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THE LAW OF LANDLORD-TENANT: A CRITICAL EVALUATION OF THE PAST WITH GUIDELINES FOR THE FUTURE

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I. INTRODUCTION

THE purpose of this article is to explain the law of Landlord and Tenant emphasizing its application to the leasing of residential space within a multi-family dwelling: what it is, how it developed and what can be done about it. It is not a very happy subject, for the law in this area is a scandal. More often than not unjust in its preference for the cause of the landlord, it can only be described as outrageous when applied to the poor urban tenant in the multi-family dwelling. There it views with complacency the most wretched living conditions, littered and unlit hallways, stairways with steps and banisters missing, walls and ceilings with holes, exposed wiring, broken windows, leaking pipes, stoves and refrigerators that do not work or work only now and then. And always the cockroaches, the rats, and the dread of the winter cold and uncertain heat.

Surely the law in a civilized urban society cannot tolerate such conditions. But it does! Let that be said frankly and without hedging. Admittedly, there are building and health codes and there is a law that governs the landlord's obligations to the tenant; but the bitter fact is that they do not adequately protect the tenant. Indeed, there is a savage mockery in the little tenant-oriented law that exists. Pro-nouncements in the building and health codes and even the sometimes harsh threat of criminal sanctions contrast painfully with the hard realities of living conditions. The deteriorating conditions persist, and grow worse. Still the landlord collects rents. That unfortunately is the system. The trouble is not that we fail to apply properly and effectively the law that is in force, but that the present law is grossly inadequate. It is just bad law. One can understand how it developed, but it is incomprehensible that responsible men and women who are normally alert to intolerable social conditions in other societies can be so blind and complacent with respect to their own shameful system. Perhaps, they do not really know.

Understanding of landlord-tenant law is best obtained by reflecting on what it is not. It is not similar to the law with which most people

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are familiar. This is contract or sales law. Although it is not difficult to find instances of serious injustice in these fields, by and large, their rules seem reasonably fair. The rights and duties of one party are related to and dependent upon those of the other. The house painter who fails to paint does not get paid, and if he performs poorly he will ultimately get less than the contract price, or perhaps nothing at all. Indeed, the result may be that he pays out considerable sums to remedy the situation he set wrong in the first place. The homeowner, in turn, must also perform, not only by paying but also by cooperating as required, e.g., by selecting the paint, making the premises available, etc. There is an interrelationship and dependence here not only between the rights and duties of the parties, but also in the remedies available to them.

Although the lease can be viewed as a type of service contract with the rights, obligations and remedies of the landlord and tenant related to one another in a manner similar to the contract between the house painter and the householder, such a view is misleading. Indeed, if one assumes as a first principle of basic fairness that whenever two people enter into an agreement one's performance is always interrelated and dependent upon the other's, he will never understand landlord-tenant law. The simple reason is that it is built on a different first premise.

The relationship between the landlord and the tenant can also possibly be viewed as similar to that which exists between a seller and a buyer. This would furnish a familiar analogy, i.e., the marketplace. Thus, it is possible to think of the landlord as leasing an apartment the way one thinks of Hertz or Avis renting a car.

However sensible this approach, it is also incorrect. In the vendor-vendee situation not only are the rights and obligations of the parties related and mutually dependent, but there is also a long tradition of imposing definite quality standards on those who market goods. This tradition, however, is foreign to the marketing of apartments.

If the more familiar legal analogies fail, where are we to go? The only course left is to approach the subject as one approaches a foreign country. One must leave behind one's preconceived notions as to how the law operates, suspend one's sense of basic fairness since this can distort the picture as well, and be prepared to accept this area for what it is, i.e., foreign country, different and sufficient unto itself. Thus, what the stranger to landlord-tenant law finds novel and singularly bewildering, the seasoned practitioner in landlord-tenant law accepts as commonplace.

In order to understand landlord-tenant law one must forget the modern urban complex with its towering office buildings, its sprawl
of huge apartments, and its teeming slums. The place to start is with the countryside, i.e., the grass, trees, and grazing sheep. We are back to the land now, and land is really what landlord-tenant law is still all about. That may seem curious to the man who gets off the elevator fifteen stories up in the air to go to an apartment where even a dandelion could not grow, but such is the fact. The land is the thing. It is the fields, orchards, pastures and streams and their possession and use that are important. To comprehend the law it is helpful to envision the tenant leaning on a fence at twilight, watching his fields and awaiting the call to dinner. It is against this simple background that landlord and tenant law took the shape it has essentially retained to this day.

With this background as a starting point, the crudities and eccentricities of landlord-tenant law become at least understandable. Still more important, it focuses our attention on not only where things started to go wrong in this body of law but also on the reason why.

II. LANDLORD-TENANT OBLIGATIONS: PART I

The landlord's primary obligation was to turn over possession\(^1\) of the land to the tenant and to agree to leave him in peaceful possession.\(^2\)

1. In technical terms the landlord conveys a leasehold estate which gives the tenant the legal right to possession. This has had interesting consequences in some jurisdictions where it has been held that the landlord has fully performed his obligation if the lease gives the tenant the legal right to possession at the beginning of the term. No obligation, however, is imposed on the landlord to see that the tenant actually gets into possession, e.g., by evicting a holdover tenant. Gardner v. Keteltas, 3 Hill 330 (N.Y. Sup. Ct. 1842); Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930). In other jurisdictions there is an implied covenant by the landlord that the premises shall be open when the time for possession arrives. Canaday v. Krueger, 156 Neb. 287, 56 N.W.2d 123 (1952) (Tenant prevented from taking possession by landlord's failure to complete construction of building on premises); Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (Sup. Ct. 1936); Barfield v. Damon, 56 N.J. 515, 245 P.2d 1032 (1952) (Tenant prevented from taking possession by a holdover). The cases are collected in Annot., 70 A.L.R. 151 (1931).

The New York common law has been changed by 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." N.Y. Real Prop. Law § 223-a (1968).

This distinction between actual possession and the mere right to possession also surfaces where the tenant voluntarily vacates the leased premises. The tenant remains liable for the rent absent a constructive eviction since he retains the legal right to possession for which rent is the payment although he is not actually occupying the premises. See Enoch C. Richards Co. v. Libby, 136 Me. 376, 10 A.2d 609 (1940); Lane v. Nelson, 167 Pa. 602, 31 A. 864 (1895); Barlow v. Wainwright, 22 Vt. 88 (1849). See also Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938).

2. This does not mean that the landlord has an affirmative duty to maintain and protect the tenant's use and possession. Quite the contrary. His duty is negative, i.e., to refrain from disturbing the tenant's possession and use. Therefore, a landlord cannot be held respon-
The tenant, in turn, was expected to pay the "rent." In technical terms, the tenant "covenanted" to pay the rent while the landlord "covenanted" to keep him in quiet possession.

Significantly, the landlord was not being paid to do anything. He was turning over the land to the tenant with the rent serving as continuous compensation for the transfer. The landlord was not expected to assist in the operation of the land. Quite the reverse, he was expected to stay as far away as possible. In other words, for the term of the lease, the lands were subject to the tenant's, not the landlord's care and concern. Should the landlord interfere, he risked violating real property law.

A landlord's or tenant's failure to perform his basic obligation led to the problem of remedies in landlord-tenant law. Once again even a rudimentary knowledge of remedies as they are found in other areas of the law, for example, in the law of sales, can cause great confusion and consternation here. One expects to find in any advanced legal system a certain sophistication where remedies will be measured at least roughly to meet the needs that gave rise to their use. However legitimate the expectation, it does not come to fruition in landlord-tenant law. Remedies, like everything else in this field, are based upon a single notion, i.e., the possession-rent relationship.

Rent was the quid pro quo for possession. If the tenant failed to pay the rent, he would be deprived of possession. The landlord, once

3. Technically, rent was the consideration furnished by the tenant for the leasehold estate, i.e., for the tenant's legal right to possession and use undisturbed by the landlord. Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930). See Coogan v. Parker, 2 S.C. 255 (1870).

