ This remedy, however, is not related directly to the landlord's failure to furnish a habitable dwelling but rather concerns improper attempts to evict the tenant from the premises.

Also altered by the Act is the common law rule that the tenant remains obligated to pay rent when his leasehold is impaired by fire or other casualty, even though the premises become uninhabitable. Under the Act, the tenant may vacate all or part of the premises and deduct rent accordingly.¹³⁷

Finally, in addition to the direct remedies provided under the URLTA, the tenant is permitted to counterclaim for damages recoverable under the lease or the Act in an action by the landlord for possession or rent.¹³⁸ By linking the landlord's right to possession and rent with performance of his own duties, the counterclaim provision abrogates the common law theory of independent covenants.¹³⁹ The

Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities, 6 IND. L. REV. 741, 761 (1973). Rent withholding, however, is merely an interim measure providing no assurance that the tenant will not be required to pay rent for the period of withholding upon an adverse adjudication of his claim. In other words, rent withholding allows a *suspension* of the rental obligation, while section 4.104 (a) (3) *excuses* the tenant from paying the rent until termination of the noncompliance. It would appear that, because of the egregious nature of the breach involved (failure to supply essential services), the draftsmen intended that the section have a punitive effect upon the landlord.

133. URLTA § 4.104(c). The official comments indicate, however, that the remedy provided by section 4.107 for the landlord's unlawful ouster, exclusion, or diminution of services may be used in conjunction with the section 4.104 remedies. *Id.* § 4.104, Comment; § 4.107, Comment. See notes 135-37 *infra* & accompanying text for a discussion of the remedies provided in section 4.107.

134. URLTA § 4.104(d).

135. *Id.* § 4.107.

136. *Id.*

137. *Id.* § 4.106.

138. *Id.* § 4.105.

139. See *id.* § 4.105, Comment.

provision, in effect, authorizes the tenant to withhold rent¹⁴⁰ in the event of a breach of the landlord's duties which the tenant deems to be a bona fide justification for a damage claim, placing the burden on the landlord to institute legal action for rent owed or for possession for nonpayment of rent.¹⁴¹ After adjudication of the legal status of the parties, the tenant may remain in possession if he satisfies whatever rental obligation the court finds that he owes.¹⁴² If the tenant has vacated the premises after withholding rent, he may nevertheless assert his counterclaim for damages in an action by the landlord for rent.¹⁴³

Measure of Damages for Failure to Maintain Habitability

Both the case law and the URLTA recognize damages as one form of relief available to an aggrieved tenant upon proof of a breach of the landlord's obligation to maintain the premises. In contrast to the specificity with which the landlord's duties are set out in the Act, measurement of damages available to the aggrieved tenant under the Act receives sketchy treatment, the tenant being allowed to recover "actual damages."¹⁴⁴ No additional meaning is given this phrase by the official comments, nor is the phrase clarified by the general requirement of the Act that remedies "be so administered that an aggrieved party may recover *appropriate* damages."¹⁴⁵

The absence of a specific measure in the URLTA may be due to the fact that the case law on damages appears settled. If the tenant has not vacated the premises, damages, according to the judicial standard, are the difference between the rental value of the premises as warranted and the actual rental value. If he has been improperly evicted, either actually or constructively, the tenant may recover the amount by

140. Note, *supra* note 132, at 761-63; Subcommittee, *supra* note 2, at 118.

141. The court may, in its discretion, order the payment of the rent withheld into court pending its determination of the rights of the parties. URLTA § 4.105(a).

142. *Id.*

143. *Id.* § 4.105(b). Although rent withholding has been allowed by judicial decision and statutes in various jurisdictions, some courts have effectively disallowed it by refusing to permit assertion of an affirmative defense by the tenant as a counterclaim in a summary proceeding by the landlord. See *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 368-70, 280 N.E.2d 208, 218-19 (1972) (permitting assertion of a tenant counterclaim), where the dissenting opinion stated that the Illinois summary proceeding previously had been used "solely for obtaining possession of real estate, regardless of the question of rent due or damages sustained." *Id.* at 369, 280 N.E.2d at 219.

144. URLTA § 4.101(b).

145. *Id.* § 1.105(a) (emphasis supplied).

which the rental value of the premises over the unexpired term of his lease exceeds the rent he would have paid had he not vacated.¹⁴⁶

A court attempting to determine the amount of damages recoverable by a tenant under the URLTA is likely to resort to the recognized judicial measure of damages.¹⁴⁷ Although the failure to supply a damage formula may be seen as a shortcoming of the Act,¹⁴⁸ there is less need

146. In *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972), the court discussed the measure of damages as follows:

Where there has been a material breach of implied warranty, tenant's damages shall be measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition. . . . When tenant vacates he is then unaffected by the condition of the premises, and that factor loses relevance in the damage equation. For the balance of the term, tenant has lost the benefit of his bargain, assuming he has an advantageous lease. He is therefore entitled to recover at that time for the value of the lease for the unexpired term, that is, the then difference between the fair value of the premises if they had been as warranted and the promised rent, computed for that period. . . . In all events, tenant should have the incidental and consequential damages which fall within the general principles governing the allowance of such damages.

Id. at 797. See also *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973).

147. URLTA § 1.103 provides: "Unless displaced by the provisions of this Act, the principles of law and equity . . . supplement its provisions."

148. That the lack of a damage formula may create problems, especially for an indigent tenant, is demonstrated in *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970), where the court noted: "The most difficult aspect of this case is determination of the amount of abatement to which tenant is entitled." *Id.* at —, 268 A.2d at 561. The court adopted the standard breach of warranty measure of damages used in most cases of implied warranty, despite its recognition of the difficulties of proof that employment of such a measure of damages entails. *Id.* at —, 268 A.2d at 561-62. In view of these difficulties, it was held that the tenant need not produce expert testimony to prove damages, so long as the evidence showed the amount of damages "as a matter of just and reasonable inference, although the result be only approximate." *Id.* at —, 268 A.2d at 562, quoting *Story Parchment Co. v. Paterson*, 282 U.S. 555, 563 (1931). It was observed: "Certainly, if tenant were required to bear the cost of producing an expert witness, the effectiveness of the relief afforded . . . would be diminished." 111 N.J. Super. at —, 268 A.2d at 556. The court agreed to use a "percentage abatement" theory and arrived at what it felt was a "fair amount." *Id.* at —, 268 A.2d at 562. This method of determining tenant damages has been deemed desirable, since developing case law would eventually establish "going rates" for different housing code violations, thereby facilitating application of the formula. 84 HARV. L. REV. 729, 737 (1971).

Also relevant is the burden of proof when the tenant seeks recovery of damages. See *Daniels*, *supra* note 39, at 935-37. Where the tenant is seeking damages either as a plaintiff in an action against the landlord or in a counterclaim in a suit by the landlord for rent or possession, he undoubtedly would bear the burden of proof on the issue of the amount of damages. As a means of obviating the need for expert testimony to prove the diminution in rental value due to defects, the *Academy Spires* approach seems meritori-

to establish certainty in the measurement of damages than in the determination of landlord obligations. Both tenant and landlord need to be apprised of the precise nature of the duties owed; otherwise, an element of risk enters into the relationship in that imprecision may induce a party to rely, to his detriment, upon a misinterpretation of the landlord's obligations. Detrimental reliance upon a miscalculation of recoverable damages, however, seems unlikely.

Landlord's Duty to Deliver Possession

A new tenant seeking to enter the premises which he has just leased may discover that they are occupied by a previous tenant under an expired lease, by a third party intruder occupying the premises without any colorable right to do so, by the landlord himself, or by another tenant holding paramount title from the landlord. Absent statutory guidance¹⁴⁹ or an express covenant in the lease agreement,¹⁵⁰ a landlord gives each tenant an implied covenant that he will transfer possession of the premises to him at the beginning of the tenancy;¹⁵¹ the case law, however, is divided with respect to the nature of "possession."

One group of jurisdictions applies what is known as the "American" rule, which guarantees to a tenant only *legal* possession of the premises, an obligation satisfied merely by granting the tenant a right to immediate possession free from any interference by either the landlord or one claiming under him.¹⁵² The landlord incurs no liability if holdover tenants or third parties occupy the premises, the ouster of such parties being left to the new tenant¹⁵³ who, meanwhile, remains liable to his landlord for all rental payments due under the lease agreement.¹⁵⁴

ous. See *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (N.Y. City Civ. Ct. 1973); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y. City Civ. Ct. 1971). In both cases, the trial courts arrived at percentage values for abatement of rent apparently without the aid of expert testimony.

149. See N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

150. *Fox Realty Co. v. Montgomery Ward & Co.*, 124 F.2d 10 (7th Cir. 1941); *Nodine v. State*, 192 Misc. 572, 79 N.Y.S.2d 834 (Ct. Cl. 1948).

151. *Johnson v. Missouri-Kan.-Tex. Ry. Co.*, 216 S.W.2d 499, 503 (Mo. 1949); *Canaday v. Krueger*, 156 Neb. 287, 291, 56 N.W.2d 123, 127 (1952); *Shelton v. Clinard*, 187 N.C. 664, 122 S.E. 477 (1924); *Dougherty v. Thomas*, 313 Pa. 287, 169 A. 219 (1933); *Hannan v. Dusch*, 154 Va. 356, 153 S.E. 824 (1930); *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N.W. 35 (1887).

152. *Jenkins v. Smith*, 92 Ga. App. 296, 88 S.E.2d 533 (1955); *Cobb v. Lavalley*, 89 Ill. 331 (1878); *Snider v. Deban*, 249 Mass. 59, 144 N.E. 69 (1924); *Ward v. Hudson*, 199 Miss. 171, 24 So. 2d 329 (1946); *Dougherty v. Thomas*, 313 Pa. 287, 169 A. 219 (1933); *Hannan v. Dusch*, 154 Va. 356, 153 S.E. 824 (1930).

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

154. The American rule is supported by several rationales: the new tenant has ade-

Other jurisdictions impose a greater duty upon landlords by applying the "English" rule,¹⁵⁵ which requires the landlord to deliver actual, as well as legal, possession.¹⁵⁶ Tenants are entitled to immediate occupancy and have no obligation to oust a third party in wrongful possession;¹⁵⁷ the landlord must remove all such obstacles or find himself in breach of the contract.¹⁵⁸ The results under the English rule align more closely

quote remedies at his disposal with which to combat the wrongdoer; the landlord should not be responsible for another not under his control; and it is not the landlord's duty to shield another party from lawsuits. *Gardner v. Keteltas & McCarty*, 3 Hill 330, 38 Am. Dec. 637 (N.Y. 1842), approved in *United Merchants Realty & Improvement Co. v. Roth*, 193 N.Y. 570, 572, 86 N.E. 544, 546 (1908); *Hannan v. Dusch*, 154 Va. 356, 153 S.E. 824 (1930). The American rule has been adopted in the following: *Lost Key Mines, Inc. v. Hamilton*, 109 Cal. App. 2d 569, 241 P.2d 273 (1952); *Judd v. Ladd*, 1 Hawaii 13 (1847); *People v. Mattingly*, 106 Ill. App. 2d 74, 245 N.E.2d 647 (1969); *Rice v. Biltmore Apts. Co.*, 141 Md. 507, 119 A. 364 (1922); *Snider v. Deban*, 249 Mass. 59, 144 N.E. 69 (1924); *Ward v. Hudson*, 199 Miss. 171, 24 So. 2d 329 (1946); *Pendergast v. Young*, 21 N.H. 234 (1850); *Underwood v. Birchard*, 47 Vt. 305 (1875).

155. The various rationales underlying the rule include implied promises or covenants to place tenants in actual possession, *Cheshire v. Thurston*, 70 Ariz. 299, 219 P.2d 1043 (1950); *Bloch v. Busch*, 160 Tenn. 21, 22 S.W.2d 242 (1929); and the warranty of quiet enjoyment, *Kammerer v. U.S. Silica Co.*, 196 Ill. App. 527 (1915); *Ft. Terrett Ranch Co. v. Bell*, 275 S.W. 81 (Tex. Civ. App. 1925). Application of the warranty of quiet enjoyment will be of no assistance in many cases, due to the tendency of some courts to disallow tenants' recovery if they have never taken actual possession of the premises. *Schwartzman v. Wilmington Stores Co.*, 32 Del. 362, 123 A. 343 (1924); *Stiger v. Monroe*, 109 Ga. 457, 34 S.E. 595 (1899).

156. Alabama, Arkansas, Connecticut, Indiana, Iowa, Kentucky, Missouri, Nebraska, New Jersey, North Carolina, Oregon, and Tennessee follow the English rule. 2 R. POWELL, *POWELL ON REAL PROPERTY* § 225[1] n.2 (P. Rohan ed. 1973). See also *Cheshire v. Thurston*, 70 Ariz. 299, 219 P.2d 1043 (1950); *Baxley v. Davenport*, 75 Ga. App. 659, 44 S.E.2d 388 (1947); *Wallace v. Carter*, 133 Kan. 303, 299 P. 966 (1931); *Barfield v. Damon*, 56 N.M. 515, 245 P.2d 1032 (1952); *Mullins v. Brown*, 87 Ohio App. 427, 94 N.E.2d 574 (1950); *Dieffenbach v. McIntyre*, 208 Okla. 163, 254 P.2d 346 (1952); *Oriental Oil Co. v. Lindsey*, 33 S.W.2d 768 (Tex. Civ. App. 1930); *Shreiner v. Stanton*, 26 Wash. 563 (1901); *Huntington Easy Payments Co. v. Parsons*, 62 W. Va. 26, 57 S.E. 253 (1907); *Gross v. Heckert*, 120 Wis. 314 (1904).

New York, an early adherent to the American rule in *Teitelbaum v. Direct Realty Co.*, 172 Misc. 48, 13 N.Y.S.2d 886 (Sup. Ct. 1939), reversed its position in 1962 by the following statute:

In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration paid.

N.Y. REAL PROP. LAW § 223-a (McKinney 1968).

157. *Adrian v. Rabinowitz*, 116 N.J.L. 586, 186 A. 29 (Sup. Ct. 1936).

158. *Rice v. Whitmore*, 74 Cal. 619, 16 P. 501 (1888); *Herpolsheimer v. Christopher*, 76 Neb. 352, 111 N.W. 359 (1907); *Shelton v. Clinard*, 187 N.C. 664, 122 S.E. 477 (1924).

with the expectations of the parties at formation of the lease agreement.¹⁵⁹

Apparently unwilling to choose between the American and English rules, the draftsmen of the URLTA left the definition of possession to state law, stating: "At the commencement of the term a landlord shall deliver *possession* of the premises to the tenant in compliance with the rental agreement"¹⁶⁰ Neither this provision, the comment thereto, nor the tenant remedy provided for failure of the landlord to deliver possession¹⁶¹ indicate which party shall bear the burden of ousting a third party wrongfully on the premises. Notwithstanding adoption of the URLTA in a given jurisdiction, resolution of this question thus will depend upon the rule traditionally applied by its courts.

Upon establishing a failure to deliver possession, the tenant is entitled, under the URLTA, to rent abatement,¹⁶² a reflection of the common law tenet that possession by the tenant is a condition precedent to his obligation to pay rent under either the American or English rules.¹⁶³ Once denied possession the tenant has the option to rescind the lease agreement¹⁶⁴ or bring an action for possession against the landlord or any wrongdoer and recover actual damages.¹⁶⁵

The lease rescission remedy retains the common law right of a tenant to repudiate the lease agreement upon a failure to deliver possession¹⁶⁶ but, by incorporating a notice requirement, departs from the common law, which required no prior demand upon the landlord.¹⁶⁷ A notice requirement encourages disclosure of intentions between the parties and places no inordinate burden on tenants; however, since the Act does not provide for summary proceedings,¹⁶⁸ the five-day requirement suggested¹⁶⁹ may be too short to permit the landlord to remove holdover

159. Comment, *Exclusion of Tenant From Possession*, 3 Mo. L. Rev. 299, 302 (1938).

160. URLTA § 2.103 (emphasis supplied).

161. *Id.* § 4.102.

162. *Id.* § 4.102(a).

163. *Farmers' & Merchants' Nat'l Bank v. Bailie*, 138 Cal. App. 143, 145, 32 P.2d 157, 159 (1934).