4. The lease was viewed as a conveyance of an estate by the landlord to the tenant. Originally, the tenant's promise to pay the rent was a separate covenant made by the tenant and independent of the conveyance made by the landlord. As a result, a default in the rental payment was indeed a breach of covenant but it did not give the landlord a right to oust the tenant from the premises. Brown v. Bragg, 22 Ind. 122 (1864); De Lancey v. Ganong, 9 N.Y. 9 (1853). The landlord's only remedies consisted of a power to sue for the rent as it accrued coupled with a power to distraint the tenant's chattels as a way of further pressuring payment. The landlord's response was to draft the lease so as to avoid this impasse. Hence a clause was inserted in the lease which reserved to the landlord power to terminate the lease for nonpayment of the rent. The process came to fruition with the passage of statutes providing the landlord with not only a procedure for evicting the tenant for default of the rent but also the power to evict by summary procedures. E.g., N.Y. Real Prop. Actions Law § 711 (1963). Interestingly enough, the modern statutes give the landlord the power of summary eviction for nonpayment even though the lease contains no clause reserving the power to terminate for nonpayment of rent. The net result of the pro-
he had conveyed the leasehold, was obliged to leave the tenant in quiet possession of the premises. Where the landlord failed in this basic possessory obligation by actually interfering with the tenant's possession, the tenant's one effective remedy was to "interfere" with the rent which stood as the surrogate for possession.\footnote{5}

The crudest form of violation of the tenant's right to possession occurred when the landlord entered the land prior to the expiration of the lease and forcefully removed the tenant. As a result of this intrusion, the law abated the rent completely, and even permitted the tenant to sue for his injuries.\footnote{6} The point, of course, was that rent stood for possession, and since possession was gone, so was the obligation to pay the rent. Further, if the tenant wanted to recover the actual possession of the premises, that too was possible by an action in ejectment.\footnote{7}

\footnote{5} Inherent in the conveyance of a possessory estate for a term was the duty of the landlord to leave the tenant in possession for the term of the lease without interference. It was in return for this estate and the continuing right to quietly possess the land that the tenant covenanted to pay the rent. This inherent duty of the landlord was imposed by the law through the device of an implied covenant. Thus, every lease contained by implication, if not expressly, the landlord's covenant not to oust the tenant from possession of the demised premises or any part thereof during the term of the lease. Thurman v. Trim, 199 Kan. 679, 433 P.2d 367 (1967); L-M-S Inc. v. Blackwell, 149 Tex. 348, 233 S.W.2d 286 (1950). The cases are collected in Annots., 62 A.L.R. 1257, 1258-66 (1929), and 41 A.L.R. 1414, 1420-23 (1955). Since undisturbed possession of the land for the term of the lease was the consideration for the rent, the law viewed the landlord's interference with the tenant's possession, for example, by forcing the tenant off the land, as a failure of consideration. The tenant's rental obligation was then abated because of a failure of consideration. When the landlord ousted the tenant, the rental obligation was suspended until the tenant regained possession of the entire premises. 18 Halsbury, Laws of England § 959, at 479 (1911).

\footnote{6} Although covenants in a lease were viewed as independent, the obligation to pay rent was in fact dependent upon the landlord's observance of his duty not to interfere with the tenant's possession. True, the breach of the landlord's covenant of quiet enjoyment did not, as such, release the tenant from his covenant to pay rent because property law held that covenants in a lease were independent. However, when the tenant was deprived of possession, there was truly a failure of consideration for the rent. Royce v. Guggenheim, 106 Mass. 201 (1870); Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917). Thus the duty to pay rent was either suspended while the tenant was dispossessed, Christopher v. Austin, 11 N.Y. 216 (1854) (partial eviction), or, should the tenant give up his estate, terminated completely, Gans v. L. Olchin, Inc., 109 Conn. 164, 145 A. 751 (1929). In addition, the tenant was given the usual remedy for breach of covenant, an action for damages. In re O'Donnell, 240 N.Y. 99, 147 N.E. 541 (1925); Scrivers v. Smith, 100 N.Y. 471, 3 N.E. 675 (1885).

\footnote{7} By the year 1500, the English courts recognized that a lessee could recover not only damages but also the land itself in an action in ejectment. 3 W. Holdsworth, History of English Law 216 (3d ed. 1927).
Once possession was recovered the rent obligation was reinstated. The law’s chief concern, therefore, was with correcting in one way or another any imbalances in this basic possession-rent relationship.

This preoccupation with the possession-rent relationship, however, was carried to extremes. Concededly, no theoretical problem arose where the landlord physically evicted the tenant. In this case the abused tenant certainly had no actual possession of the premises. The disequilibrium in the relationship was clear. However, suppose the tenant had not been physically evicted, but rather was subjected to such harassment and vexation that life on the premises became a misery. This situation presented a serious problem with regard to the tenant’s remedy. The landlord was certainly not performing. Indeed, let us assume that he was flagrantly interfering with his tenant’s “quiet enjoyment” of the premises. Was the tenant free to stop paying the rent since his use and enjoyment had been clearly diminished? The answer was no.

There were two reasons for this strange but entirely consistent result. First, the landlord had not physically interfered with the tenant’s actual hold on the premises. He had stopped short of physical eviction. Second, and infinitely more important, was the evident fact that the tenant still retained possession. As a result, although under stress, the fundamental possession-rent relationship remained in balance. The tenant was still holding onto the full leasehold, and thus, the landlord retained his right to the full rent. The rent was the surrogate for possession.

Suppose the tenant abandoned the premises? The possession-rent relationship certainly appeared to be in disequilibrium. Did the landlord still retain his right to the rent? The ancient answer is yes.¹⁸

The point that emerges and which bears emphasis is that the basic remedies peculiar to landlord-tenant law are possession oriented. The tenant who failed to pay the rent was evicted from possession. In turn, the landlord violated the law when he deprived the tenant of possession.

These measures are still the law. However, it is the contemporary man who experiences the sense of shock and not the ancient farmer. Historically, the land was the thing and its possession the whole story, more than the fabled nine-tenths of the law. It yielded grain from the fields, fruit from the orchard, water from the stream, and heat from the woods. So long as the tenant remained in possession equilibrium was maintained. He had his part of the agreement, and so long as he clung to possession, and quite literally reaped the fruits of possession, he was

¹⁸. See generally note 20 infra.

lawful ejectment, the action subsequently became the one whereby questions of title to the freehold were settled. 7 W. Holdsworth, History of English Law 10 (1926).
obliged to render to the landlord the law's substitute for possession, i.e., the rent.

III. LANDLORD-TENANT OBLIGATIONS: PART II

It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking only to be left alone to tend his fences and to shear his sheep. The heart of the system was land and its possession. The model landlord was the one who did the least. The tenant, in turn, was expected to run the farm, to be the omnicompetent man fully prepared to see to his own shelter, heat and light.

Get away from the simplicities of the rural scene, however, and the old ideas get strangely and radically out of joint. What once made sense, now looks more like nonsense.

The scene shifts from the countryside to the city, and the subject is not land but space in a building. In place of the farmer leaning on his fence at twilight there is now a clerk, newspaper under his arm, climbing the stairs to reach his flat on the second floor. The farm acreage gives way to square feet of board floor enclosed by walls and ceiling. Of course, this is to be the pattern of the future which will culminate in buildings so high that an internal transportation system will be necessary.

How did the landlord-tenant law, developed for the farm, function when applied to the apartment in the multi-family dwelling? Well enough, at least on the surface. The basics were still there, important and workable. The landlord's job was still to turn over possession and then to assure the tenant that he would not be disturbed in his tenure. The tenant, in turn, was bound to make his rental payments.

The trouble, of course, was that once you scratched below the surface even the basics began to fall apart. The tenant in the multi-family dwelling was not an independent farmer. He did not share the farmer's interest in being left alone to work the fields. Indeed, there were no fields. The object of the lease was now a building, or more accurately, a part of a building, i.e., the flat. The new type of tenant was anything but self-sufficient and the last thing he wanted was to be left alone. Since he occupied only a part of a building, he was dependent on the rest of it. He relied upon the building's water system, lighting system, and heating system; he was sharing walls, doors, corridors and stairways. Agrarian self-reliance in this context is simply not possible. Indeed, if the hypothetical farmer were somehow transposed to the flat and there attempted to be self-sufficient, he would be physically thwarted at
every turn. The law itself would impede and threaten him with the risk of serious liability were he to make the effort.