164. URLTA § 4.102(a) (1).

165. *Id.* § 4.102(a) (2).

166. *Rispin v. Midnight Oil Co.*, 291 F. 481 (9th Cir. 1923); *Lalekos v. Manset*, 47 A.2d 617 (D.C. Mun. App. 1946); *Forshaw v. Hathaway*, 112 Misc. 112, 182 N.Y.S. 646 (Sup. Ct. 1920); *Hessel v. Johnson*, 129 Pa. 173, 18 A. 754 (1889).

167. *Murdock v. Roe*, 186 Mich. 233, 152 N.W. 969 (1915); *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283 (N.Y. 1837).

168. *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP., PROB. & TR. J. 550, 579 (1971) [hereinafter cited as *Trends*].

169. URLTA § 4.102(a) (1).

tenants or challenge other claims to the premises. This problem may be alleviated as the Act is adopted in individual states by tailoring the time allowed for notice to the usual length of summary proceedings in the jurisdiction.

For the new tenant who has been denied possession but desires to institute an action for possession rather than rescind, the Act resolves several problems existing under present rules of pleading and practice. Jurisdictions are split concerning the right of a tenant who has not previously been in possession to maintain an action in ejectment. Although a majority of jurisdictions permit such actions,¹⁷⁰ in a substantial minority the tenant who has not made a prior entry may not rely on ejectment.¹⁷¹ In providing that "[i]f the landlord fails to deliver possession . . . the tenant may . . . maintain an action for possession . . . against . . . any person wrongfully in possession,"¹⁷² the Act accords with the majority rule in permitting ouster of the trespasser irrespective of prior entry by the tenant. This language also eliminates the distinction existing in certain jurisdictions between actions to oust holdover tenants and actions to oust intruders who are strangers to the landlord, the latter type of action being nonmaintainable by a tenant who has made no prior entry even though the former type of action would be allowed under the same circumstances.¹⁷³ Finally, the availability of summary proceedings, which in many jurisdictions is predicated upon a plaintiff's prior entry and possession, is not so limited under the Act.¹⁷⁴

Parties who may be made defendants to a tenant's action for possession are named disjunctively in the Act,¹⁷⁵ indicating retention of the common law rule that there may be no joinder of the landlord and the third party in possession.¹⁷⁶ Nevertheless, the provision does represent an advance over the rule in some jurisdictions which, by prohibiting the use of summary proceedings by a tenant against one other than his landlord, limits the new tenant's ability to oust a holdover tenant.¹⁷⁷

170. *E.g.*, *Ewert v. Robinson*, 289 F. 740 (8th Cir. 1923); *Gardner v. Keteltas & McCarty*, 3 Hill 330, 38 Am. Dec. 637 (N.Y. 1842).

171. *E.g.*, *Dime Bank & Trust Co. v. Walsh*, 143 Pa. Super. 189, 17 A.2d 728 (1941).

172. URLTA § 4.102(a).

173. *Anderson v. Kokomo Rubber Co.*, 161 Ga. 842, 132 S.E. 76 (1926).

174. The Act makes no specific provision for summary proceedings. *See* note 168 *supra* & accompanying text. Thus, the tenant's "action for possession," URLTA § 4.102(a)(2), would encompass such summary proceedings as are available under other state law.

175. URLTA § 4.102(a)(2) provides that an action may be maintained "for possession of the dwelling unit against the landlord or any person wrongfully in possession"

176. *Hughes v. Hood*, 50 Mo. 350 (1872).

177. *Smith v. Feigin*, 190 Misc. 461, 75 N.Y.S.2d 204 (Sup. Ct. 1947), *rev'd on other*

As noted, tenants in American rule jurisdictions will continue under the URLTA to bear the obligation of bringing action themselves to wrest possession from the wrongful occupant of the leased premises. Burdensome though this obligation may be, it is lightened considerably by the damage provisions of the Act. Not only may the tenant who is successful in his action for possession recover "actual" damages,¹⁷⁸ which would appear to encompass the consequential damages incurred as a result of having to reside elsewhere,¹⁷⁹ but punitive damages also may be awarded upon proof that "failure to deliver possession is willful and not in good faith"¹⁸⁰ The measure of damages suggested by the Act, either three months' rent or three times the tenant's actual damages, whichever is greater, plus reasonable attorney's fees,¹⁸¹ should deter deliberate attempts to interfere with a tenant's rightful possession of his dwelling unit. Moreover, the inclusion of attorney's fees eliminates perhaps the single most objectionable feature of the American rule from the tenant's standpoint, namely, the cost of legal representation necessary to secure possession. Permitting the award of attorney's fees substantially increases the likelihood that a tenant will, in fact, pursue an action for possession, thereby further increasing the deterrent value of the punitive damages provision.

Although the generous damages available under the Act alleviate the burdens borne by the tenant in American rule jurisdictions, the distinctions between the American and English rules would not be eliminated. From a tenant's standpoint, the English rule remains preferable. The provisions of the Model Residential Landlord-Tenant Code governing the landlord's duty to deliver possession¹⁸² expressly incorporate the English rule.¹⁸³ Such a rule accords better with the modern contractual approach to landlord-tenant law because it places the parties in the positions for which they bargained, the tenant having a right to full possession of the premises and the landlord having the duty to deliver that possession.

In summary, the URLTA falls short of the goals tenants doubtless

grounds, 273 App. Div. 277, 77 N.Y.S.2d (1948); *Cannon v. Gordon*, 181 Misc. 950, 48 N.Y.S.2d 124 (Sup. Ct. 1944).

178. URLTA § 4.102(a)(2).

179. One commentator has expressed doubt as to the availability of consequential damages. Subcommittee, *supra* note 2, at 111.

180. URLTA § 4.102(b).

181. *Id.*

182. MODEL CODE, *supra* note 5, § 2-201.

183. *Id.* §2-202, Comment.

would set for legislation in this area. Although the tenant who has not yet entered the premises has full standing under the Act to oust a wrongful occupant—a significant advance in many jurisdictions—a better rule would allow him to look to the landlord to perform that function.

Security Deposits

Residential lease agreements typically provide for advance payment by the tenant of a sum of money to be held by the landlord during the tenancy as security against default in rent or damage to the premises exceeding normal wear and tear. These security deposits are for the sole benefit of the landlord, and the competitive ability of landlords to demand and obtain such deposits directly reflects the tightness of the housing market.¹⁸⁴ Present law is inadequate to deal with the potential and actual abuses inherent in such a one-sided situation; in the great majority of jurisdictions, a landlord is limited only by his considerable bargaining power in negotiation of security deposits. Accordingly, the subservient role of the tenant in such matters is undergoing an examination which has engendered novel thinking.¹⁸⁵

Unfairness to the tenant may arise from several aspects of the administration of security deposits, including the size of the deposit demanded, the conditions surrounding return of the deposit, the various rights and duties arising upon assignment of the landlord's interest in the deposit, the landlord's freedom to use the money deposited for his own purposes, the landlord's right to retain any interest or investment profits earned by the deposit, and the tenant's priority in the deposit vis-a-vis creditors of the landlord upon the landlord's insolvency. The URLTA encompasses several steps taken towards alleviating possible overreaching by the landlord, although it falls short of covering all the areas which merit legislative attention.

The amount of the security deposit which the landlord may exact as a condition to the execution of a lease has rarely, if ever, been reviewed judicially, although in recent years a few state legislatures have initiated a minority trend toward establishing legal maximums for security deposits.¹⁸⁶ Such regulation is essential to prevent landlords from taking

184. The United States has changed from a country that was 64 percent urban in 1950 to one that was 73.5 percent urban in 1970. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971. See *Trends*, *supra* note 168, at 550-57; *Current Interest*, *supra* note 39.

185. See ONTARIO LAW REFORM COMMISSION, LANDLORD AND TENANT LAW APPLICABLE TO RESIDENTIAL TENANCIES 21, 28 (Interim Report 1968).

186. ARIZ. REV. STAT. ANN. § 33-1321(A) (Supp. 1973) (maximum of one and one-

unfair advantage of the intensifying lessors' market to collect larger deposits than realistically are needed. None of the statutes states a maximum amount in terms of an absolute dollar limit, tying the maximum amount instead to the monthly rental, with limits ranging between one and two months' rent. This approach reserves to the landlord some flexibility in setting appropriate deposit amounts, since the monthly rental generally will be commensurate with the value of the leased property and furnishings and, therefore, will reflect the potential for damage against which the landlord must protect himself.¹⁸⁷

Prior state statutes provided the model for the URLTA provision which suggests that security deposits be limited to an amount equivalent to one month's rent,¹⁸⁸ the amount customarily given as a security deposit.¹⁸⁹ Such a deposit would adequately protect landlords against loss caused by a tenant's midterm departure from the premises since little difficulty should be experienced in reletting the premises; likewise, the amount ordinarily should cover physical damage in unfurnished premises. Arguably, however, a deposit equal to one month's rent could prove inadequate in the case of a furnished dwelling where the extent of possible damage is substantially greater.¹⁹⁰

Abuses of the security deposit system occur most commonly after the termination of the tenancy even though tenants have a common law right to immediate return of security deposits at that time, either in full if all the terms of the lease agreement have been met or as reduced by valid landlord claims.¹⁹¹ Notwithstanding this right, tenants frequent-

half months' rental); HAWAII REV. STAT. § 521-44(b) (Supp. 1972) (maximum of one month's rental); MD. ANN. CODE art. 21, § 8-213(b) (Repl. Vol. 1973) (maximum of two months' rental or 50 dollars, whichever is greater); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973) (maximum of two months' rental); N.J. STAT. ANN. § 46:8-21.2 (Supp. 1973) (maximum of one and one-half months' rental); PA. STAT. ANN. tit. 68, § 250.511a (Supp. 1973) (maximum of two months' rental during first year, maximum of one month's rental during second and succeeding years).

187. The effectiveness of these floating maximums is vitiated whenever a landlord is able to charge exorbitant rent disproportionate to the value of the rental property because of the uncompetitive nature of the local market.

188. URLTA § 2.101(a).

189. See generally 1 CCH Pov. L. REP. ¶ 2035 (1972). The fact that the practice of setting security deposits at one month's rental is so widespread may account for the paucity of cases in the area. For a discussion of the several considerations affecting the amount of a security deposit, see Wilson, *Lease Security Deposits*, 34 COLUM. L. REV. 426 (1934).

190. Subcommittee, *supra* note 2, at 109. This commentary suggests that the draftsmen of the URLTA have overlooked the peculiar problems of the furnished dwelling.

191. *Auker v. Gerald*, 61 Ill. App. 2d 425, 214 N.E.2d 618 (1966); *Westbrook v.*

ly encounter negligent or willful retention of their deposits by careless or unscrupulous landlords. With the tenant having vacated the premises, the landlord has no risk in terms of rent withholding or damage to the premises. Thus lacking any practical leverage, the tenant's only recourse is to legal action, a step rarely justified by the amount in controversy.¹⁹²

Statutory response to the tenant's plight has been varied. Legislation in many states limits the time during which landlords must refund security deposits to periods ranging from 14 to 45 days,¹⁹³ and most of these statutes provide for mandatory written notice to the tenant of any amounts to be withheld by the landlord.¹⁹⁴ Recognizing that noncom-

Masonic Manor, 185 Neb. 660, 178 N.W.2d 280 (1970); *Tuteur v. P.&F. Enterprises, Inc.*, 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970); *Datz v. Wolfe*, 42 Misc. 2d 956, 249 N.Y.S.2d 586 (Dist. Ct. 1964); *Green v. Frahm*, 176 Cal. 259, 168 P. 114 (1917); *Security Deposits and Guaranties Under Leases*, 1 REAL PROP., PROB. & TR. J., 405, 414 (1966) [hereinafter cited as *Security Deposits*].

192. Subcommittee, *supra* note 2, at 110; Comment, *Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Snares In an Untested Law—Colo. Rev. Stat. Ann. §§ 58-1-26 to -28*, 49 DENVER L.J. 453 (1973).

193. ARIZ. REV. STAT. ANN. § 33-1321(C) (Supp. 1973) (14 days); CAL. CIV. CODE § 1950.5(c) (West Supp. 1973) (14 days); FLA. STAT. ANN. § 83.261(4) (Supp. 1973) (15 days for landlords with five or more rental units); HAWAII REV. STAT. § 521-44(c) (Supp. 1972) (14 days); LA. REV. STAT. ANN. § 9:3251 (Supp. 1973) (one month); MD. ANN. CODE art. 21, § 8-213(f) (Repl. Vol. 1973) (45 days); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973) (30 days); N.J. STAT. ANN. § 46:8-21.1 (Supp. 1973) (30 days); PA. STAT. ANN. tit. 68, § 250.512(a) (Supp. 1973) (30 days).

194. California does not require written notice of amounts withheld, CAL. CIV. CODE § 1950.5(c) (West Supp. 1973), while Massachusetts requires only that "[a]ny deduction for damage pursuant to this section shall be itemized by the landlord with particularity indicating the nature of the repair necessary to correct any damage and the actual or estimated cost thereof." MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973). Although this notice usually will be written, and the draftsmen of this section probably intended it to be in writing, the express language of the statute does not require a writing. Similarly, Louisiana requires merely an "itemized statement accounting for the proceeds which are retained." LA. REV. STAT. ANN. § 9:3251 (Supp. 1973).

Neither Massachusetts nor New Jersey, which require written notice by either registered or certified mail, expressly provides that this notice be communicated to the tenant within a specified period. Although the New Jersey statute might be interpreted as requiring that notice be sent before the deadline for return of security deposits, there is no necessary inference. The possibility remains, therefore, that in these states a landlord can refund an arbitrary amount and delay any written explanation to the tenant until the facts and evidence have grown stale or the tenant has given up his fight. MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973); N.J. STAT. ANN. § 46:8-21.1 (Supp. 1973).

Louisiana, Florida, and Pennsylvania require that written notice be given within certain time limits and, further, cause landlords to forfeit their right to impose a claim on deposits held if they should fail to give the mandatory notice. FLA. STAT. ANN.

pliance is remediable only by a court judgment, the costs of which generally exceed its utility, some states have provided for recovery from the landlord of costs and attorney's fees in addition to the withheld deposit.¹⁹⁵

All of these types of remedies are included in the URLTA.¹⁹⁶ Refund along with written notice of amounts withheld must be accomplished within a suggested 14-day period.¹⁹⁷ Tenants are encouraged to pursue

§ 83.261(4) (Supp. 1973); PA. STAT. ANN. tit. 68, § 250.512(b) (Supp. 1973); LA. REV. STAT. ANN. § 9:3251 (Supp. 1973). Maryland stipulates that notice of an intended claim against a security deposit be given 15 days prior to the actual withholding. Failure to give such notice precludes the landlord from withholding funds. MD. ANN. CODE art. 21, §§ 8-213(f), (h) (Repl. Vol. 1973). The Maryland statute also requires that landlords give new tenants a written list of all damages existing at the beginning of the tenancy within 15 days of occupancy. Upon a landlord's failure to do so, his tenant becomes entitled to an amount calculated at three times the security deposit less any amount which the landlord could rightfully withhold. *Id.* § 8-213(d).

Hawaii has enacted the strictest legislation covering notice requirements. Within 14 days after termination of the tenancy, landlords must notify tenants in writing of their intent to withhold all or any part of a deposit, include "particulars of and grounds for the retention," and include written notice of the costs of repair. Failure to comply with this section causes a landlord to forfeit his claims. HAWAII REV. STAT. § 521-44(c) (Supp. 1972). The burden of this progressive legislation on most landlords is slight as, in the course of re-renting, they will necessarily enter the premises for cleaning and repair before the new occupant arrives. The objective safeguards that such written notice gives tenants against subsequent landlord claims for damages caused by prior tenants seems to outweigh any slight additional burden placed on landlords. Improved disclosure is the goal of these sections; an honest landlord loses nothing as long as he acts promptly within the deadline.