Just as the real property law served the agrarian tenant, it worked against the tenant in the multi-family unit. True, he had possession of part of the building and the older law assured him of his quiet possession in his assigned area, but the rest of the building was not only owned by someone else, but also was possessed by others whose quiet possession was also protected by the law. Consequently, he could no longer assure warmth in his dwelling, for doing so involved entering areas outside the leasehold and tampering with another man’s boiler. His own “quiet possession” in this context assured him the undisputed possession of a cold apartment that he could not heat even if he were prepared to spend the time, the effort, and the money.

Clearly, the ancient landlord-tenant idea of the lease is woefully out of line with the changed physical circumstances. Possession, even possession of apartment space, is no longer the whole story. Possession is only part of the agreement. Indeed, it may not even be the prime component. Just a very short stay in an apartment without heat or light, with broken plumbing and rodent infestation is all that is needed to make this point painfully clear. A roof and a floor are admittedly important, but hardly the only aspect to the renting of an apartment.

Surely the landlord assumed added obligations more consonant with the changed situation. Who else could supply the needed services? He did, of course.

Or did he? On the surface he certainly did. This type of obligation is commonplace even in the form lease; at least some of the standard clauses, e.g., heat and water have been included for a long time. But even these, unfortunately, come accompanied by a variety of waivers and disclaimers. The crucial question, however, is not whether the landlord has a stated obligation to render services, but rather what can be done about

9. E.g., The Real Estate Board of New York, Inc., Standard Form of Apartment Lease, clause 13 provides: “As long as Tenant is not in default under any of the provisions of this lease Landlord covenants to furnish, insofar as the existing facilities provide, the following services: (a) Elevator service; (b) Hot and cold water in reasonable quantities at all times; (c) Heat at reasonable hours during the cold seasons of the year.”

In addition to the obligations which the landlord assumes by covenant in the lease, there are those imposed upon him by statutes, local building codes, and municipal ordinances. For instance, where applicable, the N.Y. Mult. Dwell. Law requires the owners of most apartment buildings to supply hot and cold water to every apartment, § 75 (Supp. 1969); to keep the apartments in good repair, § 78 (1946); to provide heat, § 79 (Supp. 1969); and to light and ventilate public halls and stairs within the building, § 217 (1946). The tenant may recover in tort for damages caused by the landlord’s failure to keep the tenant’s apartment in good repair. Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).
his failure to do so. It is here that one of the more bizarre features of landlord-tenant law surfaces.

One would have anticipated a give and take between landlord and tenant in this area. The landlord's failure to supply heat would justify the tenant in withholding rent or reducing it somewhat to cover the costs of his own attempts at interim heating. The prospect of a tenant's being forced to continue paying rent under pain of summary eviction when heat is not supplied seems preposterous to one who expects basic fairness from the law. However, this is exactly how the law of landlord-tenant operates.\(^1\) The reason for this legal monstrosity lies in the inability of the courts to adjust the old law satisfactorily to the new circumstances. There had to be adjustments where the landlord had assumed new obligations beyond the mere assurance of quiet possession. The only question was what adjustments.

What the law did was to preserve the old landlord-tenant law with its fixation on possession as the crux of the lease, and with rent as the quid pro quo for possession. Onto this was engrafted a new set of rights and duties (concerning heat, hot water and repairs) which were independent of the possession-rent relationship and considered incidental and unimportant relative to possession.\(^2\) The result was a double set of relationships between the landlord and the tenant, \(i.e.,\) a two level relationship.

On level one, the basic level, whether the tenant happened to be a farmer or a dweller in a multi-family unit was quite immaterial. He was first and foremost a tenant, and that meant he was entitled to possession, whether it happened to be land or space in a building. He was assured of quiet possession, and in return was bound to pay the full rent under pain of eviction.

On level two, the newer and less important level legally, he had a right to heat, light and other services from the landlord. Level two

\(^1\) Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Barone Bldg., Inc. v. Mahoney, 16 La. App. 84, 132 So. 795 (1931). Also, the landlord's breach of his statutory obligation to make repairs, etc., does not permit the tenant to withhold rent.

\(^2\) Frazier v. Riley, 215 Ala. 517, 111 So. 10 (1926). (Since the landlord's covenant to repair is independent of the tenant's covenant to pay rent, the breach of the covenant to repair is no bar to an action for rent accruing while the tenant continues in possession); Wurz v. Watts, 73 Misc. 262, 132 N.Y.S. 685 (Onida County Ct. 1911); Graham Hotel Co. v. Garrett, 33 S.W.2d 522 (Tex. Civ. App. 1930) (Because of the landlord's breach of the covenant to supply heat and hot water, the tenant can recover damages to the extent of his loss of profits. However, the tenant must pay the rent accruing while he remained in possession, landlord's breach of covenant notwithstanding.).
constituted a separate agreement. The landlord was expected to perform and if he did not the tenant was free to sue him for redress.

Significantly, the two levels were separate and distinct. A failure to perform on one level generated a remedy on that level, but in no way affected the other level. In technical terms, the covenants on one level were not reciprocal with the covenants on the other. What it actually meant was that the tenant had to pay the full rent so long as he had possession of the premises (level one), even though the landlord failed miserably in the delivery of services (level two). The sophisticated legal structure was a velvet glove which concealed an iron fist.

Theoretically, the tenant was free to go into court to seek redress for the breached service contract, but the route was so cumbersome, time consuming and costly that it was neither practical nor realistic. Moreover, it meant that even when the tenant went into court, he did so in a cold apartment with small pressure on the dilatory landlord. Stopping the rent was language the landlord was likely to understand, but this was not available. The tenant, who assumed that basic fairness permitted him to operate on a "no heat, no rent" basis, was in trouble. The tenant was here confusing the two levels, attempting to apply level one remedies to level two problems. On level one the tenant was bound to pay the rent so long as he was assured possession. In addition, the landlord was fulfilling his obligation by assuring the tenant quiet possession. By withholding the rent, however, the tenant was violating his part of the level one relationship. He had possession and full rent was due. His refusal to pay the rent, therefore, was without legal justification. He was the wrongdoer.

In addition, the landlord had every right to apply his basic level one remedy, i.e., eviction of the tenant from the premises. The result was a legal proceeding where only two questions were asked: (1) Are you in the apartment? (2) Did you pay the rent? Everything else, the heat, the garbage, the plumbing, was techni-

12. Stewart v. Childs Co., 86 N.J.L. 648, 92 A. 392 (Ct. Err. & App. 1914) (The covenant to pay rent is independent of the landlord's covenant to maintain the basement of the premises in a waterproof condition. Hence, the landlord's breach of this covenant is no defense to an action for rent.)


The text refers, of course, to the now traditional "constructive eviction with abandonment" doctrine in its modern urban context. For a discussion of this doctrine see 1 American Law of Property § 3.51 (A.J. Casner ed. 1952).

18. Stone v. Sullivan, 300 Mass. 450, 15 N.E.2d 476 (1938). As previously noted, the lease was considered as fundamentally a conveyance to the tenant of a right to possession for a term. Once the conveyance was made, and the tenant had acquired a legal right to possession for an agreed period, the main thing had been accomplished. Except for the covenant of quiet enjoyment, therefore, the covenants in a lease were viewed as incidental and relatively unimportant when compared with the conveyance to the tenant of his estate, i.e., his right to possession. 1 American Law of Property § 3.11 (A. J. Casner ed. 1952). Consequently, a subsequent breach by either party of the promises incidentally inserted in the lease was considered immaterial and, therefore, gave the aggrieved party no right to rescind the conveyance or terminate the estate conveyed. Moreover, it did not excuse the injured party from the performance of his covenants. E.g., Ravkind v. Jones Apothecary, Inc., 439 S.W.2d 470 (Tex. Civ. App. 1969).
19. E.g., Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959) (Landlord's failure, in breach of the lease, to furnish light, heat, electrical power and elevator service to a fifth floor tenant was breach of covenant of quiet enjoyment.).
20. Dyett v. Pendleton, 8 Cow. 727 (N.Y. Ct. Err. 1826). The text refers, of course, to the now traditional "constructive eviction with abandonment" doctrine in its modern urban context. For a discussion of this doctrine see 1 American Law of Property § 3.51 (A.J. Casner ed. 1952).
could be invoked. The doctrine was not so much one of “constructive” eviction as it was one of “constructive” eviction with abandonment. The abandonment was the critical element that placed the case into the category of an “eviction.” The reason was that the abandonment affected the possession component of the possession-rent relationship, placing it in disequilibrium. Granted, it had been caused by the voluntary act of the tenant, but the landlord was ultimately responsible for the decision to leave. Given this actual abandonment, an analogy exists between the true eviction and “constructive” eviction. In both the result was the same. Possession had been taken from the tenant, in one case by crude force, \textit{i.e.}, the true eviction, in the other by indirect measures, \textit{i.e.}, the “constructive” eviction. Where the harassment was not accompanied by an abandonment of the premises, it was not treated as an eviction. The tenant could not abate the rent, but rather had to pay in full while he remained in possession of the uninhabitable premises.

This appeared very traditional. The law was not talking about the landlord’s failure to supply services, but rather of his obligation to assure quiet possession. That was the old idea, and that was what triggered the old remedy, \textit{i.e.}, the tenant’s power to abate the rent by leaving the premises. Beneath the traditional exterior, however, a radically new idea was really at work. What the law was doing was taking an obligation that clearly situated itself on level two, \textit{i.e.}, the landlord’s service obligation, and shifting it down to level one. On this level, there was a relationship of dependence between it and the rent. Here a failure to supply service, at least a gross failure to supply service, did affect the rental obligation. What the law was accomplishing, therefore, was the fusion of the two levels in the limited situation where the failure to provide services was so severe that it shocked the court’s conscience.

Although the effort was praiseworthy, it contained a radical defect. It was a possession-oriented remedy. Harassment of the tenant worked a rental abatement only when the tenant actually abandoned the premises. But if he chose to remain and use the land, the full rent was due. For the tenant in the multi-family dwelling, this meant that the tenant was free to abandon the premises where the failure of service was extreme, but had to pay the full rent so long as he stayed.\textsuperscript{21}

The remedy’s value became even more ephemeral in the modern context of a housing shortage. Assuming gross abuse of the service obligation by the landlord, abandonment by the tenant may not be a very real option. All too familiar in the urban ghetto is the family in an apartment with peeling plaster, broken windows, random heat, 

faulty plumbing and appliances, and rats. The family can leave and be
rid of the rent obligation, but where are conditions any better, and if
the same situation develops there, as it normally does, what are they
to do? So they usually stay and the full rent remains due. If it is not
paid they are subject to eviction, defective services and poor living con-
ditions notwithstanding.

This final horror led to still another quite recent attempt to find a
remedy within the creaky system. This was the development of the
theory of "constructive eviction without abandonment." 222 Here lawyers
were attempting not merely to stretch the old law, but to develop a
radically new idea under the guise of a recognized and accepted legal
document. The starting point was the "constructive eviction with
abandonment." Why not continue classifying the gross failure of ser-
vice as a constructive eviction and permit the tenant to abate the rent
without abandoning the premises? 223 As a matter of simple justice, to do
so makes eminently good sense. What blocked this most sensible de-
velopment was the old landlord-tenant law's inability to relinquish the
hoary possession-rent correlation. What had made the "constructive"
eviction an "eviction" was the fact that the premises were actually
abandoned by the tenant. The crux was not so much the failure of
services as it was the actual abandonment. The law equated the situation
with a crude physical eviction. Moreover, the crucial rental abatement
did not depend on the harassment by the landlord, but on the fact
that the harassment resulted in the actual abandonment of the premises.
Possession had been surrendered and this affected the rent. The old
possession-rent relationship, therefore, was in disequilibrium because of
the landlord's misconduct. This justified the abatement of the rent.

22. See generally Schoshinski, Remedies of the Indigent Tenant: Proposal for Change,

23. It is also possible to view a failure of services as a constructive partial eviction.
Therefore, although the tenant remains in possession of the "incomplete" premises, he may
refuse to pay rent without fear of eviction until the landlord's wrong is corrected. Borel v.
Lawton, 90 N.Y. 393 (1882); Barash v. Pennsylvania Terminal Real Estate Corp., 31 App.
Div. 2d 342, 298 N.Y.S.2d 153 (1st Dep't 1969) (A breach of a covenant to provide air-
conditioning in evenings and on weekends so that the tenant's office could remain open
during those times constituted a partial eviction which relieved the tenant of his obligation to
pay rent while the breach continued. This was true even though the tenant had not aban-
doned the premises.); Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T.),

On suspension of the rent in the case of an actual partial eviction, see Fifth Ave. Bldg.
Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917); Edgerton v. Page, 20 N.Y. 281
(1859); Christopher v. Austin, 11 N.Y. 216 (1854); Two Rector St. Corp. v. Bein, 226
App. Div. 73, 234 N.Y.S. 409 (1st Dep't 1929); Kusche v. Sabin, 6 N.Y.S.2d 771 (New
Rochelle City Ct. 1938).
Where there was no abandonment by the tenant it was hard to see how there could be talk of an “eviction” constructive or otherwise. After all, the tenant was still in possession.  

As previously noted, what the “constructive eviction without abandonment” doctrine was attempting to do was to permit an abatement of the rent even though the tenant remained fully in possession. This was a radically new idea and had it succeeded it would have linked the rental obligation not just to possession, as was traditional, but to a failure to provide service. In effect, the landlord’s covenant to render service would now be reciprocal with the tenant’s rental obligation, at least where the failure of service was so gross as to be classifiable as a “constructive” eviction. Beneath the jargon was a direct attack against the two level system.

A number of courts have approved the doctrine, but unfortunately it has not yet been widely accepted. Perhaps it is simply too sophisticated a fiction, however sensible its intentions, to bridge the gap between the two levels upon which landlord-tenant law operates. If it had been fully accepted, landlord-tenant law would have been developed to the point where the tenant’s rental obligation was dependent upon the landlord’s performance of his service function as well as upon the fulfillment of the covenant of quiet enjoyment.

However, the old law was maintained. The landlord’s routine failure to perform his service obligation is, therefore, as a practical matter, without remedy. Gross failures may be remedied in some extreme cases by abandonment of the premises. Short of this the tenant must continue to pay the rent whether he stays or leaves.

25. The suspension of the tenant’s obligation to pay rent even while he is in possession would not be unjust were the landlord permitted to recover the reasonable value of the use of the premises in their defective condition. This was done in Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961), a case of breach of warranty of habitability.
28. As with other fictions which permit the development of the law without a radical dislocation of traditional modes of thought, the cumbersome “constructive eviction without abandonment” device could have been later dropped and, in the interest of clarity and realism, its underlying purpose frankly acknowledged, i.e., that covenants in a lease are actually reciprocal. Indeed, the way would have been open to carry the realism a step further by expressly noting that the two level relationship that previously structured landlord-tenant relationships in the law was no longer so evident a fact.
With the law of landlord-tenant so radically out of balance in favor of the landlord, the consequence was predictable. In ghetto areas, deteriorating structures, rat infestation, and health and fire hazards are widespread. Surely this could not be tolerated by civilized men and women. It was not, of course. A variety of legislative efforts designed to correct the situation were made. The private law had failed to develop a clear set of really enforceable service obligations between the landlord and his tenant. Legislatures, therefore, imposed on the landlord civic obligations which the landlord would now owe to the community at large. These obligations were imposed on the landlord in the form of building and health codes.29

IV. LANDLORD-TENANT OBLIGATIONS: PART III

A. Criminal Sanctions

The usual way to force a citizen to observe higher standards of conduct is by the use of criminal sanctions.30 With the sanction threatening, presumably the one threatened will do his civic duty. Should he fail, the pain of fines and prison walls stand ready to instruct him in the error of his ways.