195. Maryland allows a recovery of three times the amount withheld plus reasonable attorney's fees, MD. ANN. CODE art. 21, § 8-213(f)(iv) (Repl. Vol. 1973), while New Jersey permits recovery of two times the amount withheld "together with full costs of any action." N.J. STAT. ANN. § 46:8-21.1 (Supp. 1973). Remedies available to tenants in Arizona and Pennsylvania are limited to two times the amount wrongfully withheld. ARIZ. REV. STAT. ANN. § 33-1321(D) (Supp. 1973); PA. STAT. ANN. tit. 68, § 250.512(a) (Supp. 1973). Louisiana allows the court, "in its discretion [to] award costs and attorney's fees to the prevailing party." LA. REV. STAT. ANN. § 9:3253 (Supp. 1973). This section does not attempt to prejudge the reasonableness of attorney's fees as do so many other statutes, and, by permitting an award of such fees to a prevailing landlord, it may deter actions for recovery by some tenants. Hawaii returns only the amount wrongfully withheld and the "cost of suit." HAWAII REV. STAT. § 521-44(h)(2) (Supp. 1972).

Two states have adopted dissimilar remedies, neither of which requires reimbursement of attorney's fees. Massachusetts allows a double damage recovery plus interest thereon at five percent. MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973). California provides only for limited punitive damage recovery plus actual damages. CAL. CIV. CODE § 1950.5(f) (West Supp. 1973).

196. URLTA § 2.101(b), (c).

197. *Id.* § 2.101(b). The Model Code provides for a two-week mandatory deadline for the return of funds on deposit. MODEL CODE, *supra* note 5, § 2-401(2). Section 2.101(b) of the URLTA appears superior to its Model Code counterpart because the

their legal remedies by provision that, in addition to the recoverable security deposit and reasonable attorney's fees, a tenant may be awarded punitive damages in the amount of twice the security deposit to be refunded,¹⁹⁸ such damages being available whether or not the landlord withheld the deposit willfully.¹⁹⁹

More comprehensive protection of tenant rights to security deposits in the post-tenancy period is provided by the URLTA than by any other present statute. The only provision absent from the Act which might further protect tenant interests concerning such deposits is the criminal penalty the Model Code imposes upon a landlord who wrongfully and willfully retains a security deposit.²⁰⁰

Treatment of Security upon Transfer of the Landlord's Interest

Tenants have no protection under the common law for their security deposits in the event a landlord transfers his reversionary interest in the

Act applies its 14-day deadline to all situations, requiring landlords to itemize all withheld amounts in a written notice to tenants within the same time period. The Model Code fails to require written notice itemizing amounts withheld by landlords, and it contains a potential escape clause for unscrupulous landlords: "if at the end of this period, the landlord is in the process of remedying tenant's defaults under Sec. 2-304(1) [Remedy for Tenant's Waste, Failure to Maintain, or Unlawful Use], the landlord may retain the security deposit until he has been able to ascertain the cost of the remedy." MODEL CODE § 2-401(2). While the draftsmen of the Model Code undoubtedly intended this exception to apply only to unusual situations where the total extent of a tenant's damages is difficult to ascertain due to the nature of the defect or inability to obtain a professional estimate of repair within the two-week period, the wording of this section is sufficiently ambiguous to allow a landlord to parlay the meticulous itemizing of total damages into a lengthy retention of the tenant's funds until the tenant abandons his claim. See note 192 *supra* & accompanying text. The result apparently intended could have been obtained if, for example, the draftsmen had required the deposit of these funds in an interest-bearing escrow account which would be disbursed to the proper party upon a final determination of actual damages.

198. URLTA § 2.101(c).

199. The Model Code provides that, upon proof of a willful retention, a landlord is guilty of a misdemeanor. One-half of any fine imposed on the landlord is forwarded to the tenant in addition to any damages recovered. MODEL CODE §§ 2-401(5), 3-501, 3-502. Hawaii allows treble damages plus costs of suit if the tenant can prove "willfulness." HAWAII REV. STAT. § 521-44(h)(1) (Supp. 1972). Louisiana allows tenants to recover "actual damages or two hundred dollars, whichever is greater, from the landlord or lessor" if that person willfully fails to return any amounts due within the one-month period; a landlord's "failure to remit within thirty days after written demand for a refund shall constitute willful failure." LA. REV. STAT. ANN. § 9:3252 (Supp. 1973). For a discussion of a tenant's problems in proving willful retention, see Comment, *Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Snares In An Untested Law—Colo. Rev. Stat. Ann. §§ 58-1-26 to -28*, 49 DENVER L.J. 453, 456 (1973).

200. MODEL CODE §§ 2-401(5), 3-501, 3-502.

premises, since, absent an express lease covenant to the contrary, the grantor-landlord is not obligated to return a deposit merely because he terminates his status as landlord.²⁰¹ Furthermore, tenants cannot prevent the transfer of their security deposits to another landlord from whom subsequent recovery may be even more difficult than it would be from the original landlord.²⁰²

Because the majority of jurisdictions applying the common law treat the landlord's obligation to return a security deposit as a personal covenant²⁰³ which does not "run with the land,"²⁰⁴ the grantee-landlord takes the deposit free of any obligation to return it upon termination of the tenancy.²⁰⁵ If a grantor-landlord absconds with the deposits after transferring his interest, the tenant is left without an action against the grantee-landlord and little chance for recovery from the departed landlord. Tenants may encounter similar difficulty upon a transfer of the lease from one corporate entity to another owned by the same landlord, and uneducated or uninformed tenants may find the corporate web impossible to unravel.

In contrast to the apparent complete absence of statutory remedies prior to the drafting of the uniform acts, both the Model Code and the URLTA protect the tenant against the loss of his security deposit due to a change in landlords. The URLTA provision concerning security

201. *Gallagher v. McMann*, 119 Cal. App. 688, 7 P.2d 204 (1932); *Rosenfeld v. Aaron*, 248 N.Y. 437, 162 N.E. 478 (1928); *Ross v. McCall*, 283 S.W. 891 (Tex. Civ. App. 1926).

202. *Eldredge v. Jensen*, 89 Idaho 243, 404 P.2d 624 (1965); *Perkins v. Langdon*, 231 N.C. 386, 57 S.E.2d 407 (1950). See also *Strum*, *supra* note 127, at 496-97. Tenants may object to the transfer of security deposits to a financially weak landlord since, in many states, in the event of the landlord's insolvency tenants will have no priority over other creditors in the deposited funds. See notes 215-18 *infra* & accompanying text.

203. *Cummings v. Freehold Trust Co.*, 118 N.J.L. 193, 191 A. 782 (Ct. Err. & App. 1937); *Daly v. Schenk*, 9 N.J. Misc. 734, 155 A. 466 (Sup. Ct. 1931).

204. *Partington v. Miller*, 122 N.J.L. 388, 5 A.2d 468 (Sup. Ct. 1939); *Cummings v. Freehold Trust Co.*, 118 N.J.L. 193, 191 A. 782 (Ct. Err. & App. 1937); *Mallory Assoc. v. Barving Realty Co.*, 300 N.Y. 297, 90 N.E.2d 468 (1949); *Pollack v. Jackson*, 124 Misc. 608, 209 N.Y.S. 120 (N.Y. City Ct. 1925). This personal covenant is based on privity of contract. *Kaufman v. Williams*, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918); *Tuteur v. P.&F. Enterprises, Inc.*, 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970).

205. *Tuteur v. P.&F. Enterprises, Inc.*, 21 Ohio App. 2d 122, 255 N.E.2d 284 (1970). In certain situations the grantee does become liable to tenants for the amount of their deposits: where the grantee becomes a substitute pledgee, *Four-G Corp. v. Ruta*, 25 N.J. 503, 138 A.2d 18 (1958); *Kaufman v. Williams*, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918); where the grantee assumes the obligations of the grantor, *Moskin v. Goldstein*, 225 Mich. 389, 196 N.W. 415 (1923); and where the grantee accepts the deposited funds as a set-off against the purchase price, *Four-G Corp. v. Ruta*, 25 N.J. 503, 138 A.2d 18 (1958); *Walter H. Sullivan, Inc. v. Johnson*, 116 Cal. App. 591, 3 P.2d 72 (1931).

deposits expressly declares that "[t]he holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this section."²⁰⁶ Thus, the grantee-landlord stands squarely in the shoes of the grantor-landlord if the grantee-landlord has the deposits in his possession; in effect the obligation to return security deposits "runs with the land."²⁰⁷ Moreover, the Act retains an alternative remedy for tenants against the grantor-landlord, who "remains liable to the tenant for all security recoverable by the tenant"²⁰⁸ The rationale underlying this preservation of the grantor-landlord's liability is expressed as follows: "As between the original landlord and tenant, it is intended that the loss for failure to account for security and prepaid rent if recoverable should fall upon the landlord who, in contrast to the tenant, can take steps to protect the integrity of the security and prepaid rent account at the time of sale."²⁰⁹ The Act imposes on the grantor-landlord the role of a surety, forcing him to pay his former tenants an amount equivalent to the value of their deposits if the grantee-landlord cannot refund the deposits for any reason.²¹⁰

206. URLTA § 2.101(e).

207. The courts of Michigan follow this rule. Professor Casner has observed: "There appears to be no legal reason why the covenant cannot be treated as one running with the land, the obligation thus devolving upon the grantee of the reversion." 1 AMERICAN LAW OF PROPERTY § 3.73 (A.J. Casner ed. 1952) [hereinafter cited as Casner].

208. URLTA § 2.105.

209. *Id.* § 2.105, Comment. Prior common law decisions holding that the liability was personal to grantor-landlords, see notes 203-04 *supra* & accompanying text, appear to have been concerned with the possibility that grantee-landlords might not be aware of the existence of the deposits in question at the time of the conveyance and that some hardship would befall them as a result. See 1 Casner, *supra* note 207, § 3.73.

210. A close examination of URLTA §§ 2.101(b), (e) reveals imprecise wording which could vitiate the progressive nature of these sections. Section 2.101(e) binds grantee-landlords to the provisions of subsection (b), which refers to required "landlord" actions concerning funds "held by the landlord as security." It is unclear whether a literal reading of these subsections results in the grantee-landlord being accountable only when the grantor-landlord actually placed these funds in his possession or also when such funds are in the possession of any "landlord." It is submitted that a preferable reading would hold the grantee-landlord responsible for any deposit paid anyone by his new tenants. Since most security deposit requirements are included in the leases, copies of which a purchasing landlord assuredly would obtain, the grantee-landlord would be apprised of outstanding security deposits. Furthermore, the grantee-landlord is in a better position to track down the absconding landlord than are individual tenants. *Trends, supra* note 168, at 587. Such a construction of the Act would place the burden of protecting the tenants' rights upon the new landlord, in consonance with the break with the common law which this subsection accomplishes. "Landlord" would be interpreted to mean any landlord in the chain of ownership of the reversionary

Unlike the URLTA, the Model Code limits tenants to a recovery of the security deposit from the present landlord only. It directs the grantor-landlord either to turn over the security deposits to his successor with notification to tenants of the name and address of the new holder of the deposits or to return the funds to the tenant.²¹¹ Upon performance of either alternative obligation, the original landlord is relieved of any further liability respecting the deposits. The new landlord who receives the security deposits takes with them the rights and obligations of the original landlord.²¹² Unlike the URLTA,²¹³ however, the Model Code provides the tenant no recourse against the original landlord if the new landlord breaches his obligations.

State legislation in this area has been sporadic, with the existing statutes being divided between those adopting the proposals of the Model Code and those following the Act.²¹⁴ It is submitted that the Act is superior because of its provisions for dual liability of both old and new landlords. Tenants will find either form of statute preferable to the case law on this point.

Characterization of Security Deposit—Debt, Pledge, or Trust?

Following the execution of a lease agreement and payment of a security deposit, the landlord is assured that the deposited funds will remain in his hands at least for the duration of the lease term since early termination without the landlord's consent ordinarily will result in his permanent retention of the funds. If the business-minded landlord invests the funds, the question arises whether the resulting profits may be claimed by the landlord, who has an absolute right to the invested funds during the lease term, or by the tenant, who has an absolute right to return of the invested funds upon compliance with the lease provisions. Another common dispute concerns priority in the security deposit, in the event of the landlord's insolvency, between the tenant's

interest subsequent to the beginning of a tenancy and prior to its termination. An interpretation of "landlord" to mean only the landlord at the termination of the tenancy would do violence to the progressive spirit of the Act.

211. MODEL CODE § 2-401(3).

212. *Id.* § 2-401(4).

213. See notes 209-10 *supra* & accompanying text.

214. Arizona is the only state which has expressly adopted the wording of the proposed Act. ARIZ. REV. STAT. ANN. §§ 33-1321(F), -1325(A) (Supp. 1973). Maryland has enacted a statute which seems to effect the same result but which is susceptible to the same questions which surround the wording of the Act. MD. ANN. CODE art. 21, § 8-213(e) (Repl. Vol. 1973); see note 210 *supra*.

right to a refund of the deposit and the claims of the landlord's creditors. Proper resolution of both of these issues depends upon the characterization of the security deposit. Absent an express agreement by the parties, the resulting relationship between landlord and tenant may be that of creditor-debtor, pledgor-pledgee, or trustee-beneficiary. In some respects, the URLTA lacks the clarity of the Model Code and existing state legislation on this issue.

Most frequently, the landlord and tenant are said to stand as debtor and creditor.²¹⁵ Where the relationship is so characterized, the landlord, as debtor, may use the funds as he desires while they are in his possession. He has no obligation to keep the deposited funds intact nor to return to the tenant any profits realized from their use,²¹⁶ despite the fact that title to the deposited funds remains in the tenant subject to the terms of the lease agreement.²¹⁷ Because the tenant must rely solely upon the general credit of the landlord for recovery of his deposit upon termination of the lease, and because he has no preference over other creditors of the landlord in the event of the landlord's insolvency,²¹⁸ such a characterization of the relationship is disadvantageous to the tenant where his landlord is heavily indebted.²¹⁹

A pledgor-pledgee relation has been held to exist in some states.²²⁰

California and New Jersey emulate the Model Code. CAL. CIV. CODE § 1950.5(d) (West Supp. 1973); N.J. STAT. ANN. § 46:8-21 (Supp. 1973). New York follows the Model Code in format, but instead of the "reasonable time" allowed by section 2-401(3) of the Model Code, New York makes such action mandatory within five days after the transfer of the reversion. N.Y. GEN. OBLIG. LAW § 7-105(1) (McKinney Supp. 1973). New York also allows the grantor-landlord to keep the security deposits of his former tenants only if he notifies them by registered or certified mail of his intentions. *Id.* § 7-105(1)(c).

215. *Young v. Cobbs*, 83 So. 2d 417 (Fla. 1955); *Handle ex rel. Keswick Theatres Corp. v. Real Estate-Land Title & Trust Co.*, 316 Pa. 116, 173 A. 313 (1934); 1 Casner, *supra* note 207, § 3.73.

216. *Rambach v. Heights Theatres, Inc.*, 239 App. Div. 203, 267 N.Y.S. 208 (1933); *Lefkowitz v. Parkchester Apts. Co.*, 61 Misc. 2d 1020, 307 N.Y.S.2d 741 (Sup. Ct. 1970); *Goodman v. Schached*, 144 Misc. 905, 260 N.Y.S. 883 (County Ct. 1932); *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956).

217. *Burns Trading Co. v. Welborn*, 81 F.2d 691 (10th Cir. 1936); *City Inv. Co. v. Pringle*, 73 Cal. App. 782, 239 P. 302 (1925).

218. *Malco Trading Corp. v. Mendelson-Silverman, Inc.*, 240 App. Div. 322, 269 N.Y.S. 95 (1934); *Sadow v. Poskin Realty Corp.*, 63 Misc. 2d 499, 312 N.Y.S.2d 901 (Sup. Ct. 1970); *Harris, A Reveille To Lessees*, 15 S. CAL. L. REV. 412, 413-16 (1942).

219. See Klamen, *Landlord, Tenant and Lender Lease Security Deposit Problems*, 7 LAW NOTES, 123 (1971).

220. *In re Morrison-Barnhart Motors, Inc.*, 142 F. Supp. 845 (N.D. Ohio 1956); *Rasmussen v. Helen Realty Co.*, 92 Ind. App. 278, 168 N.E. 717 (1929); *Partington v.*

As with the debtor and creditor relationship, the pledgee-landlord has no duty to keep deposits intact²²¹ or to avoid commingling them with his own funds²²² although title to the security deposit remains with the tenant.²²³ Under the pledge relationship, however, the landlord must hold the original deposit or equivalent substituted funds at all times during the period of the tenancy.²²⁴ These funds are earmarked as the property of the tenant, giving him priority in them over any creditors of the landlord in bankruptcy.²²⁵

Occasional decisions in several jurisdictions have treated security deposits as trusts²²⁶ with the landlord as trustee.²²⁷ Even within their own jurisdictions, however, these decisions do not represent the majority position.²²⁸ Trust status is more likely to be raised by stipulations between the negotiating parties or legislative action than by judicial decision. A New York statute, the forerunner of recent enactments which have created trust relationships, provides:

Whenever money shall be deposited or advanced on a contract . . . for the use or rental of real property as security . . . , such money, . . . until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same. . . .²²⁹

Miller, 122 N.J.L. 388, 5 A.2d 468 (Sup. Ct. 1939); *Four-G Corp. v. Ruta*, 45 N.J. Super. 128, 131 A.2d 566 (App. Div. 1957).

221. *Colantuoni v. Balene*, 95 N.J. Eq. 748, 123 A. 541 (Ct. Err. & App. 1924).

222. *Haskel v. 60 West Fifty-Third Street Corp.*, 138 Misc. 595, 246 N.Y.S. 698 (Mun. Ct. 1929).

223. *Colantuoni v. Balene*, 95 N.J. Eq. 748, 750, 123 A. 541, 542 (Ct. Err. & App. 1924).

224. *Harris*, *supra* note 218, at 421.

225. *Security Deposits*, *supra* note 191, at 416.

226. Although security deposits are treated as having a trust status in these instances, a true trust does not actually exist. *People v. Horowitz*, 138 Misc. 794, 798, 247 N.Y.S. 365, 370 (Mag. Ct. 1931).

227. *Atlas v. Moritz*, 217 App. Div. 38, 216 N.Y.S. 490 (1926); *Alumor Garage, Inc. v. George L. Stivers, Inc.*, 128 Misc. 400, 218 N.Y.S. 683 (N.Y. Mun. Ct. 1926).

228. *Boteler v. Koulouris*, 1 Cal. App. 2d 566, 37 P.2d 136 (1934); *Levinson v. Shapiro*, 238 App. Div. 158, 263 N.Y.S. 585 (1933); *Mendelson-Silverman, Inc. v. Malco Trading Corp.*, 146 Misc. 215, 260 N.Y.S. 881 (Sup. Ct.), *aff'd*, 238 App. Div. 852, 262 N.Y.S. 991 (1933); *Goodman v. Schached*, 144 Misc. 905, 260 N.Y.S. 883 (County Ct. 1932).

229. N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1973). *See also* N.J. STAT. ANN. § 46:8-19 (Supp. 1973), which expressly denominates the relationship in that state between landlord and tenant a trust relation, and stipulates that the trust funds be placed in a

In keeping with the trust theory, these statutes provide that funds on deposit are exempt from the claims of creditors of the landlord,²³⁰ and conversion usually will lie for a landlord's failure to comply with these statutes.²³¹ Presumably, in a trust relationship the landlord would have to account for any profits realized from use or misuse of the funds in his hands.

Creation of a trust fund relationship by statute appears to be the only effective means by which the vast majority of tenants, regardless of wealth, will be able to obtain trust-type protection for security deposits. The disparity of bargaining power between prospective tenants and landlords in a lessor's market is such that further statutes have been necessary to void any agreement by a tenant to waive the trust relation established by the legislature.²³²

Unlike the URLTA, which is silent as to the rights of interested parties in security deposits in the hands of landlords, the Model Code attempts to create a "quasi-trust status," permitting the landlord to commingle funds on deposit with his own but giving the tenant priority over the landlord's creditors as to such funds.²³³ Tenants should be given at least this much protection; the failure of the URLTA to do so supports the contention that tenant interests in this area will be best served by developments independent of the Act.

"banking institution or savings and loan association in this State insured by an agency of the Federal Government . . ." Maryland does not expressly label the relationship between landlord and tenant a trust relation, but the statute requires that "[t]he landlord shall maintain all security deposits in a banking or saving institution within the State of Maryland. The account shall be devoted exclusively to security deposits . . ." MD. ANN. CODE art. 21, § 8-213(e)(i) (Repl. Vol. 1973). This creates an effective trust relation.

Two states, Florida and Pennsylvania, expressly require the landlord to hold the security deposits in trust (Florida) or in escrow (Pennsylvania) accounts, or, in the alternative, to post bonds that guarantee the survival of the amount of the security deposits. FLA. STAT. ANN. § 83.261(2)(a) (Supp. 1973); PA. STAT. ANN. tit. 68, § 250.511a (Supp. 1973).

230. MD. ANN. CODE art. 21, § 8-213(e)(iii) (Repl. Vol. 1973); N.J. STAT. ANN. § 46:8-23 (Supp. 1973).

231. *In re Izrue Corp.*, 58 Misc. 2d 343, 295 N.Y.S.2d 204 (Sup. Ct. 1968); *In re Perfection Technical Services Press, Inc.*, 22 App. Div. 2d 352, 256 N.Y.S.2d 1966 (1965), *aff'd*, 18 N.Y.2d 644, 273 N.Y.S.2d 71, 219 N.E.2d 424 (1966).

232. FLA. STAT. ANN. § 83.261(3) (Supp. 1973); LA. REV. STAT. ANN. § 9:3254 (Supp. 1974); MD. ANN. CODE art. 21, § 8-213(i) (Repl. Vol. 1973); N.J. STAT. ANN. § 46:8-24 (Supp. 1973); N.Y. GEN. OBLIG. LAW, § 7-103(3) (McKinney Supp. 1973); PA. STAT. ANN. tit. 68, § 250.511a(f) (Supp. 1973).

233. MODEL CODE, *supra* note 5, § 2-401, Comment. Section 2-401(1) of the Model Code states that "[t]he tenant's claim to such money shall be prior to that of any

While priority in landlord bankruptcy administration is likely to be an important issue only for a small percentage of tenants, ownership of the profits from reinvested security deposits is an issue affecting any tenant deprived of the use of such funds while they are held by the landlord. A more general objection to the common law treatment of security deposits, therefore, might be directed against the fact that it allows the landlord to keep the profits earned by money not his own. Assuming that security deposits are technically only a form of prepaid damages which remain the property of the tenant unless and until a lease covenant is breached, the tenant has a strong argument for mandatory payment of interest by a landlord on the funds which he holds on deposit, or for a mandatory disbursement to the tenant of any profits which the landlord receives from investment of such funds.

An increasing minority of states have enacted legislation providing for payment of interest on security deposits.²³⁴ Typically these statutes apply only to deposits in excess of a specified dollar amount,²³⁵ to those deposits held longer than a certain time period,²³⁶ to landlords renting more than a specified number of units,²³⁷ or to landlords meeting a combination of these criteria.²³⁸ Interest rates²³⁹ and the

creditor of the landlord, including a trustee in bankruptcy, even if such security funds are commingled."

234. FLA. STAT. ANN. § 83-261(2) (b) (Supp. 1973); ILL. ANN. STAT. ch. 74, §§ 91-93 (Smith-Hurd Supp. 1973); MD. ANN. CODE art. 21, § 8-213(f) (Repl. Vol. 1973); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973); N.J. STAT. ANN. §§ 46:8-19, -26 (Supp. 1973); N.Y. GEN. OBLIG. LAW § 7-103 (McKinney Supp. 1973); PA. STAT. ANN. tit. 68, § 250.511(b) (a) (Supp. 1973).

235. MD. ANN. CODE art. 21, § 8-213(f) (iii) (Repl. Vol. 1973) (50 dollars or more); PA. STAT. ANN. tit. 68, § 250.511b (Supp. 1973) (100 dollars or more).

236. ILL. ANN. STAT. ch. 74, § 91 (Smith-Hurd Supp. 1973) (six months or more); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973) (one year or more); PA. STAT. ANN. tit. 68, § 250.511b(c) (Supp. 1973) (two years or more).

237. ILL. ANN. STAT. ch. 74, § 91 (Smith-Hurd Supp. 1973) (25 or more units); N.J. STAT. ANN. § 46:8-26 (Supp. 1973) (all rental premises except owner-occupied premises with two or fewer rental units); N.Y. GEN. OBLIG. LAW § 7-103(2-a) (McKinney Supp. 1973) (six or more units).

238. The Illinois statute is the most selective. It applies only to those landlords renting 25 or more units in a municipality having a population of 500,000 or more. ILL. ANN. STAT. ch. 74, §§ 91-93 (Smith-Hurd Supp. 1973).

239. FLA. STAT. ANN. § 83.261(2) (b) (Supp. 1973) (five percent if deposits not kept in trust; if kept in interest-bearing trust then tenants to receive at least 75 percent of interest paid); ILL. ANN. STAT. ch. 74, § 91 (Smith-Hurd Supp. 1973) (four percent); MD. ANN. CODE art. 21, § 8-213(f) (Repl. Vol. 1973) (three percent); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973) (five percent). New Jersey, New York, and Pennsylvania require the funds to be deposited in accounts drawing the current rate paid for such accounts. N.J. STAT. ANN. § 46:8-19 (Supp. 1973); N.Y. GEN. OBLIG. LAW

methods of payment of interest to the tenants²⁴⁰ vary among the states.

Neither the URLTA nor the Model Code incorporates comparable provisions. The draftsmen of the Model Code have articulated two reasons for excluding an interest provision:²⁴¹ the belief that the work and expense imposed upon landlords in accounting for profits would be unjustifiable and that a tenant able to afford a security deposit large enough to warrant the payment of interest would be able to bargain for such interest on his own.²⁴² Whether or not similar reasoning was applied to the drafting of the URLTA, the failure to bring the Act abreast of developments in tenant protection in the security deposit area may be a source of tenant resistance to adoption of the Act.

Other Omissions from the Act

Various state statutes governing the administration of security deposits contain other terms favorable to tenants not found in the Act or the Model Code. Examples include provisions for mandatory written notice to tenants of nonrefundable cleaning or redecorating deposits,²⁴³ mandatory issuance of written receipts to tenants for security deposits with penalties for noncompliance,²⁴⁴ the issuance upon request of written enumeration of all damages to the premises caused by former tenants present at the beginning of the current tenancy,²⁴⁵ the prohibition of any lease requirement that tenants deliver postdated checks or negotiable instruments for the payment of future rents,²⁴⁶ and the utilization

§ 7-103(2) (McKinney Supp. 1973); PA. STAT. ANN. tit. 68, § 250.511b (Supp. 1973). These states allow the landlord to withhold one percent interest as an administration fee.

240. FLA. STAT. ANN. § 83.261(4) (Supp. 1973) (paid to tenant when security deposit returned); ILL. ANN. STAT. ch. 74, § 92 (Smith-Hurd Supp. 1973) (paid to tenant or credited against rent within 30 days after end of each 12-month period); MD. ANN. CODE art. 21, § 8-213(f) (Repl. Vol. 1973) (paid to tenant when security deposit returned); MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1973) (paid to tenant at end of each year); N.J. STAT. ANN. § 46:8-19 (Supp. 1973) (credited toward rental due each term); N.Y. GEN. OBLIG. LAW § 7-103(2) (McKinney Supp. 1973) (paid to tenant annually or held and paid at end of term or credited toward rentals); PA. STAT. ANN. tit. 68, § 250.511b (b) (Supp. 1973) (paid annually on anniversary of lease after two years).

241. MODEL CODE, *supra* note 5, § 2-401, Commentary.

242. *Id.*

243. ARIZ. REV. STAT. ANN. § 33-1321(B) (Supp. 1973).

244. MD. ANN. CODE art. 21, §§ 8-213(c)(i), (ii) (Repl. Vol. 1973).

245. *Id.* § 8-213(d).

246. HAWAII REV. STAT. § 521-44(e) (Supp. 1972).

of small claims courts by either landlords or tenants without representation by counsel.²⁴⁷ These provisions are of relatively minor significance, but the cumulative effect of their absence from the Act may create the impression that the Act is out of step with trends in landlord-tenant law.

Notwithstanding the various shortcomings of the Act, it is safe to assert that its coverage of security deposit relations is more complete than that of any single state. Moreover, the majority of states have undertaken little or no statutory treatment of security deposits. Therefore, the Act, both in its present form and as a framework for additional legislation, may be said to represent an advance in security deposit law.

Tenant Obligations and Landlord Remedies

Achieving the URLTA's goal of establishing parity in the relationship between landlord and tenant requires an improvement of the legal position of the tenant, principally through an expansion of landlord obligations and associated tenant remedies. Improvement in the tenant's position also may be attained, however, by a limitation of tenant obligations and landlord remedies. Article Three and Part Two of Article Four of the Act have the latter objective.

Landlord Distraint

"Distress," "distrain," and "distress and distraint" are terms, synonymous in use, denoting the legal right by which a landlord may seize his tenant's personal property as a remedy for unpaid rent.²⁴⁸ Although recognized at common law²⁴⁹ and still available in many states,²⁵⁰ this remedy has been under attack on several grounds.

A number of distraint statutes have been struck down for failure to meet the procedural due process requirements of notice and opportunity for a hearing announced in recent Supreme Court decisions.²⁵¹ Thus,

247. *Id.* § 521-44(h).

248. 18 VILL. L. REV. 771 n.3 (1973). See generally Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 408-11 (1970).

249. 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1305 (repl. ed. 1959).

250. RESTATEMENT (SECOND) OF TORTS § 187 (1965).

251. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

in Georgia,²⁵² Texas,²⁵³ and Pennsylvania,²⁵⁴ statutes which failed to provide the tenant timely opportunity to challenge the deprivation of his personal property have been set aside. Even where a statute is constitutional on its face, the possibility of abuse remains. While virtually all state statutes provide for exemptions of certain property such as food, clothing, or a stated dollar value,²⁵⁵ the fact that the exemptions are enforceable only by legal action may lead some landlords to ignore them. Moreover, redress in damages for this abuse offers scant comfort to the tenant who has been deprived of necessities for a period of time.

Accordingly, the distraint remedy has been discarded in New Jersey,²⁵⁶ an example the URLTA has followed.²⁵⁷ Experience in New Jersey and in the states adopting the Act²⁵⁸ will test the claim that the loss of the distraint remedy will drive landlords out of business.²⁵⁹ An exemption of 500 dollars has been proposed as a compromise,²⁶⁰ but such an exemption is more a reversion to traditional law than a true compromise. Elimination of the distraint remedy is obviously desirable from the tenant point of view. Distraint being abolished by the URLTA, tenants could achieve no greater protection by relying upon judicial developments instead of the Act.

Self-Help Eviction

Uncertainty surrounds the present status of the common law remedy of self-help eviction,²⁶¹ especially as it is modified by forcible entry

252. *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971).

253. *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972) (landlord entry and distraint without notice held state action without due process).

254. *Gross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972) (Pennsylvania's distraint procedure held unconstitutional on its face); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970) (distress sales without hearing invalidated). See also *Nelson v. Madigan*, 1 CCH Pov. L. REP. ¶ 2340.371 (Cal. Super. Ct. 1969) (sheriff enjoined from giving landlord custody of tenant's property following eviction for unlawful detainer as tenant had no opportunity to file claims of exemption allowed to other judgment debtors).

255. E.g., CAL. CODE CIV. PROC. § 690 (West Supp. 1973); PA. STAT. ANN. tit. 68 §§ 250.401-.404 (Supp. 1973); S.C. CODE ANN. tit. 41 § 41-152 (1962).

256. N.J. STAT. ANN. § 2A:33-1 (Supp. 1974-75).

257. URLTA § 4.205(b).

258. See note 3 *supra*.

259. Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

260. *Trends*, *supra* note 168, at 587.