Criminal law designed to coerce landlords into the maintenance of decent building and health standards have an ancient tradition.31 Their value in the context of the modern urban setting, however, is questionable at best. Although there are laws designed to eliminate substandard living conditions, these conditions still prevail. There exists a frightful gap between the high promises of the building and health codes on the one hand, and the hard reality of dreadful living conditions on the other.

Enacting laws is one thing; translating them into action is another and quite different thing. The criminal law on its most superficial level is merely words on paper. The reality of enforcement is that the indicted activity must be identified, and a case must be assembled, prepared, and presented to the trier of fact. Manageable things, such as physical conditions and actions, along with not so manageable things like subjective intentions and a criminal state of mind must be proven. It takes time and effort; a lot of people and money are needed. There are

29. Housing codes designed to protect tenants, as opposed to regulations intended to protect the public from fire and building collapse, were first enacted at the beginning of this century. Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1259 (1966).
30. See generally Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304, 314-23 (1965).
only so many policemen, public prosecutors and judges. Consequently, there has to be a screening process. It is only the extreme violation that has any chance of being remedied in the major city setting, where large numbers of old buildings are deteriorating rapidly. The present costs of municipal government are extremely high, taxable revenues always insufficient, and the demands on the criminal enforcement system intense. Even when the case does move through the system to court action, there is still the human element, a variable that is difficult to define, but no less real. For example, there is the problem of the imposition of a penalty at the conclusion of a successful trial. Shall the court impose a fine or send the landlord to prison, and how much of a fine, or how many days in jail are there to be? These are hard questions to answer, but ones that will have a profound affect on whether tenants sue landlords. Sending landlords to prison is not very popular.\(^3\) Even in New York, a major housing area with countless structures in fearsome disrepair and more than its share of professional slumlords, a prison sentence in a housing case is rare indeed.\(^3\) The fine is the usual remedy, and if the experience in New York is any indication of its effectiveness, it is simply not significant. The average fine per case in New York City has been variously estimated as $14\(^3\) and $16.\(^3\) What does it all amount to when the law has run its course and the fine imposed? Very little indeed, and honesty compels a frank admission of that fact.

For the knowledgeable landlord, the whole process is simply a matter of risks and basic economics. How likely is it that the law will penalize him and how long will it take the law to get around to doing so, if it does so at all? If the landlord is threatened with suit what are the options available to him to smooth things out along the way, e.g., a start at some repairs? If the matter actually terminates in conviction and a fine, how does the cost of the fine compare with the cost of maintaining the building properly or even rectifying the complained of conditions?\(^3\) At the

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3. Id. at 1279-81.
33. In New York City in 1963 only 36 out of 14,786 landlords convicted of housing code violations were imprisoned. Id. at 1277 n.102. The District of Columbia's record is even better. Through 1965 no landlord had ever been sent to jail for a housing code violation. P. Wald, Law and Poverty 1965 15 (1965).
34. Gribetz and Grad, supra note 29, at 1276.
35. P. Wald, supra note 33, at 15.
36. In one case a fine of $50 was imposed for violations of the Multiple Dwelling Law and New York City's Administrative Code. The correction of the violation would have cost $42,500. Even so, the court of appeals might have reversed the conviction because the land-
base of the process lie these economic questions. Actually, it is far cheaper to pay the fine than to make the repairs, much less maintain the building in a habitable condition. What about the opprobrium of a conviction? That carries about the same sting as a traffic ticket.

Although this recital is discouraging, it is not the entire story, since all that has been considered is the handling of the housing offense after it has come to the attention of the criminal enforcement system. That is the tail end of a process, not the beginning. Before the case gets there it must work its way through several different bureaucracies. With the housing and health codes come departments of buildings, health, gas, water and electricity, sanitation and fire, etc. This generates yet another and a different set of problems. The first is the problem of jurisdiction. What department is charged with remedying the particular complaint? Since serious complaints come in clusters, what departments are to be contacted, and how do they relate to one another? In the modern city the answer to a jurisdictional question requires a knowledgeable housing expert. The inexperienced may wander for days, weeks or months just looking for the right place to go.37

After finding the right department, the second problem is the awesome one of getting that department’s machinery into operation to serve the complaining tenant. Here again the tenant is faced with a self-contained bureaucratic system. It is burdened with waiting lists, heavy daily work loads, too few inspectors, too few substitutes, intense paperwork levels, and on top of all that, other equally important work to do, e.g., fighting fire, repairing water mains, etc. Once again complaints must be screened in order to handle the graver violation. Policies of adjustment are adopted in order to reduce costs and caseloads. Moreover, before the case is even suggested for prosecution, decisions on higher levels must be made. This leads to further delays.

The process is slow, to say the least. When and if all the wheels get

lord did not have the money to correct the violations and could not procure a loan. People v. Rowen, 9 N.Y.2d 732, 174 N.E.2d 331, 214 N.Y.S.2d 347 (1961), rev’g 11 App. Div. 2d 670, 204 N.Y.S.2d 74 (1st Dep’t 1960).

37. A housing complaint’s guide for New York City clearly demonstrates the maze through which a citizen must wander when looking for help. In 1964, no water in an entire building was a matter for the New York City Department of Health; no cold water in one apartment, no hot water in one apartment and insufficient water were matters for the Department of Buildings. Leaking pipes, sinks, and radiators were also for the Department of Buildings. If the leak was a large one, however, wasting a lot of water, the Department of Water Supply, Gas and Electricity had jurisdiction. Leaking toilets were under the jurisdiction of both the Buildings Department and the Health Department. An overflow of water from the apartment above was a Police Department matter. WMICA: Call For Action, Housing Complaints Guide: The Book you SHOULDN’T Need 3 (1964).
moving up and down the bureaucratic line and into the court process, a small fine is the result. Obviously, something more effective is needed.\footnote{38}

What is needed is a remedy that is closer at hand and more immediately available to the tenant. Since abating the rent seemed to be the most effective sanction, laws were passed\footnote{39} which sought to control the landlord's abuse of his service obligation by altering in some way the tenant's rental obligation. Here was a weapon available to the tenant himself designed to force the landlord to maintain decent housing conditions.

B. Rent Impairing Remedies\footnote{40}

The idea behind this new direction was familiar enough. Simply stated, it was that the tenant's rental obligation was to be reciprocal with the landlord's service obligation. This same idea, it will be recalled, was latent in the "constructive eviction with abandonment" doctrine and emerged full blown in the constructive eviction without abandonment" doctrine.\footnote{41}

With new laws enacted, the tenant was now free to stay in possession of the premises. He gained the power, if not to abate fully the rent, at least to prevent or delay its payment to the landlord.\footnote{42} It was anticipated that this economic pressure would cause the landlord to perform his service obligation.

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38. "We must, therefore, develop new sanctions and remedies in housing code enforcement not only because the old ones no longer work, but also because there has been a change in the nature of code enforcement itself." Gritbetz & Grad, supra note 29, at 1259. A new, civil remedy for housing code violations is suggested. Id. at 1281-90.

39. See text accompanying notes 48-63 infra.

40. See generally Comment, supra note 30, at 323-31.

41. "Constructive eviction with abandonment" is much closer to actual eviction since both are characterized by the tenant's absence from the premises. The difference lies in what leads to the absence. In the case of actual eviction the landlord physically dispossesses the tenant. The "constructive" eviction involves something short of this, e.g., harassment, and now the landlord's gross failure to service the apartment which renders the apartment untenantable. E.g., Rome v. Johnson, 274 Mass. 444, 174 N.E. 716 (1931) (failure to supply heat in breach of covenant to do so). What was in fact a failure of service was treated as breach of the ancient covenant of quiet possession. Since this was so, failure of service now could affect the rent provided the tenant actually abandoned the premises. The "constructive eviction without abandonment" doctrine attempted to carry the process one step further by eliminating the necessity for abandonment in an effort to permit a rental abatement without requiring a disturbance of the fundamental act of possession by the tenant. If this had succeeded it would have been clear that a gross failure of service was reciprocal with the rent. Indeed, with abandonment of the premises no longer necessary, description of the doctrine as an "eviction" becomes rather strained since this is no longer an important element. Reciprocity, in turn, emerges as the basic principle.

These laws took a variety of forms. Some permitted the tenant to channel the rent to other institutions, e.g., the courts. Others provided the tenant with a defense should he stop paying rent and then find himself faced with summary eviction proceedings. Despite their good intentions these laws were all subject to the same critical weakness. This was the simple fact that a tenancy only lasts a limited period of time. When the tenancy expires, the tenant must leave or the law will eject him. Should the landlord permit him to remain beyond the lease, his tenancy continues, but for brief periods, e.g., month to month. He is now a tenant at the pleasure of the landlord and can be evicted without reason after notice of termination of the periodic tenancy. The court called to evict the tenant is concerned with only one question: did the lease expire? If it did, the tenant is removed.

Consequently, the tenant's bargaining power vis-à-vis the landlord wanes as the termination of the lease approaches. At this point, even the legitimate complaint of the luxury apartment tenant is made obliquely and courteously. Once the lease has ended the tenant is subject to the landlord's plenary and arbitrary power for the landlord alone decides whether the tenant may renew the lease. Obviously, the holdover tenant is in the poorest possible position to complain or threaten to withhold the rent.

Unfortunately, the urban ghetto tenant is usually a tenant by sufferance. As a result, the landlord has the power to evict him. The tenant is well advised, therefore, not to complain. Nagging complaints about the service, a call to the department of buildings, a discussion of common complaints with other tenants, invite the landlord's wrath. This is the retaliatory eviction. Quite simply, it turns out the "troublemaker," however legitimate his grievance and desperate his state. Further, the landlord does not have to give a reason for the eviction. The risk of retaliatory eviction must be reduced before a tenant can consider altering his rent payments to force the landlord to improve basic services. Direct attacks on the retaliatory eviction have been made in an effort to erase this inequity in the law. However, this effort has not been notably successful.

45. The landlord's reasons for wanting the holdover tenant removed are immaterial. DeWolfe v. Roberts, 229 Mass. 410, 118 N.E. 885 (1918); Wormood v. Alton Bay Camp Meeting Ass'n, 87 N.H. 136, 175 A. 233 (1934).
46. There are a few statutes expressly prohibiting retaliatory evictions. E.g., Ill. Rev. Stat. ch. 80, § 71 (Smith-Hurd 1967); Mich. Comp. Laws § 600.5646(4) (Supp. 1969). A regulation of the Department of Housing and Urban Development dated February 7, 1967, requires that a tenant in a federally assisted, public housing project who is given notice to vacate must
The problem, of course, is that the tenant needs a measure of permanence if he is to carry the fight to the landlord, and that is precisely what the holdover tenant does not have. One exception to this exists in the rent control situation. One of the hidden and seldom acknowledged advantages of rent control is its permanency of tenure feature. Once in possession, the tenant stayed there. The landlord's power to evict on the ground that the lease had run out is sharply circumscribed; indeed it is virtually nonexistent. In this context a retaliatory eviction is no longer possible. Free of this threat, the tenant's position vis-à-vis the landlord is strengthened. It now becomes possible to talk intelligently of rent impairing remedies available to the tenant himself. It is in this light that New York's experience as the only remaining rent controlled city becomes of general importance. It is also revealing

be told the reasons for the eviction. Thorpe v. Housing Authority, 393 U.S. 268 (1969). The regulation goes a long way toward prohibiting retaliatory eviction, especially when a housing authority concedes, as it did in the Thorpe case, id. at 282-83, that it may not evict a tenant for engaging in constitutionally protected activity.

Moreover, the courts seem to be tending toward the prohibition of retaliatory eviction. See Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969) (Fact that landlord gave month to month tenant notice of termination and sought to evict the tenant because she had reported sanitary code violations to municipal authority is, under Washington, D.C. housing and sanitary codes, a defense to the eviction action. The court indicated that it would be unconstitutional for it to enforce an eviction sought in retaliation for the exercise of constitutional rights of speech and petition for redress of grievances.); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969) (dictum); Tarver v. G.&C. Constr. Co., Civil No. 64-2945 (S.D.N.Y., Nov. 9, 1964); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S. 278 (Binghamton City Ct. 1968); Watts v. Lyles, 15 Welfare L. Bull., Dec., 1968, at 17 (Mich. Cir. Comm'r Ct. 1968); cf. Lawrence v. Benjamin Realty Corp., Civil No. 69-3045 (S.D.N.Y., Aug. 22, 1969); Prendergast v. Snyder, 64 Cal. 2d 877, 413 P.2d 847, 50 Cal. Rptr. 903 (1966); Abstract Investment v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. 1962) (Landlord sought to evict a holdover because he was married to a Negro. Held, issuance and enforcement of eviction order would be state action discriminating on the basis of race, and, therefore, violative of the fourteenth amendment.). But see Hoyt v. La Chance, 14 Welfare L. Bull., Sept., 1968, at 11 (Conn. Cir. Ct. 1968) (Enforcement of an eviction order allegedly obtained in retaliation for reporting housing code violations is not unconstitutional state action when the tenant did not raise the defense of retaliation in the eviction action); Wilkins v. Tebbetts, 216 So. 2d 477 (Fla. Dist. Ct. App. 1968) (Court refused to decide issue of retaliatory eviction because the question was not properly raised. A dissent would follow the decision in Edwards v. Habib, supra); Lincoln Square Apartments v. Davis, 58 Misc. 2d 292, 295 N.Y.S.2d 358 (Civ. Ct. 1968) (Constitutional issues may not be considered by New York Civil Court in a summary proceeding to oust. There are other more appropriate forums for testing the issue of retaliatory eviction); Novick v. Levitt & Sons, Inc., 200 Misc. 694, 108 N.Y.S.2d 615 (Sup. Ct.), aff'd mem., 279 App. Div. 617, 107 N.Y.S.2d 1016 (2d Dep't 1951).

to say the least. How have the newer type remedial statutes fared in this geographic area?

Section 755 of New York's Real Property Actions and Proceedings Law is designed to give the individual tenant the power to withhold rent when the landlord fails to perform his service obligation. The law requires, however, that a serious violation against the landlord be recorded by a government bureau before the process commences. When this occurs, the tenant may stop paying the rent. Should the landlord later seek to evict the tenant for nonpayment, the tenant can deposit the rent in court and continue to deposit it until the repairs are made. At that time, the accumulated rent is turned over to the landlord.

The most striking feature of this new law is its similarity to the basic ideas present in the older landlord-tenant law. First, the statute is not designed to compel the landlord to maintain his full service obligation, nor even to comply totally with the housing and health code. Quite the contrary. Only the gross failure to maintain minimum standards is singled out for treatment. This, it will be recalled, is the type of failure that was characterized as "constructive" eviction, and described as a situation where conditions were so unbearable that the tenant was justified in abandoning the premises.

The second significant point is that it is not merely a gross failure to provide service which triggers the statute, but one that has been recorded as such by the municipal authorities. This brings into play the whole bureaucratic process outlined above in connection with the use of criminal sanctions. The tenant must initially enlist the aid of the municipal department concerned, and then support the complaint until a recorded violation characterized as serious, i.e., sufficient to warrant a recommendation of prosecution, is made.

A further cruel twist peculiar to the New York law is that the serious recorded violation must also be serious enough in the estimation of the court to constitute a constructive eviction and to warrant section 755 treatment. Judges vary, and the tenant's lawyer in New York is never quite certain how things will go in court, recorded serious violation notwithstanding.


49. In New York, effective September 1, 1969, the violation need not amount to a constructive eviction. It will be sufficient if the condition "is, or is likely to become, dangerous to life, health or safety." L. 1969, ch. 820 § 1. What that adds to the law is not clear.

landlord, and grants a warrant of eviction.\textsuperscript{51} When this occurs, the now evicted tenant has only the consolation of knowing that the landlord is seriously at fault, but not seriously enough. The tenant will not even learn what constitutes an actual violation because normally the court gives no reason for its decision. Unfortunately, second guessing the judge is simply part of the process.