261. See generally *Gibbons*, *supra* note 248, at 404-08; Barnett, *When the Landlord Resorts to Self-Help: A Plea for Clarification of the Law in Florida*, 19 U. FLA. L. REV. 238, 276-77 (1966).

and detainer statutes.²⁶² A growing minority of states hold that, without a voluntary surrender of possession by the tenant, the landlord must resort to legal process.²⁶³ Other jurisdictions continue to follow the "English" rule at common law, which permits a peaceable re-entry.²⁶⁴ Although the weight of authority would authorize a self-help eviction where the lease permits it,²⁶⁵ there are recent decisions which may indicate a trend to the contrary.²⁶⁶

The URLTA limits the available remedies for regaining possession and would appear to rule out self-help in removing a tenant.²⁶⁷ Because the Act lacks needed procedural mechanisms, however, particularly a procedure by which the landlord may quickly enforce his claim to possession upon early termination of the rental agreement,²⁶⁸ there may be no viable alternative to the self-help remedy.²⁶⁹

Several factors encourage prohibition of self-help evictions. Such action on the part of the landlord may lead to a violent confrontation with the tenant, especially in a tense urban environment, even when

262. Forcible entry and detainer statutes, enacted in numerous jurisdictions, codify the landlord's common law right to take whatever steps are necessary to remove a tenant from possession, e.g., FLA. STAT. ANN. § 83.05 (Supp. 1974-75), although limitations are frequently placed on the degree of force that may be employed, e.g., CAL. PENAL CODE § 418 (West Supp. 1970); CAL. CODE CIV. PROC. §§ 1159-60 (West Supp. 1972).

263. *Jordon v. Talbot*, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) (lease provision permitting forcible entry void as contrary to public policy); *Lamey v. Masciotra*, 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 (Ct. App. 1969) (forcible entry not confined to physical force or restraint or threat of physical harm but covers incidents of self-help without tenant's consent or resort to legal process); *Malcolm v. Little*, 295 A.2d 711 (Del. 1972) (summary procedure being prompt, landlord must resort to legal process and failure to do so may entitle tenant to damages); *American Holding Co. v. Hanson*, 23 Utah 2d 432, 464 P.2d 592 (1970) (summary dispossession statute held to be exclusive remedy); *Peterson v. Platt*, 16 Utah 2d 330, 400 P.2d 507 (1965) (damages for trespass and conversion awarded for landlord's taking of possession without legal process).

264. *Paddock v. Clay*, 138 Mont. 541, —, 357 P.2d 1, 3 (1960).

265. *Clark v. Service Auto Co.*, 143 Miss. 602, —, 108 So. 704, 706 (1926).

266. See, e.g., *Lamey v. Masciotra*, 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 (Ct. App. 1969) (holding that the landlord, under a commercial lease, had to resort to legal process despite a lease provision allowing reentry without notice to the tenant).

267. URLTA § 4.207 provides: "A landlord may not recover or take possession of the dwelling unit by action or otherwise, including willful diminution of services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electricity, gas, or other essential service to the tenant, except in case of abandonment, surrender, or as permitted in this Act."

268. See *id.* § 4.206.

269. Subcommittee, *supra* note 2, at 106.

a peaceful eviction is attempted.²⁷⁰ Moreover, the hardship of depriving a residential tenant of possession before he has found other shelter should be avoided, housing being too precious a commodity, too important to health and safety, to be denied a tenant without the safeguards inherent in legal process.

Elimination of the self-help remedy, a development obviously favorable to tenants, has already begun in the courts. Complete elimination will be accomplished by adoption of the Act, with the important qualification that an efficient alternative procedure for eviction be available in the adopting jurisdiction.

Eviction for Cause

Eviction is prohibited under the URLTA "except in case of abandonment, surrender, or *as permitted in this Act*."²⁷¹ The quoted language would appear to prohibit arbitrary eviction of a tenant,²⁷² but periodic tenancies, week-to-week and month-to-month, may yet be terminated at the landlord's pleasure upon the giving of appropriate notice.²⁷³ If the tenant attempts to hold over without the landlord's consent, the URLTA authorizes an eviction action.²⁷⁴ Even though the tenant may resist eviction on the basis of the landlord's lack of good faith,²⁷⁵ problems of proof limit the effectiveness of such a defense.

Thus, the Act provides incomplete protection against an arbitrary refusal to continue a periodic tenancy. By analogy, the principles underlying the prohibition of arbitrary midterm evictions ought to apply when renewal is denied a tenant who has every reason to anticipate continuance of his periodic tenancy. Technically, a periodic tenancy is a leasehold interest of very limited duration; nevertheless in practice it is treated, by landlords and tenants alike, as a lease of indefinite term. Therefore, any refusal to renew is, in effect, a midterm eviction—one which, if arbitrary, ought also to be forbidden.

A minimum term, for example six months, has been proposed for all

270. Gibbons, *supra* note 248, at 406.

271. URLTA § 4.207 (emphasis supplied).

272. Eviction would be permissible upon a tenant's noncompliance with the rental agreement, *id.* § 4.201(a), failure to pay rent, *id.* § 4.201(b), and abandonment of the premises, *id.* § 4.203(c). Each of these tenant defaults is grounds for termination of the rental agreement, whereupon the landlord has a claim for possession, *id.* § 4.206.

273. *Id.* §§ 4.301(a), (b).

274. *Id.* § 4.301(c).

275. *Id.* § 1.302.

periodic tenancies.²⁷⁶ Such a minimum term could eliminate some petty evictions and reduce turnover in rental housing, thereby lending stability to the housing market while leaving some flexibility by allowing the two parties to agree to terminate or permit unilateral termination only in special circumstances. This proposal is not contained in the URLTA and was rejected by the authors of the Model Code.²⁷⁷

Although there is no protection afforded to private sector tenants against arbitrary eviction except through the URLTA, tenants in public housing are protected by the doctrine that they cannot be the subject of arbitrary eviction by a public authority. This limitation was recognized in *Rudder v. United States*,²⁷⁸ the court stating that "[t]he government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law."²⁷⁹ In *Thorpe v. Housing Authority*²⁸⁰ the Supreme Court went a step further in holding that a tenant in a federally assisted housing project could not be evicted without notification of the reasons for eviction and an opportunity to reply. This principle was elaborated in *Ruffin v. Housing Authority*,²⁸¹ the court stating: "The right of a tenant to public housing is no less 'property' under the Fifth and Fourteenth Amendments than the right of a student to remain in school. A tenant may not be deprived of it without due process of law."²⁸²

Eviction from public housing cannot be arbitrary or based upon mere whim or caprice,²⁸³ and the government cannot deprive a tenant of continued tenancy without adequate procedural safeguards, even if public housing be considered a privilege.²⁸⁴ Appropriate safeguards should include sufficient notice informing a tenant of the particular conduct alleged

276. See Gibbons, *supra* note 248, at 398-99.

277. Levi & Hablutzel, *Preface to ABA MODEL RESIDENTIAL LANDLORD TENANT CODE 2* (Tent. Draft 1969).

278. 226 F.2d 51 (D.C. Cir. 1955).

279. *Id.* at 53.

280. 393 U.S. 268 (1969). The case concerned application of a policy circular distributed by the Department of Housing and Urban Development. Dep't of Housing and Urban Dev., Circular, in 1 CCH Pov. L. REP. ¶ 2365.35 (Feb. 7, 1967).

281. 301 F. Supp. 251 (E.D. La. 1969).

282. *Id.* at 253.

283. *Williams v. White Plains Housing Authority*, 62 Misc. 2d 613, 309 N.Y.S.2d 454 (Sup. Ct.), *aff'd mem.*, 35 App. Div. 2d 965, 317 N.Y.S.2d 935 (1970) (regulations promulgated by the state insufficient to protect the societal interest which the state had established in housing).

284. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

to enable him to rebut the charges. Furthermore, the tenant should have the right to a decision based upon evidence, to which the tenant has equal access, presented at a hearing where the tenant may challenge the source of the evidence. Thus, a decision against a tenant is invalid when based upon information contained in a file kept by the housing authority and not made available to the tenant.²⁸⁵ Finally, the tenant should be allowed to present his case to an impartial official rather than to the one who initiated the action against him.²⁸⁶ It has been urged that a tenant have a right to counsel or an advisor.²⁸⁷ The informal procedure litigated in *Thorpe* fell short of actual review,²⁸⁸ prompting the suggestion that housing agencies adopt administrative review procedures.²⁸⁹

Another commentator has suggested that tenants in private housing be afforded protection against arbitrary landlord action by treating all housing as a public utility with a consequent infusion of due process requirements into private sector landlord-tenant relations.²⁹⁰ Due process already inheres in these relations to the extent that notice to the tenant is a statutory prerequisite to a landlord's remedial action following an alleged tenant default.²⁹¹ Due process in evictions by private landlords

285. *Id.* at 862.

286. *Id.* at 863.

287. Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988 (1968). "Nowhere has Congress or a state legislature expressly provided that landlord-tenant law governs evictions from public housing." *Id.* at 995.

288. Dep't of Housing and Urban Dev., Circular, in 1 CCH Pov. L. REP. ¶ 2365.35 (Feb. 7, 1967).

289. Note, *supra* note 287, at 1004.

290. Roisman, *Tenants and the Law: 1970*, 20 AMER. U.L. REV. 58 (1970). As a public utility, housing would be "subject to the same regulation in the public interest as is required for those who provide light and fuel and transportation and other public necessities." *Id.* at 61.

291. The URLTA requires notice to the tenant before the landlord may put into effect his remedies for the following tenant defaults: noncompliance with the rental agreement, URLTA § 4.201(a); failure to pay rent, *id.* § 4.201(b); and failure to maintain the premises, *id.* § 4.202.

In *Edwards v. Habib*, 227 A.2d 388 (1967), *rev'd*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), the Court of Appeals for the District of Columbia Circuit acknowledged three lines of cases in which the landlord's right to terminate a tenancy is limited by due process or otherwise: (1) those involving a governmental body as landlord, *Thorpe v. Housing Authority*, 393 U.S. 268 (1967); *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); (2) emergency rent control legislation restricting the rights of landlords, *Block v. Hirsh*, 256 U.S. 135 (1921); (3) eviction in retaliation for a tenant's registering or actually voting, *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961); *United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965). It might also be possible to defend against eviction on the basis that the eviction was sought solely because of race. *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

would require, in addition, that rent modifications be "uniform in rate to all units within the same building, for otherwise rent discrimination could be employed as a substitute for termination."²⁹²

An eviction procedure ensuring due process could be burdensome to landlords in that, not only advance notice, but also a valid reason for terminating a tenancy should be given. Rule violations clearly ought to constitute a substantial violation of the tenant's obligation before termination is allowed²⁹³ and perhaps should be continuous or recurrent in order to support a finding of undesirability.²⁹⁴ An isolated violation of law on the premises may be insufficient to show use of the dwelling unit for an unlawful purpose and, therefore, not grounds for eviction.²⁹⁵ It has been held that the landlord, as a private person, could not terminate a tenancy on the ground that the tenant was in violation of a municipal ordinance, there being no provision for private enforcement of the ordinance.²⁹⁶ Another court has held that a tenant under a month-to-month oral lease could not be evicted merely because the landlord wanted him out when the tenant had offered payment to the landlord after receiving notice to pay rent or face termination of the rental agreement.²⁹⁷

As noted above, the URLTA expressly prohibits arbitrary midterm evictions, and its good faith clause limits the landlord's right to refuse arbitrarily to renew a periodic tenancy. Although these protections are in the nature of due process requirements, it cannot be said that the draftsmen intended that the provisions assume constitutional dimensions; so drastic a measure undoubtedly would provoke overwhelming opposition from landlord interests.

292. Gibbons, *supra* note 248, at 398.

293. *Moss v. Hirshtritt*, 60 Misc. 2d 402, 303 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1969) (mere annoyance or momentary upset not grounds for removal in summary proceeding; provisions for forfeiture of lease disfavored and strictly construed).

294. *Tompkins Square Neighbors, Inc. v. Zaragoza*, 2 CCH Pov. L. REP. ¶ 15,527 (N.Y. City Civ. Ct. 1972) (summary dispossession proceeding brought on claim that tenant's mentally retarded son violated rules and regulations dismissed for failure to show violations were continuous and recurrent).

295. *190 Stanton Inc. v. Santiago*, 60 Misc. 2d 224, 302 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1969) (act must be done customarily or habitually on the premises to constitute an illegal use for which tenant can be evicted). *But cf. Manhattan Embassy Co. v. Tad Brown, Inc.*, 1 CCH Pov. L. REP. ¶ 2300.38 (N.Y. Sup. Ct. 1970) (the landlord's knowledge of or acquiescence in an illegal use no bar to eviction).

296. *Widamo Estates, Inc. v. McCoy*, 1 CCH Pov. L. REP. ¶ 2300.62 (N.Y. Sup. Ct. 1969) (municipal ordinance prohibiting overcrowding in dwelling units).

297. *Madison v. Rosser*, 3 Ill. App. 3d 851, 279 N.E.2d 375 (1972).

Grace Periods

A tenant's failure to perform certain obligations will justify a termination by the landlord of the rental agreement, to a limited extent under the URLTA²⁹⁸ and to a greater extent under most present law. The Act²⁹⁹ and statutes in 37 states,³⁰⁰ however, provide a grace period after notice of default during which the tenant may correct a condition which otherwise would result in termination,³⁰¹ and the landlord often is required to follow the form for notice precisely.³⁰² In some cases, a tenant's default cannot be reversed,³⁰³ but a default in rent can always be corrected by tendering the amount in arrears plus any additional costs imposed. Occasionally, payment of rent even after a judgment against the tenant will be sufficient to keep the tenant in possession.³⁰⁴

Statutory grace periods can cause certain problems for landlords. Frequent reliance upon a grace period by a tenant can result in a continuing lag in rent payments, arguably justifying the common landlord practice of collecting a late charge as a penalty for late payment.³⁰⁵ A tenant also may fail to pay rent, then, at the end of the grace period, announce his insolvency or disappear. His occupancy of the premises during the grace period will have been rent-free,³⁰⁶ the landlord's only protection being the security deposit.

Nevertheless, the availability of grace periods is so widespread that

298. See note 272 *supra*.

299. URLTA § 4.201. A 14-day grace period following notice of noncompliance with the rental agreement or nonpayment of rent is suggested. *Id.* §§ 4.201(a), (b).

300. *E.g.*, CAL. CODE CIV. PROC. § 1167 (West Supp. 1973) (tenant must pay rent within five days after it is due or surrender possession); ORE. REV. STAT. § 105.115(1) (1971) (same, except tenant given 10 days).

301. See Baird, *The Illusory Grace Period*, 7 LAW NOTES 19 (1970).

302. *Lamey v. Masciotra*, 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 (Ct. App. 1969) (despite lease provisions allowing landlord to reenter if rent becomes more than ten days in arrears, landlord required to give the tenant notice to pay or be evicted); *Madison v. Rosser*, 2 CCH Pov. L. REP. ¶ 15,261 (Ill. App. Ct. 1972) (after notice to tenant to pay within five days or suffer termination of the lease, tenant's offer of payment to the landlord held sufficient to bar the landlord's termination of an oral month-to-month tenancy); *American Holding Co. v. Hanson*, 23 Utah 2d 432, 464 P.2d 592 (1970).

303. Baird, *supra* note 301, at 20.

304. N.J. STAT. ANN. § 2A:18-55 (1952). See *Saveriano v. Saracco*, 97 N.J. Super. 43, 234 A.2d 244 (App. Div. 1967). In *Academy Spires, Inc. v. Jones*, 108 N.J. Super 395, 261 A.2d 413 (App. Div. 1970), the court stated: "Since under NJSA 2A:18-57 a warrant for possession may not issue until the expiration of 3 days after entry of judgment for possession, the tenant as a practical matter has three days in which to pay the amount he is in default in order to remain in possession." *Id.* at 415.

305. Subcommittee, *supra* note 2, at 120.

306. Gibbons, *supra* note 248, at 382 n.71.

adoption of the URLTA will not work a great change. There seems to be little basis for argument by tenants that reform outside the Act could go beyond the grace period protections it provides. The essence of a grace period is mandatory leniency on the part of the landlord, and the Act affords such leniency with respect to all defaults for which the tenant might be penalized.

Hardship Stays of Eviction

Statutes in several states allow judges to grant stays of eviction in cases of hardship,³⁰⁷ generally for a period of six months.³⁰⁸ Each statute requires that the tenant fully meet his obligation to pay rent either by making payment into court or by paying the landlord directly.³⁰⁹ To be eligible for a stay the tenant must be exposed to severe hardship upon eviction by reason of his inability to locate suitable housing nearby after reasonable efforts.³¹⁰ Depending upon individual circumstances, a court may also impose various other conditions upon the granting and maintaining of a stay of eviction in order to protect both parties.

It has been argued successfully that a court's inherent power to control its own process gives it power to stay the state's eviction procedure from going into effect until a reasonable time. Thus, in a California case, despite statutory provisions for a five-day stay in unlawful detainer actions,³¹¹ the court refused to set aside a ten-day stay of a default judgment for rent and possession.³¹²

Where authorized, a stay of execution of eviction serves as another limitation on landlord remedies in that it can delay for periods of up to six months the possession of the landlord's property. There is no indication that the practice of granting stays is widespread, especially in states not having statutory provisions for them. Nonetheless, the

307. CONN. GEN. STAT. ANN. § 52-546 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 239, §§ 9-11 (Supp. 1973); N.J. STAT. ANN. § 2A:42-10.6 (Supp. 1973); N.Y. REAL PROP. ACTIONS & PROC. LAW § 751 (McKinney 1963).

308. An exception is New York, where the stay is limited to four months for areas other than New York City. N.Y. REAL PROP. ACTIONS & PROC. LAW § 751(4) (a) (McKinney 1963).

309. E.g., N.J. STAT. ANN. § 2A:42-10.6 (Supp. 1973).

310. Canigiani v. Deptula, 59 Misc. 2d 401, 299 N.Y.S.2d 234 (Dist. Ct. 1969); Joseph v. Cheeseboro, 42 Misc. 2d 419, 248 N.Y.S.2d 969 (N.Y. City Civ. Ct. 1964); McLaughlin v. DeLuca, 183 Misc. 894, 50 N.Y.S.2d 454 (N.Y. City Mun. Ct. 1944).

311. CAL. CODE CIV. PROC. § 1174 (West Supp. 1974).

312. Tarmina v. San Jose-Milpatis Municipal Court, 1 CCH Pov. L. REP. ¶ 2300.76 (Cal. Super. Ct. 1970).

absence of a stay of eviction provision from the URLTA will support tenant opposition to the Act, especially in light of the increasing difficulty of locating substitute housing on short notice.

Trial Bonds

Because of the current expansion of tenant defenses to an eviction action, the landlord may suffer loss due to the continued occupancy of the premises by the defendant tenant during a lengthy trial. Although the landlord may prevail on the possession issue, he may be unable to recover the rent accruing during the litigation inasmuch as the tenant's inability to pay may have been the cause of the attempted eviction in the first instance.

A degree of protection can be afforded the landlord by requiring the tenant who intends to defend in an eviction action to pay rent into court while litigation is in progress.³¹³ Under such a procedure the tenant may perhaps pay more than ultimately is due the landlord, as where the condition of the premises warrants an abatement of rent. Moreover, there is an element of inconsistency in requiring a tenant to pay rent into court while allowing him to assert defenses in an effort to show that rent is not due. These issues were raised by the Court of Appeals for the District of Columbia Circuit in *Bell v. Tsintolas Realty Co.*³¹⁴

The *Bell* court was concerned with balancing the equities between landlords and tenants.³¹⁵ On the one hand, prepayment is extraordinary in the course of civil litigation and can restrict the right of indigent tenants to proceed to trial. On the other hand, the court acknowledged the three- to six-month delay in landlord-tenant jury trials, the availability of new tenant defenses, and the right of the tenant to remain in possession, implying that the landlord may be in need of some form of protection. Moreover, the court noted that payment of rent into court is not an

313. GA. CODE ANN. §§ 61-302 to -306 (Supp. 1973). The Georgia procedure formerly required that a tenant, merely to defend in a summary proceeding against him, post a bond amounting to double the potential amount due at the end of the trial and entitled the landlord to double rent should he prevail on the merits. A tenant could prevent immediate eviction only by filing the double bond and raising a defense to the action. This procedure was modified while being litigated before the Supreme Court in *Sanks v. Georgia*, 401 U.S. 144 (1971) (controversy held moot). See also *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

314. 430 F.2d 474 (D.C. Cir. 1970).

315. *Id.* at 481-84.

additional burden imposed upon the tenant; it requires no more than that which he promised upon execution of the rental agreement.

In balancing the competing interests, the *Bell* court held that only when the tenant requests a jury trial or asserts a defense premised upon housing code violations can the landlord require rent to be paid into court. The landlord must demonstrate a need for the protective order,³¹⁶ and he cannot demand back rent in an action brought for possession only, as such a requirement would impose a penalty on the tenant. Finally, the trial court may order payment of a lesser amount than full rent due if the tenant can show violations of the housing code by the landlord.

The URLTA provides that, if a tenant asserts any of his defenses under the Act in an action for possession or rent, the court may order him to pay into court all or part of the rent accrued or coming due.³¹⁷ No standards are established to guide the court in the exercise of its discretion relative to such an order. It is submitted that incorporation of standards similar to those established in *Bell* would guarantee to landlords and tenants alike the protection needed over the course of a lengthy contest for possession or rent. The *Bell* solution also might be employed to resolve an impasse between parties over repairs to be made, the tenant paying the rent into court and the landlord using the funds to correct the defects alleged.³¹⁸

Additional Restrictions on Landlord Remedies

Several other restrictions are placed upon landlord remedies by the URLTA, including prohibitions against rental agreements containing waivers of tenant rights or remedies under the Act, confession of judgment clauses, agreements by the tenant to pay the landlord's attorney's fees, or limitations upon landlord liability arising under the law.³¹⁹ Such provisions are made unenforceable, and their usage may result in the landlord paying damages to the tenant.³²⁰ The Act also allows courts to refuse to enforce unconscionable provisions in rental agreements.³²¹

316. *Id.* at 483-84.

317. URLTA § 4.105.

318. *Berman v. Similty*, 2 CCH Pov. L. REP. ¶ 17,536 (N.Y. City Civ. Ct. 1973); *Abanet Realty Corp. v. Cruz*, 2 CCH Pov. L. REP. ¶ 17,318 (N.Y. City Civ. Ct. 1973) (summary proceeding tied up in court for two years, by consent of parties; tenant refused to pay rent because of a dangerous ceiling which landlord had repaired unsatisfactorily).

319. URLTA § 1.403(a).

320. *Id.* § 1.403(b).

321. *Id.* § 1.303(a).

Finally, in cases of tenant abandonment under the Act, the landlord has a duty to mitigate damages³²² by making reasonable efforts to re-rent the premises,³²³ thus reversing the majority rule that the landlord is under no duty to mitigate.³²⁴ The prevailing rule that the landlord may continue to hold the tenant liable for rent after abandonment³²⁵ is also altered by the provision that, if the landlord fails to take reasonable steps to rent the abandoned premises, the rental agreement terminates as of the time the landlord was first apprised of the abandonment.³²⁶

Tenant Obligations Under the Act

In addition to the primary obligation of the tenant to pay rent,³²⁷ the Act imposes other duties,³²⁸ principally the obligation to maintain the premises in accordance with building and housing codes and to keep the premises as clean and safe as conditions permit.³²⁹ These provisions codify the tenant's common law duty not to commit waste³³⁰ and represent the landlord's assurance that the value of his property is not diminished unnecessarily. If the tenant commits waste in a manner materially affecting health or safety, the landlord may resort to his remedies but is limited by requirements of notice and the tenant's opportunity to cure his breach.³³¹ If, after notice, the tenant fails to effect a timely cure, the landlord has the option of terminating³³² or performing the work himself and billing the tenant.³³³

A second tenant obligation concerns granting the landlord access to the premises for purposes of inspection and repair.³³⁴ Again the tenant's obligation is narrowed by a requirement that the landlord give notice,³³⁵ by a specification of only three situations in which entry may

322. *Id.* § 4.203(c).

323. *Id.* § 1.105(a).

324. *E.g.*, *Gruman v. Investors Diversified Servs., Inc.*, 247 Minn. 502, 78 N.W.2d 377 (1956).

325. *E.g.*, *Diehl v. Gibbs*, 173 So. 2d 719 (Fla. Dist. Ct. 1965).

326. URLTA § 4.203(c).

327. *Id.* § 1.401.

328. *Id.* §§ 3.101-.104.

329. *Id.* §§ 3.101(1)-(7).

330. *See generally* *Sigsbee Holding Corp. v. Canavan*, 39 Misc. 2d 465, 240 N.Y.S.2d 900 (N.Y. City Civ. Ct. 1963).

331. URLTA § 4.201(a).

332. *Id.*

333. *Id.* § 4.202.

334. *Id.* § 3.103.

335. *Id.* § 3.103(c).

be made,³³⁶ and by a proscription of the landlord using the right of access to harass the tenant.³³⁷ The tenant may obtain injunctive relief for abuse of access or terminate the rental agreement and, in either case, recover the greater of actual damages or one month's rent plus attorney's fees.³³⁸

The Act also permits the landlord to impose additional rules and regulations upon the tenant but carefully limits them to those which promote the convenience, safety, or welfare of the tenants, preserve the landlord's property, or fairly distribute services and facilities made available to the tenants.³³⁹ Such rules and regulations must be reasonably related to the purposes for which adopted, applicable to all tenants equally, sufficiently explicit to inform the tenant of his obligations, and not have the purpose of evading the landlord's obligations. If a rule is adopted after the commencement of the lease term substantially modifying the tenant's bargain, it is of no force unless the tenant consents to it in writing.³⁴⁰ These provisions are said to protect the tenant from "vague, arbitrary, whimsical, unconsented to, unpopular and unequally enforced rules."³⁴¹

One novel URLTA provision authorizes the inclusion in leases of a requirement that the tenant notify the landlord of any anticipated extended absence from the premises.³⁴² If the tenant fails to give notice when required and the premises are damaged in his absence, he will be required to reimburse his landlord in the amount of the damages if the landlord can show that failure to give notice was willful and the damages would not have occurred but for the tenant's absence.³⁴³ Thus, the penalty for what might seem a relatively innocuous breach of the rental agreement can be extremely harsh. Accordingly, a rental agreement which contains a provision for notification of anticipated absence also should be required to include an express warning to the tenant detailing the extent of his potential liability for failure to give such notice.

Tenant obligations under the Act, particularly those involving the duty not to commit waste, are drafted with great specificity. The ap-

336. *Id.* § 3.103(d).

337. *Id.* § 3.103(c).

338. *Id.* § 4.302(b).

339. *Id.* § 3.102.

340. *Id.* § 3.102(b).

341. Gibbons, *supra* note 248, at 392 (footnote omitted).

342. URLTA § 3.104.

343. *Id.* § 4.203(a).

parent intent of the draftsmen was to limit, by the principle of *inclusio unius est exclusio alterius*, the obligations which may be enforced against the tenant. Of course, the landlord may create additional obligations by the device of rules and regulations, but midterm adoption of such rules and regulations is ineffective against the nonconsenting tenant. Although the landlord's bargaining power may enable him to impose the rules and regulations on new tenants, such tenants are protected further by stringent requirements for reasonableness of the rule or regulation. In sum, the tenant obligations under the Act are such that the tenant who pays his rent and refrains from destructive conduct may enjoy the premises in the assurance that no duties may be enforced against him other than those expressed in the rental agreement.

THE EFFECT OF THE URLTA ON DEVELOPMENT OF ALTERNATIVE REMEDIES

Throughout the foregoing discussion of the URLTA, passing reference has been made to the relationship between reform in favor of tenants under the URLTA and by means of recently developed judicial doctrines. At this point it is appropriate to consider whether enactment of the URLTA is likely to foreclose alternative routes of reform. In addition to judicial remedies, the relationship between the URLTA and concerted tenant action for housing improvements merits attention.

Concerted Tenant Actions

Concern for the habitability of his dwelling place occasionally has led the tenant to join with other similarly concerned tenants in efforts to improve their common lot.³⁴⁴ The decade of the 1960's³⁴⁵ saw two significant developments in the landlord-tenant relationship: tenant unions were organized to multiply the bargaining power of individual tenants, and rent strikes were called by groups of tenants to protest conditions and extract improvements from landlords. Despite the dubious

344. Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 323 (1965); Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368, 1370-73 (1968).

345. Prior to 1970, four states instituted statutory withholding of rents to be used whenever substantial landlord noncompliance with housing regulations was discovered. MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1973) (enacted 1965); MICH. COMP. LAWS § 125.530(3) (Supp. 1973) (enacted 1968); N.Y. REAL PROP. ACTIONS art. 7A (McKinney Supp. 1973) (enacted 1965); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973) (enacted 1966).

utility of the latter tactic, both receive some support from the URLTA, especially in the provisions concerning retaliatory conduct by the landlord.

Rent strikes have been defined as "the concerted withholding of rent by a group of tenants from the same landlord, for the purpose of exerting economic, social and political leverage to compel him to bargain with the tenant group about maintenance, repairs, improvements or other matters."³⁴⁶ These strikes, not to be confused with the work of tenant unions,³⁴⁷ are ad hoc responses to particular problems which have reached a crisis point. Thus, the organizations are short-lived, seeking specific relief from an immediate problem and generally disappearing soon after some temporary relief is granted by an individual landlord or a legislature.³⁴⁸

This fleeting existence of rent strike coalitions has proved to be their major weakness.³⁴⁹ A rent strike also may prove counterproductive in provoking landlords to use one of their three primary retaliatory weapons: failure to renew leases without cause,³⁵⁰ increased rental rates,³⁵¹ and abandonment of the premises.³⁵² Retaliation is likely to occur during the post-strike period when strike fervor has abated and strike leadership has dissipated. Use of a fourth traditional retaliatory weapon, eviction for nonpayment of rent, has been limited by statute in some jurisdictions.³⁵³

346. Gibbons, *supra* note 248, at 390.

347. See notes 360-62 *infra* & accompanying text.

348. Note, *supra* note 344, at 1370.

349. This statement assumes that a sufficient number of tenants are able to organize in the first instance, as rent withholding by only a few of a landlord's tenants will generate insufficient pressure to effect changes. One writer has suggested that a major reason for the limited success of rent strikes has been the inability of each individual tenant to demonstrate that he has suffered a constructive eviction or that his landlord has breached an implied warranty of fitness with respect to his dwelling unit. *Trends*, *supra* note 168, at 570. Other writers have indicated that organizing slum dwellers is extremely difficult because of tenant apathy, fear of landlord retaliation, and the inability of tenants to fund such organizations. Coulson, *The Tenant Union—New Institution Or Abrasive Failure?*, 14 *PRAC. LAW.*, April 1968, at 23, 25; Gibbons, *supra* note 248, at 392; Note, *Tenant Unions: Their Law And Operation In The State And Nation*, 23 *U. FLA. L. REV.* 79, 98-99 (1970). On the other hand, middle-class tenants have used concerted action effectively to settle a variety of claims. See Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 *COLUM. L. REV.* 1254, 1289 (1966).

350. Coulson, *supra* note 349, at 25-26.

351. Comment, *supra* note 344, at 320.

352. *Id.* at 320-22.

353. *E.g.*, N.Y. REAL PROP. ACTIONS § 755 (McKinney Supp. 1973). See generally Comment, *supra* note 344, at 323-31.

Success of a rent strike depends upon the publicity it receives and the resulting public interest. Pressure exerted by housing code enforcement agencies, state legislatures, and the general public frequently has resulted in the correction of deplorable situations.³⁵⁴ Nevertheless, even when public sentiment is aroused, favorable results may not always be achieved because of the insensitivity of some landlords to public opinion³⁵⁵ and the occasional unwillingness or inability of enforcement agencies and legislatures to act.³⁵⁶

Despite tenant interest in statutory authorization of rent strikes, it is submitted that the utility of the tactic is limited because it relies upon the uncertain effects of publicity and because it may deteriorate to a test of endurance rather than a resolution of the merits of the controversy. One commentator has concluded: "[T]he tenant led rent strike is more a symptom than a cure. It is primarily a weapon of protest rather than an effective device for bringing a lasting solution to the problems of slum housing. When the rent strike arises it indicates the accepted methods of creating an adequate supply of standard low cost housing have broken down."³⁵⁷

Tenants need a method for pressing their demands that will not subject them to landlord reprisals and that may be readily utilized by tenants of all income levels; at the same time, landlords must be protected against unwarranted and arbitrary tenant attacks. Although both the URLTA³⁵⁸ and the Model Code³⁵⁹ provide for the withholding of rent by individual tenants who believe that their landlord has failed to comply with either the terms of the lease agreement or a specified statute, neither statute expressly permits rent strikes.