Should the tenant's lawyer be successful and convince the court that the recorded violation is indeed serious enough to warrant section 755 treatment, then the rent is paid into the court and stays there until repairs are made. As noted previously, when repairs are made, the accumulated rents are returned to the landlord, less such amounts as the court may direct to be used to pay for repairs, fuel, electricity and the like. This, too, is a very old idea which fails to shock only because it is so familiar. What the law is stressing is the ancient idea that the landlord has a right to the full rent so long as the tenant is actually in possession. The full rent is the quid pro quo for possession, and so long as possession is retained by the tenant, the full rent is due and payable.

What startles the reasonably neutral observer is the treatment of the tenant. The landlord has seriously failed to fulfill his obligation. This has resulted in premises so seriously below standards as to warrant intervention by municipal authorities and perhaps, criminal prosecution. The conditions have persisted for a long time, certainly through the long delays incident to departmental inspection, formal recordation, eviction proceedings, and final court action. In the meantime, the tenant remains in the miserable apartment, which admittedly is a hazard to life and health. Yet, when the landlord finally decides to repair, he regains a right to all the accumulated rent. What of the real losses the tenant has suffered in the interim? Human misery aside, the apartment itself failed to be minimally tenantable for significant periods of time. However, the full rent, even for those periods, still accrued to the landlord. This result can only be characterized as preposterous.

It is as if a leased car turned out to be defective in its heating, lighting, gas and electrical systems. It is a misery to the driver, a hazard to the rest of us, and cause for the criminal prosecution of the lessor. Yet, the entire rental payment would remain due. At best, rental payments could be paid over into court and returned in full to the leasing company if and when repairs were ultimately made. A statute built on these lines is simply shocking in its callous disregard for basic justice. The reason is historic. The rent is the ancient price for possession and the tenant had possession. Thus, the newer law repeats the

inherited formula of the older landlord-tenant law. However that formula is incorrect. When the rent is paid a good deal more is expected than mere possession. Everyone knows that. That courts should repeat and laws incorporate the old bromide is a monument to either ignorance, complacency or callousness.

Rental abatement for the landlord's failure to supply services, as distinguished from merely withholding and subsequently depositing the rent into court, is also available in New York, through section 302A of the Multiple Dwelling Law. A study of this law is instructive. Again, a serious recorded violation is required to get the law into operation. Six months after the landlord has been notified of the recordation, the section 302A abatement takes effect. What this means is that six months after notification the tenant can stop paying rent and, when a nonpayment proceeding is commenced, deposit the accumulated rent into court, and seek a section 302A abatement. If he succeeds in obtaining the abatement he can retain the rent and need pay no further rent until repairs are made.

The startling thing is that we have reached such a point in the radical inequality between landlord and tenant that this presents itself as remedial legislation. Observe that we are talking about a gross abuse of service by the landlord which constitutes a serious violation of the housing or health code. The tenant must suffer this violation for a full six months before the law accords him the abatement remedy. He is held to the full rent during that period. In addition, the landlord can defeat section 302A by singling out the critical violation, repairing it, and leaving everything else in the same condition. If the tenant loses in his action, he loses not only the case but also can be ordered to pay $100 in court costs plus the rent! This results notwithstanding the fact that the apartment is definitely substandard and the landlord is in default on many points.

The remedies geared to governmental intervention to reduce the rent

55. Id.
56. The tenant can be required to pay costs of up to $100 only when he raises the defense frivolously, i.e., when he claims a rent impairing violation of at least six months duration when there is not one; when the tenant caused the violation and when he refused the landlord entry to his premises to repair the violation. If the tenant loses because, though there is a rent impairing violation on record, the landlord has repaired it, the tenant cannot be made to pay costs of $100. N.Y. Mult. Dwell. Law § 302-a(3)(c) (Supp. 1969).
have been more successful. Thus, under New York’s Spiegel Law, the Department of Welfare can cut off rental payments where the tenant is on welfare and there are serious recorded violations, i.e., the apartment is “dangerous, hazardous or detrimental to life or health.” Infin-initely more sophisticated, although rarely recognized for its radical theoretical importance, is the power of the New York Rent and Rehabilitation Administration to decrease the permissible rent in a rent controlled dwelling by way of adjustment for the decline in services. This remedy, although dependent on rent control, is extremely enlightened.

First, the rent control law is not only geared to remedying the landlord’s flagrant failure to supply services. In theory, at least, it provides a possible remedy for any substantial failure of services. Second, it takes as a first principal that the rent is made up of something more than, merely the transfer of possession. Rent is conceived rather as a package sum which contains compensation for both possession and the basic services that give possession its real value. Third, the law operates on the premise that the covenant to pay the rent is indeed reciprocal with the landlord’s obligation to render service. Theoretically, as one varies so should the other.

All of these ideas are as novel as they are fair. The unfortunate fact is that the ideas required the context of rent control to attain articulation in the law. This confines them to a single city in the nation. The wonder is that such insights have not found more universal application in one form or another elsewhere.

A different approach to the problem is found in Article 7-A of the Real Property Actions and Proceedings Law. This is New York’s Rent Strike Law. It is an affirmative remedy accorded to one third of the residents of multi-family dwellings. The statute permits them to go to court, deposit the rent, and get an administrator appointed to run the building and to make the repairs.

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59. New York City, N.Y., Admin. Code Y51-5.0(h) (Supp. 1969); 1 City of New York, Rules and Regulations of New York City Agencies § 34.2 (1967).
62. Id. at §§ 776(b), 778(l).
This brief summary of Article 7-A underplays the awesome complexity involved in organizing the tenants, presenting the case, and administering the building. The process discourages all but the hardiest ghetto lawyer, and more often than not, even he will refuse to go the 7-A route.

Yet, in New York, the 7-A proceeding is among the first things the ghetto lawyer considers after he has noted the obvious ones of simply relocating the family, getting a rent reduction from the rent control board or stopping the rent via the Speigal Law for the welfare client.

The tragedy is that these are all the remedies available to the tenant. Landlord-tenant law, not only in New York but also across the nation, as it regulates the private obligations between the landlord and the tenant comes to very little. At best, the law justifies the tenant in moving out in horrendous situations without fear of being later charged with a demand for further rent. However, it offers very few practical ways for the tenant to hold the landlord to minimum standards of housing decency. Yet, all admit that the tenant is utterly dependent on the landlord's affirmative activity in the multi-family dwelling unit. The housing and health codes provide high hopes and promises, but little else. It is comforting to know that the landlord can be threatened by the law, but the law is exceedingly cumbersome and carries in this area a painless sting. Rent impairing remedies are noted, but even in a jurisdiction like New York where rent control blocks the retaliatory eviction and assures the tenant a measure of permanence, they are insignificant.

The urban ghetto tenant is the leper in our midst. Even the law purporting to remedy his more desperate needs, only mocks him with a promise that it consistently fails to deliver. There he sits, and even the sophisticated urban lawyer is largely powerless to help him. Small wonder that rumblings of violence are heard in the ghettos of the nation and that our best young minds raise angry questions we are hard put to answer honestly.

V. GUIDELINES FOR THE FUTURE

Little is accomplished by complaining about the past or raging about the present, unless one is equally concerned about the future. Indeed, the future is where the really critical problem situates itself. Faced with an ancient body of law long unsuited to reform, the temptation is to accept its injustices. Unfortunately, this seems to be the pattern of the present. This passivity comes at a high price, not only in terms of human misery but also in terms of our own acceptance of powerless-

64. See also Gribetz and Grad, supra note 29, at 1281-90; Levi, supra note 34, at 279-85.
ness before injustice. What is more dangerous still, we lose our sensitivity to justice with all that that implies. We have grown so complacent before the legal inadequacies of the landlord-tenant law that it now seems normal enough, even fair. Unfortunately, this sort of life has the stagnant smell of death.

At the other extreme is an attitude of intense frustration which would sweep both the past and the present aside and replace them with utopian legislative schemes. A code similar to the recent Uniform Commercial Code, now operative throughout the commercial world, is no doubt possible. Indeed, it is desirable. But codes of this magnitude and complexity do not spring out of the head full blown. They take time and necessitate long periods of ferment and maturation. They require as well the intense concern of many, and a broad based recognition of the need for change. In time, the law of landlord-tenant may come upon these resources. At present, it does not have them in any great abundance. Very little is happening in the law of landlord-tenant.65 Quite literally this body of law is static, and the few concerned, far from being buoyed up by hope, are oppressed by the apparent futility of efforts at reform.