Tenant unions promote a more reasoned approach to the settlement of landlord-tenant disputes. A tenant union may be defined as "an organization of tenants formed to bargain collectively with their landlord for an agreement defining the parties' mutual obligations."³⁶⁰ The specific, short-term goals of rent strike coalitions differ significantly from the expanded tenant union objectives which encompass long

354. Gibbons, *supra* note 248, at 390 n.118.

355. *Id.*

356. Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 239-42 (1969); Comment, *supra* note 344, at 314-23, Note, *supra* note 344, at 1371.

357. Comment, *supra* note 344, at 334.

358. URLTA § 4.105.

359. MODEL CODE, *supra* note 5, §§ 2-205 to -207.

360. Note, *Tenant Unions: An Experiment in Private Law-Making*, 2 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 237, 238 (1966).

range planning. Moreover, rent strikes are extra-legal attempts by tenants to coerce landlords, while tenant unions negotiate agreements between their members and landlords which give rise to legally enforceable rights and duties. Tenant union tactics include continual persuasion and negotiation, with resort to militancy only when all else fails.³⁶¹ They also provide their members with a stronger political voice with which to exhort legislatures into enacting favorable legislation.³⁶²

No law prevents tenants from organizing tenant unions, but the functioning of such a body may require legislative protection. Otherwise, the specter of landlord retaliation might deter unions from the use of effective measures against the landlord. In terms of vulnerability to landlord retaliation, the member of a tenant union is in the same position as any individual tenant, membership in the union being no protection against being singled out by the landlord. If any statutory shield is required by tenant unions, it is the same shield needed to protect tenants in general. The provisions of the URLTA covering retaliatory conduct are a long step in this direction.

Retaliatory Conduct

Despite the existence of agencies charged with enforcing housing codes, tenants usually must register a complaint in order to initiate corrective action. Likewise, a defect on the premises not constituting a code violation ordinarily will remain unrepaired until the tenant brings it to the attention of the landlord. By complaining, either to an agency or his landlord, the tenant may incur the displeasure of the landlord and provoke some form of retaliatory action. He also may be inviting retaliation when he joins in concerted action such as a rent strike or a tenant union. Retaliatory measures available to the landlord include evicting the tenant, increasing his rent, refusing to renew his lease, and discontinuing or reducing services.

Efforts towards promoting an open and just relationship between landlord and tenant increasingly are finding expression in legislation³⁶³

361. Note, *supra* note 344, at 1370.

362. See Note, *supra* note 349, at 112.

363. ARIZ. REV. STAT. ANN. § 33-1381 (Supp. 1973); CAL. CIV. CODE § 1942.5 (West Supp. 1973); CONN. GEN. STAT. ANN. § 19-375a (Supp. 1973); HAWAII REV. STAT. § 666-43 (Supp. 1972); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1973); MD. ANN. CODE art. 21, § 8-213.1 (Supp. 1973) (applicable only to one county); MINN. STAT. ANN. § 566.03 (Supp. 1974); N.J. STAT. ANN. §§ 2A:42-10.10 to .12 (Supp. 1973); N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney Supp. 1973); R.I. GEN. LAWS ANN. §§ 34-20-10, -11 (1969).

and case law³⁶⁴ which attempt to prevent landlords from taking unfair advantage of their position to intimidate or punish tenants. Legal measures adopted for this purpose are aimed primarily at aiding the tenant who is a defendant in a landlord's retaliatory action or suit. Thus, a landlord may be barred from recovering possession in an eviction proceeding³⁶⁵ or a tenant may counterclaim for damages upon a showing of the retaliatory nature of the landlord's action.³⁶⁶

The URLTA, in section 5.101, expressly prohibits three common forms of retaliatory conduct—increased rent, decreased services, and eviction.³⁶⁷ This prohibition is enforced by recognition of retaliatory conduct as a defense to a landlord's action for possession,³⁶⁸ as a ground for termination of the rental agreement,³⁶⁹ and as a basis for the recovery of damages and reasonable attorney's fees.³⁷⁰ After explicating occasions which may call forth retaliatory conduct, including tenant complaints

364. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972); *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); *Church v. Allen Meadows Apts.*, 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Sup. Ct. 1972).

365. *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969); *Silberg v. Lipscomb*, 117 N.J. Super. 491, 285 A.2d 86 (1971); *Dickhut v. Norton*, 45 Wis. 2d 309, 173 N.W.2d 297 (1970).

366. *Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971).

367. URLTA § 5.101(a).

368. *Id.* § 5.101(b).

369. *Id.* § 4.107.

370. *Id.* The tenant may "recover an amount not more than [3] months' periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney's fees." The Model Code allows an additional recovery of "the cost of suit," MODEL CODE, *supra* note 5, § 2-407(3), adopted by Hawaii without substantial change, HAWAII REV. STAT. § 666-43(c) (Supp. 1972).

Massachusetts provides the most liberal recovery by tenants found in a state statute not patterned after one of the uniform acts:

Any person or agent thereof who threatens or takes reprisals against any tenant . . . shall be liable for damages which shall not be less than one month's rent or more than three months' rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of the suit, including a reasonable attorney's fee.

MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1973).

Arizona, which adopted the URLTA, allows recovery of two months' rental (as against three months' rental suggested by the URLTA) or actual damages, whichever is greater, but has failed to provide for tenant recovery of attorney's fees. ARIZ. REV. STAT. ANN. § 33-1367 (Supp. 1973). This gap in the statute may tend to discourage bona fide tenant claims due to the high proportion of such recoveries absorbed by attorney's fees.

to a governmental agency or landlord and organization of or membership in a tenant union,³⁷¹ the Act establishes a rebuttable presumption that the landlord's conduct is retaliatory if there is "evidence of a complaint within [1] year before the alleged act of retaliation"³⁷² This provision is designed to remove from the tenant the virtually impossible burden of proof in establishing that a landlord has acted with a retaliatory intent; the Act thus requires the landlord to prove that his actions were not retaliatory and enumerates circumstances the existence of which the landlord may prove to justify his actions.³⁷³

The one-year presumption,³⁷⁴ in effect, gives tenants a one-year grace period following a complaint. Although the provision arguably may encourage tenants to register complaints periodically in order to preserve the benefits of the presumption,³⁷⁵ any spurious complaints would run afoul of the Act's good faith requirement³⁷⁶ requiring "honesty in fact in the conduct of the transaction concerned."³⁷⁷ Nevertheless, because of the difficulty of proving lack of good faith, a better, more objective test of the good faith of a complaint should incorporate something akin to the "reasonable commercial standards of fair dealing in the trade" test of the Uniform Commercial Code.³⁷⁸ Thus, a mere showing of a complaint ought not suffice to raise the blanket presumption; some evidence should be offered tending to prove that the condition complained of could reasonably be thought to have resulted from a breach of the landlord's duties.

In its present form the presumptive retaliation provision hardly offers grounds for tenant opposition to the Act inasmuch as its weakness works against the landlord. Even with the addition of the proposed requirement for proof of the complainant's good faith, the protection

371. URLTA §§ 5.101(a)(1)-(3).

372. *Id.* § 5.101(b).

373. *Id.* § 5.101(c). The section provides that the landlord's action for possession is justified if a code violation in question was caused by the tenant, if compliance with a code would require such extensive work as to deprive the tenant of the enjoyment of his premises, or if the tenant is in default in rent. *Id.*

374. Other statutes provide for shorter periods: ARIZ. REV. STAT. ANN. § 33-1381(B) (Supp. 1973) (six months—adopting the Act but substituting a shorter period than the suggested one year); CONN. GEN. STAT. ANN. § 19-375a(a) (Supp. 1973) (six months); HAWAII REV. STAT. § 666-43(a) (Supp. 1972) (six months); ME. REV. STAT. ANN. tit. 14, § 6001 (Supp. 1973) (six months); MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1973) (six months); MINN. STAT. ANN. § 566.03 (Subdiv. 2) (Supp. 1973) (90 days).

375. Strum, *supra* note 127, at 503.

376. URLTA § 1.302.

377. *Id.* § 1.301(4).

378. UNIFORM COMMERCIAL CODE § 2-103(1)(b).

given tenants against retaliatory conduct of the landlord by the URLTA would permit pursuit of improvement of specific grievances by individual or concerted actions. Furthermore, the Act evidences an intent to encourage, rather than foreclose, general reform of landlord-tenant law by the courts and the legislatures.

The URLTA and Case Law Development of Habitability Doctrines

Two specific provisions in the Act suggest that the draftsmen did not intend to curtail independent judicial development of rules governing the landlord's obligation to supply habitable premises. The comment to the general tenant remedies section states: "Remedies available to the tenant pursuant to Section 4.101 are not exclusive."³⁷⁹ Additionally, the Act provides that, unless specifically displaced by the Act, common law principles remain applicable to the landlord-tenant relationship.³⁸⁰ These provisions evidence the intent of the URLTA not to preempt the field of reform but to leave the courts free to fashion the law needed to fill the gaps left by the Act. Nevertheless, these two provisions do not dispose entirely of the potentially inhibitory effect of the Act, and, in any event, construction of a statute is not always bound by the draftsmen's intent.³⁸¹ It remains possible that, notwithstanding these provisions, a court faced with a situation not covered by the Act will feel itself precluded by the very existence of such a wide-ranging statute from judicial lawmaking and will fall back upon old law. Consideration of the habitability concept illustrates the relationship between the URLTA and judicial reforms bolstering the position of the tenant.

Comparing the theories of implied warranty of habitability developed in the courts with the obligations imposed by the URLTA in section 2.104 reveals similarity. Commonly included in the judicial doctrine is a covenant that the premises are fit for habitation at the start of the term as well as a covenant that the landlord will maintain the premises

379. URLTA § 4.101, Comment.

380. *Id.* § 1.103. This provision, which, like several other general provisions of the Act, is adapted from the Uniform Commercial Code, provides: "Unless displaced by the provisions of this Act, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions."

381. *Cf.* *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968); Malcolm, *Reflections on West Side Bank: A Draftsman's View*, 18 CATHOLIC U.L. REV. 23, 30-33 (1968).

in habitable condition throughout the term. Frequently, there is an added warranty relating to violations of applicable housing codes.³⁸² Section 2.104 follows the judicial warranty of habitability doctrine:³⁸³ both incorporate applicable housing code provisions into the warranty;³⁸⁴ each requires the landlord to provide and maintain the premises in a habitable and safe condition;³⁸⁵ and each assures provision of services essential to the tenant's enjoyment of the premises.³⁸⁶ Section 2.104 differs substantially from the judicial doctrine only in its greater detail and specificity.

Among the remedies provided by the URLTA for breach of the habitability warranty are rescission,³⁸⁷ damages and injunctive relief,³⁸⁸ self-help,³⁸⁹ and rent withholding.³⁹⁰ Courts have invoked the implied warranty doctrine to allow each with the possible exception of injunctive relief.³⁹¹ Dicta in one opinion indicated that a tenant could

382. In *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972), the Iowa Supreme Court stated what has become the most frequently articulated version of the implied warranty of habitability:

[T]he landlord impliedly warrants at the outset of the lease that there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty we perceive in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulations which shall render the premises unsafe, or unsanitary and unfit for living therein.

Id. at 796.

383. URLTA § 2.104, Comment.

384. *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); URLTA § 2.104(a) (1).

385. *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); URLTA §§ 2.104(a) (2), (3).

386. *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); URLTA §§ 2.104(a) (4)-(6).

387. URLTA § 4.101(a).

388. *Id.* § 4.101(b).

389. *Id.* §§ 4.103, 4.104.

390. *Id.* § 4.105.

391. *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (all providing for rescission). Damages are usually in the form of partial or total abatement of rent due to the defective condition of the demised premises. *Quesenbury v. Patrick*, 2 CCH Pov. L. REP. ¶ 15,803 (El Paso County Ct., Colo., 1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970). Self-help was permitted in *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). Cases permitting rent withholding include *Givens v. Gray*, 2 CCH Pov. L. REP. ¶ 15,412 (Ga. Ct. App. 1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1972); *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970).

be granted specific performance in a proper case,³⁹² and the self-help "repair and deduct" remedy authorizes, in effect, a form of specific performance.³⁹³

Whether the URLTA is intended to supplant the illegal contract theory developed in the courts is unclear. Seemingly, the provision which allows termination of the lease upon a failure of the landlord to comply with applicable housing codes³⁹⁴ incorporates the illegal contract theory into the Act. While a housing code violation would not render the lease void per se under the URLTA, it would allow the tenant to terminate the lease, with the same result. The well-recognized weaknesses of the illegal contract theory, especially when the tenant desires to remain in possession,³⁹⁵ should indicate the scant likelihood that the theory would be expanded by the courts; thus the Act poses no threat to tenant gains otherwise achievable by application of the theory.

Review of tenants' rights and remedies vis-a-vis habitability thus indicates that the URLTA goes at least as far as any judicial doctrine in a direction favorable to tenants. It does not appear that any argument on behalf of the tenant has found acceptance in the case law which does not have its counterpart in the provisions of the Act. It may be concluded that, with respect to habitability, the Act embodies the most progressive legal thinking from a tenant's standpoint, leaving no grounds for the

392. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970).

393. The statement in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970), regarding the availability of specific performance and the provisions of the URLTA allowing injunctive relief, URLTA § 4.101(b), raise difficult questions concerning the practicability and desirability of using a residential lease as a basis for compelling a landlord to make improvements on his property at the insistence of his tenant. See notes 34 & 39 *supra*.

Besides the injunctive relief provided in section 4.101(b), the comment to section 1.105 indicates that specific performance may be available under supplementary principles of law and equity through section 1.103. Section 1.102 states that one purpose of the Act is "to encourage landlords and tenants to maintain and improve the quality of housing . . ." URLTA § 1.102(b) (2). There may be a question, however, whether compulsion by specific performance is a proper form of "encouragement" under the terms of the Act.

394. URLTA § 4.101(a). The tenant may terminate for noncompliance with section 2.104(a) (1), which requires the landlord to conform the premises to building and housing codes.

395. *Hinson v. Delis*, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972). Several courts have declined to apply this theory for various reasons. *E.g.*, *Golden v. Gray*, 2 CCH Pov. L. REP. ¶ 15,295 (N.Y. Sup. Ct. 1971); *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

contention that the Act retreats from the judicial development of tenants' rights. Furthermore, an examination of the course of judicial handling of landlord-tenant law in the leading jurisdictions of Wisconsin and New Jersey demonstrates the uncertainties inherent in reliance upon case law development of reforms favorable to the tenant.

Problems of Judicial Reform of Landlord-Tenant Law

As discussed previously,³⁹⁶ the Supreme Court of Wisconsin, which propounded the original statement of the implied warranty doctrine in *Pines v. Persson*,³⁹⁷ nevertheless later decided against a tenant who argued an illegal contract theory on facts that apparently would have supported a decision in favor of the tenant on the implied warranty theory.³⁹⁸ Several possibilities may account for the differing results: the tenant may not have raised the arguments suggested by *Pines*; the court may have failed to recognize the import of its own precedent in *Pines*; or the court may have determined *sub silentio* that *Pines* should be limited strictly to its facts. The legislative policy invoked in support of the earlier broad statement of the implied warranty doctrine was viewed in the later decision as a hindrance to further expansion of the doctrine. Certainly there were distinguishing features in the cases, but there are distinctions in all cases. The two cases demonstrate that the shortcoming of a judicial precedent, as contrasted with a statutory rule, is its limited ability to embrace a broad spectrum of factual variations or, stated conversely, its susceptibility to being distinguished away factually.

Further complications in Wisconsin arise from a later decision by a lower court, *Posnanski v. Department of Agriculture*,³⁹⁹ upholding a state administrative agency's cease and desist order prohibiting the leasing of dwellings which had been placarded as unfit for human habitation or against which housing code violations had been cited, unless the prospective tenants were fully informed of the defects in question. The theory of the order concerned unfair competition by misrepresentation based on nondisclosure, but, significantly, the basis for allowing the action was the judicially created doctrine of implied warranty. Thus, the case exemplifies inconsistency in application of a judicial doctrine, even within the jurisdiction which conceived it.

New Jersey decisions on implied warranty reveal a more orderly

396. See notes 44-57 *supra* & accompanying text.

397. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

398. *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

399. 2 CCH Pov. L. REP. ¶ 17,054 (Wis. Cir. Ct. 1973).

evolution of the doctrine, as straightforward and consistent as that of any jurisdiction. Nonetheless, a careful reading of the opinions in that state reveals that the development of the law has not been free of difficulty.⁴⁰⁰

In the first New Jersey case to enunciate the implied warranty theory, *Reste Realty Corp. v. Cooper*,⁴⁰¹ the court found for the tenant on a claim of constructive eviction, but, apparently because of the length of time the tenant had remained on the premises before abandonment,⁴⁰² the court buttressed its decision by citing *Pines* and discussing the doctrine of implied warranty "against latent defects."⁴⁰³

Given the facts before the court in *Reste*, a decision could have rested on either the implied warranty or constructive eviction theories; the court, however, tied the two together. Consequently, in the next case concerning habitability, *Marini v. Ireland*,⁴⁰⁴ upholding a tenant's right to deduct from rent the cost of self-help repairs, unnecessary reference was made to the doctrine of constructive eviction. After discussing the rule of implied warranty, the opinion equated a breach of the warranty with a constructive eviction.⁴⁰⁵ Noting the inappropriateness of the constructive eviction requirement that the tenant abandon the premises, the court asserted that the tenant should have a right to correct the cause of such constructive eviction. Carrying further its incorporation of constructive eviction principles into the implied warranty, the court stated that "the tenant has *only* the alternative reme-

400. An interesting point, not as evident from the New Jersey decisions as from a comparison of cases in other jurisdictions, is that the earlier decisions, e.g., *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), were very short and concise, with little discussion of the possible ramifications of the holding. By comparison, the more recent decisions, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973), have been quite voluminous, often dwelling at length upon explanations of those doctrines which are being rejected and accepted, as well as the policy considerations underlying the courts' actions. In addition, the presence of concurring (*Boston Housing Authority v. Hemingway*, *supra*) and dissenting (*Jack Spring, Inc. v. Little*, *supra*) opinions is an indication of the more thorough analysis that the implied warranty doctrine is receiving in recent decisions. A greater judicial appreciation of the multi-faceted consequences of the implied warranty doctrine is apparent.

401. 53 N.J. 444, 251 A.2d 268 (1969).

402. Strict application of the constructive eviction theory requires that the tenant abandon the premises soon after the alleged defect is discovered. See notes 16-20 *supra* & accompanying text.

403. 53 N.J. at —, 251 A.2d at 276.

404. 56 N.J. 130, 265 A.2d 526 (1970).

405. *Id.* at —, 265 A.2d at 534.

dies of making the repairs or removing from the premises upon such a *constructive eviction*.”⁴⁰⁶

In *Academy Spires, Inc. v. Brown*,⁴⁰⁷ a lower court sought to apply the ill-defined New Jersey rule where a tenant had withheld rent because of numerous defects in his apartment, claiming a partial or total abatement of rent due to the alleged reduced value of the premises. The court observed that “whether *Marini* is authority for the tenant’s position is . . . troublesome,”⁴⁰⁸ since the tenant had neither repaired the defects nor vacated the premises and was therefore not within the letter of the *Marini* rule.⁴⁰⁹ Nevertheless, the court placed the case within the “broad principles” enunciated in *Marini* and *Reste*, finding it difficult to believe that the Supreme Court intended in *Marini* for the tenant’s only available remedy, besides abandonment, to be self-help, especially in the case of a 400-unit apartment complex.⁴¹⁰

Not until three years later did the New Jersey Supreme Court affirm the lower court’s interpretation of the *Marini* principle. In *Berzito v. Gambino*⁴¹¹ a tenant again sought an abatement of rent because of uncorrected defects in his apartment. Referring to the language in *Marini* restricting tenants’ remedies, the court stated that it would not let a “casual *dictum* . . . shackle the Court to prevent a later exercise of its creative powers in fashioning new remedies as need and occasion demand.”⁴¹² *Berzito* clearly broadened the remedies available to redress breach of the landlord warranties; it must be noted, however, that the warranty litigated in that case was *express*.⁴¹³ Therefore, *Berzito* technically is not authority for giving relief for breach of an *implied* warranty to a tenant who has neither repaired the defects nor vacated the premises.

In *Berzito* the court’s opinion was directed to the questions of dependency of lease covenants and expansion of tenant remedies and did not address the constructive eviction aspects of the earlier decisions. Thus, the implied warranty of habitability and the doctrine of constructive eviction have not yet been disentangled in New Jersey, with the

406. *Id.* at —, 265 A.2d at 535 (*dictum*) (emphasis supplied).

407. 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970).

408. *Id.* at —, 268 A.2d at 558.

409. The court took judicial notice of a housing shortage in the locality which would make an abandonment requirement unreasonable. *Id.* at —, 268 A.2d at 558.

410. *Id.* at —, 268 A.2d at 559-60.

411. 63 N.J. 460, 308 A.2d 17 (1973).

412. *Id.* at —, 308 A.2d at 21.

413. *Id.* at —, 308 A.2d at 20-21.

result that, theoretically, a tenant could be denied relief in an implied warranty situation.

Another factor affecting the development of law in the courts is a judicial reluctance to embark upon a new course, especially in areas in which the legislature has acted. Landlord-tenant cases have often expressed a concern with this problem because of the widespread use of building and housing codes and the piecemeal enactment of landlord-tenant legislation. Accordingly, the potential effect of legislation such as the URLTA upon judicial attitudes is central to the present inquiry.⁴¹⁴

A comparison of judicial attitudes in Wisconsin and New Jersey illustrates alternative approaches to the question of "judicial legislation."

414. In addition to the possibility that adoption of the Act might stultify judicial development in jurisdictions enacting it, it has been suggested that courts in other jurisdictions might also refer to the URLTA standards and remedies in fashioning their own doctrines. It is argued that the Act could prevent the development of additional reforms in all jurisdictions, especially if the Act were endorsed by the American Bar Association. Subcommittee, *supra* note 2, at 123. If, however, the standards and remedies provided by the Act are superior to those which have been developed in the courts, the influence of a uniform act would not necessarily be detrimental to the interests of tenants and might be advantageous, in that the greater specificity and definiteness of the Act might find its way into the case law.

There is also a question whether uniformity in the law governing the landlord-tenant relationship is necessary among the various jurisdictions in the United States. If there is such a need, then courts *should* look to other states' legislative enactments, such as the URLTA, and judicial decisions construing this legislation in order to promote the accomplishment of one of the Act's purposes, "to make uniform the law with respect to the subject of this Act among those states which enact it." URLTA § 1.102(b)(3). Any argument that uniformity is necessary in landlord-tenant law is far less persuasive than in areas such as sales and negotiable instruments encompassing aspects of commerce in which frequent transactions spanning two or more jurisdictions render the need for uniformity readily apparent. Such considerations traditionally have been absent from landlord-tenant law, although the growth of the national economy and, especially, the development of various forms of joint and syndicated property ownership undoubtedly have resulted in a greater number of property owners who reside outside the state in which their property is situated.

The difference between the urban and rural landlord-tenant relationship may be another reason why uniformity is not necessary and why it may, indeed, be inadvisable. The rationale underlying the older common law rules may still have application in some of the rural areas of the country. If so, the courts have been as guilty as the draftsmen of the URLTA in failing to make this distinction. Generally the court-made rules have not limited their applicability to urban situations, although invariably the cases have arisen from urban residential leases. The URLTA has to some extent taken this distinction into account by allowing certain exceptions to the applicability of the Act. URLTA § 1.202. The most noteworthy of these exceptions is found in section 1.202(7), which provides that premises used primarily for agricultural purposes are excluded from the coverage of the Act.

In *Posnanski v. Hood*⁴¹⁵ the Wisconsin Supreme Court was asked to grant a tenant the power to withhold rent in order to force landlord compliance with local housing regulations. Although in *Pines*⁴¹⁶ the court previously had fashioned a remedy which comported with its view of the general legislative housing policy, in *Hood* it seemed to find such a policy inadequate to support a holding in favor of the tenant. Upon noting that statutorily approved rent withholding had been involved in decisions in other jurisdictions approving use of the tactic for housing code enforcement, the court ruled that rent withholding was improper absent specific legislative authorization.⁴¹⁷

The approach of the New Jersey court in *Berzito v. Gambino*⁴¹⁸ contrasts with the strict position taken by the Wisconsin court. Although a statute authorizing rent withholding in New Jersey enacted subsequently to the dispute litigated in *Berzito* was nonretroactive, the court felt free to rely upon it, observing that "a statute often reflects legislative concern over a longstanding abuse, and to that extent may be fairly understood as articulating a public policy pre-existing the date of the statutory enactment. Such is clearly the case here."⁴¹⁹ A more conservative court might have argued that enactment of a rent withholding statute indicates a legislative determination that the matter is one for statutory regulation and that, prior to the legislative entrance into the field, the withholding of rent was unauthorized.

An even broader reading of a legislative mandate is found in *Boston Housing Authority v. Hemingway*,⁴²⁰ concerning statutory rent withholding in Massachusetts. The court found that the tenant could not rely upon the rent withholding statute because he had failed to give the landlord the required form of notice.⁴²¹ Nonetheless, the tenant was afforded relief under the implied warranty and dependent covenant theories, approved for the first time in Massachusetts in this case. The court discussed several state statutes which had established statewide housing standards, sanctioned rent withholding, and allowed a tenant to initiate housing code enforcement process by paying rent into court

415. 46 Wis. 2d 172, 174 N.W.2d 528 (1970).

416. *Pines v. Persson*, 14 Wis. 2d 590, —, 111 N.W.2d 409, 412-13 (1961).

417. 46 Wis. 2d at —, 174 N.W.2d at 533.

418. 63 N.J. 460, 308 A.2d 17 (1973).

419. *Id.* at —, 308 A.2d at 23.

420. 293 N.E.2d 831 (Mass. 1973).

421. The landlord had been notified of housing code violations by public authorities before the tenant started to withhold rent. An amendment to the Massachusetts statute after the case arose made such notice sufficient satisfaction of the notice requirement. *Id.* at 836 n.5.

for use to correct the alleged defects.⁴²² Instead of determining that the legislature thus had preempted landlord-tenant law reform, the court decided that the judicial erosion of the older rules was accelerated by such legislation. The court also found itself "confronted with a situation in which the legislation's 'establishment of policy carries significance beyond the particular scope of each of the statutes involved'" ⁴²³ and concluded: "If we fail to repudiate the underlying common law concept of a lease which fostered the independent covenants rule, the landlord-tenant law in Massachusetts will remain in an illogical state because our statutory and common law will be based on different conceptual assumptions as to the essential nature and consequences of a lease."⁴²⁴

The reluctance of the Wisconsin court to enter without invitation upon territory occupied by the legislature has been shared by other jurisdictions.⁴²⁵ Most of the decisions reflecting this attitude, however, are either relatively old or were rendered by lower courts understandably hesitant to make new law; more courts have exhibited the willingness to supplement statutory law typified by *Berzito* and *Boston Housing Authority*.⁴²⁶ Indeed, a reverse effect has been observed, namely, statutory reform prompted by judicial activism.⁴²⁷ In any event, it

422. *Id.* at 838-39.

423. *Id.* at 840.

424. *Id.* at 843.

425. *Golden v. Gray*, 2 CCH Pov. L. REP. ¶ 15,295 (N.Y. Sup. Ct. 1971); *cf. Murdock v. Lofton*, 2 CCH Pov. L. REP. ¶ 17,280 (Cal. Ct. App. 1973); *Fritz v. Warthen*, 2 CCH Pov. L. REP. ¶ 16,001 (St. Paul Mun. Ct., Minn. 1972); *Kearse v. Spaulding*, 406 Pa. 140, 176 A.2d 450 (1962); *Northchester Corp. v. Soto*, 2 CCH Pov. L. REP. ¶ 17,011 (Bucks County Ct. C.P., Pa. 1972). *See also* *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 378, 280 N.E.2d 208, 223 (1972) (dissenting opinion); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 851-53 (Mass. 1973) (concurring opinion).

426. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366-67, 280 N.E.2d 208, 217 (1972); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Rome v. Walker*, 38 Mich. App. 458, —, 196 N.W.2d 850, 853 (1972); *King v. Moorehead*, 495 S.W.2d 65, 73 (Mo. Ct. App. 1973); *Kline v. Burns*, 111 N.H. 87, —, 276 A.2d 248, 251 (1971); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, —, 343 N.Y.S.2d 406, — (N.Y. City Civ. Ct. 1973); *Ellabee Realty Corp. v. Beach*, 72 Misc. 2d 658, —, 340 N.Y.S.2d 8, —, (N.Y. City Civ. Ct. 1972). The two New York cases exemplify application of a statutory tenant remedy, N.Y. REAL PROP. ACTIONS § 755 (McKinney Supp. 1973), permitting a tenant to obtain a stay of proceedings in a landlord suit for possession or rent in the event certain defects or housing code violations are shown to exist. The statute was interpreted in light of the doctrine of implied warranty of habitability, so as not to frustrate the legislative purpose of inducing landlords to maintain their property.

427. In reference to the District of Columbia's enactment of tenant remedy provisions, it has been noted: "Drawing upon this rapidly developing case law, the city council's

seems clear that legislation such as the URLTA will more likely be perceived by the courts as encouraging, rather than foreclosing, further expansion of landlord-tenant law. Enactment of the URLTA should be viewed as an expression of a legislative intent that the ancient legal rules, so favorable to the landlord, be discarded as unreasonable and impracticable in a modern, urbanized society.⁴²⁸

CONCLUSION

Since compromises are inevitable in drafting uniform acts, the Uniform Residential Landlord-Tenant Act is subject to the criticisms of those who reject compromise. Landlords will find much of the Act objectionable; indeed, it is probable that landlords will resist its adoption by individual states more vigorously than will tenants. Nevertheless, this Note is confined primarily to an examination of the effect adoption of the Act will have upon the legal position of tenants. As a general proposition, it may be stated that the Act is much more than a codification of existing law, although its effect will vary from state to state. It accomplishes reforms in landlord-tenant law which will be of significant benefit to tenants.

Two doctrines borrowed from the case law form the core of the Act. First, the theory of implied warranty of habitability is adopted, imposing upon the landlord an obligation to put and maintain the tenant's premises in habitable condition. Second, lease covenants are made dependent so that maintenance of the premises in a habitable condition by the landlord is a condition precedent to his recovery for any tenant breach of the lease agreement.

Although similar developments are progressing in the courts that arguably may afford the tenant greater protection than the URLTA compromised provisions, there is no certainty that judicial activism will ever extend so far. In any event, it must be conceded that expansion of tenant rights in the courts has been halting and sporadic. Indeed, the recent Supreme Court decision in *Lindsey v. Normet*⁴²⁹ that there is no constitutional requirement that lease covenants be treated as dependent

Landlord-Tenant Regulations codify and strengthen the common law rather than establishing remedies unrelated to these judicial developments. Because of the judicial activism, broader opportunities for reform were available to the council than would have been available to a similar body in a jurisdiction rigidly governed by traditional common law concepts." Daniels, *supra* note 39, at 956.

428. URLTA § 1.102; § 1.102, Comment; § 2.104(e), Comment; § 4.101(d), Comment; § 4.105, Comment.

429. 405 U.S. 56 (1972).

may presage a retrogressive trend of decisions. Moreover, no consistent pattern of independent state legislation exists that could be said to obviate the need for the Act. Finally, the assertion that adoption of the Act will foreclose judicial developments beyond the Act is of dubious validity at best; at worst, it is a charge that the judiciary will abdicate its proper function.

Tenants may view the omission of some provisions as shortcomings of the Act. Notably absent are the English rule governing the tenant's right to possession at the inception of the tenancy and a provision for fiduciary-type protection of the tenant's security deposit while in the hands of the landlord. The lack of procedural improvements by which tenants may implement their expanded remedies is also problematic, although it is understandable that the draftsmen would not attempt to superimpose a single procedure for landlord-tenant actions upon the disparate procedural systems of the various jurisdictions.⁴³⁰ On balance, nevertheless, it is submitted that the positive features of the Act heavily outweigh its shortcomings, with the result that tenants in all jurisdictions will profit by its speedy adoption.

430. See Subcommittee, *supra* note 2, at 106, stating: "[T]he absence of even an attempt to suggest such a procedural method may lead some to claim that perhaps this inability to insure speedy enforcement of the rights may be sufficient to make the drafting of this particular Act inappropriate at this time."