If our legal house is to be set in order, the most effective way to do it is gradually, on a case by case basis. This is the traditional approach of the common law. It is eminently manageable in this area. Three things are needed if the common law method is to be effectual. First, there must be an intense realization of the present system's injustice; second, a measure of confidence in the courts as a vehicle of reform in this area; and third, some basic idea of the lines along which development within the traditional framework is possible. It is the last point which requires some elaboration.

Surprisingly, landlord-tenant law, for all its present horrors, remains sufficiently malleable to serve the purposes of reform. Indeed, one suspects the real trouble in the past has been a decided lack of legal acumen, imagination and courage in shaping old rules to serve present needs.

The safest method of developing guidelines in this area is to build on the obvious inadequacies of the present system. To this end, five suggestions are offered as a fundamental but small beginning in this important work.

First: It should be frankly recognized that the rent is not simply

a quid pro quo for possession. No one actually believes that it is, and for the law to insist that it is can only be described as irresponsible. Possession is but part of what one pays for when one pays the rent. What gives possession value is a complex system of supporting services which should be expressly recognized by the law. When you rent an apartment, you are dealing with the landlord in terms of living space to be sure, but you are also dealing with him in terms of heat, light, sanitation, ingress and egress, and many other things.

The realization will come as a surprise to some that this fundamental point is rather traditional. We have already considered this very point in the law of landlord-tenant and accepted its basic wisdom. Indeed, it was felt to be self-evident. More surprising still, the point was developed not in response to tenant demands but rather to those of the landlords themselves.

This was the national experience with rent control. Here the subject was rent and it was necessary to know realistically the concept's components if payment levels were to be set or adjusted intelligently. It certainly required no elaboration to prove that there was more to the rent than the quiet possession of the apartment space.

In Chicago Housing Authority v. Bild, 346 Ill. App. 272, 104 N.E.2d 666 (1952), it was contended that a surcharge for the use of an extraordinary amount of electric power could not be considered "rent" for the purpose of an action to dispossess for nonpayment of rent. The court disagreed and held for the landlord. It stated: "[D]efendant urges that the term 'rent' must be limited to the profit out of the lands and tenements and cannot include compensation for such services as electricity furnished the tenant, even though the parties by their agreement expressly include the furnishing of such services as a part of the consideration for the rent fixed in the lease. This contention ignores the present day conditions in large cities where multiple dwelling buildings are not only common but necessary to meet the requirement of housing a great number of people in a small area. Electricity, gas and water are as essential to the proper enjoyment of the use of these dwelling places as light and air. No reason of public policy prohibits the parties from including the furnishing of this service as part consideration of the fixed monthly rental agreed upon, and to provide, as additional rental, for payment for additional or extraordinary electricity, gas or water." Id. at 275, 104 N.E.2d at 667.

Landlords acknowledge this fact prosaically in their advertisements. These typically state that services such as a doorman, gas, electricity, air-conditioning and a television security system are included in the rent. E.g., N.Y. Times, Aug. 19, 1969, at 69, cols. 4-9.

This point is not confined to the rent control situation. Landlords have successfully argued that rent is payment for more than the delivery of possession in instances where they have been asserting a right to distress, or to a lien, or even the right to evict. Thus, the entire payment promised by the tenant was "rent" for the above purposes though the payment was not merely for possession of land but also for the use of chattels on the land. See generally Stein v. Stely, 32 S.W. 782 (Tex. Civ. App. 1895) (furniture in a rented room); for gas, see generally Fernwood Masonic Hall Ass'n v. Jones, 102 Pa. 307 (1883); for water, see generally Woolsey v. Abbet, 65 N.J.L. 253, 48 A. 949 (Ct. Err & App.
It is high time that the courts shaped the law to conform to this common understanding. Not to do so makes of the law a sort of “Alice-in-Wonderland” world.

Second: The idea that covenants in a lease are not reciprocal is an ancient legal axiom whose repetition serves little purpose, and does very great harm. Initially, the idea had theoretical justification to commend it but it is doubtful that even its most ardent present admirer could defend it rationally on grounds other than a predilection for the landlord’s cause.\footnote{On dependency of covenants in a lease, see Schoshinski, supra note 22, at 534-37.} Moreover, it is a sport in the law inconsistent with the more rational recognition in other areas of the law that reciprocity of promises and performances is an apparent first principle.\footnote{“It is idle to speculate whether the land or the promise is the principal element of a lease of an apartment with a promise to furnish heat from a central heating plant or of a lease of space in a modern business building with a promise not to lease other parts of the building to an operator of a competing business. The bargain is for both. If the warp is conveyance, the woof is contract and neither alone makes a whole cloth.” 1 American Law of Property § 3.11, at 203 (A.J. Casner ed. 1952). The obvious indication is that a lease should be governed by contract law when justice requires; inter alia, the covenant for rent and the landlord’s service and repair covenants should be viewed as mutually dependent. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942). It has been held that the duty to pay rent is dependent upon several of the landlord’s covenants. See University Club v. Deakin, 265 Ill. 257, 106 N.E. 790 (1914); Stiftner v. Hartman, 225 Mich. 101, 195 N.W. 673 (1923). In Pines v. Persson, 14 Wls. 2d 590, 111 N.W.2d 409 (1961) it was held that the rent was dependent upon the landlord’s covenant of habitability. The doctrine of constructive eviction recognizes the dependency. A constructive eviction may be claimed because of the landlord’s failure, in breach of contract or statute, to maintain the premises and provide essential services. See 1 American Law of Property § 3.51, at 282 (A.J. Casner ed. 1952).}

The absence of reciprocity, therefore, is really an eccentricity of the law of landlord-tenant. The unhappy thing is that this particular eccentricity results in patent legal injustices readily translatable into terms of human misery and suffering. It should be quietly put to rest. To do so does not require so radical a departure from the past as one might at first imagine.

The “constructive” eviction is an established part of the law of landlord-tenant. Its use to cover the situation where the landlord has seriously failed to maintain the premises is also familiar law. What this means in terms of theory is that under the guise of the traditional, a new idea has already been accepted. There is even now reciprocity
between the landlord's service obligation and the tenant's rent obligation.

The real problem is that this reciprocity surfaces only when the landlord's failure is horrendous and becomes operative only when the tenant abandons the premises. It is only then that the failure constitutes a breach of the covenant of quiet enjoyment. It takes no great legal acumen to see that with the principle of reciprocity established it is an easy step to its extension. Now it is merely a matter of degree to move from the extreme failure to supply services, to the very serious, to the substantial coupled with the elimination of the requirement of abandonment. It can be done on a step by step basis, and the court can easily draw the line where it sees the need.

If further precedent for reciprocity is felt to be necessary, that too is at hand with the older rent control regulations.\(^2\) Granted, this type of legislation is presently operative in only one city, New York, but its basic insight is of more universal value. The idea is that the rent should vary with the service. It helped the landlord raise the rental payment levels, it worked against him where service was curtailed. Significantly, the landlord has retained the power to raise the rental level. Where controls are imposed, as in New York, he is quick to insist on the fact that rent levels must reflect service costs. Yet, he vigorously resists the same idea when advanced by the tenant who complains of inadequate services and asserts that this should be reflected in rent payments.

If it is felt that a frank adoption of the idea that covenants in the lease are reciprocal would be too unsettling, there are easy compromises at hand. One was suggested above. Thus, the landlord's failure to provide service can be characterized as tantamount to a breach of the covenant of quiet possession. The breach can affect the rent. The covenant of quiet possession can, in turn, be shaped case by case to fit contemporary needs, with breaches ranging from the horrendous, as we have at present with the typical constructive eviction situation, down to the substantial.

Another possibility is to think of the rent as a package containing payment components designed to cover first possession of the apartment space and then the service obligation. This is simply the fact anyway. With this established, it is possible to retain the old law unchanged as to the component of the rent that is attributable to the apartment space. This would establish an absolute rent floor for the landlord. What we now treat as rent, *i.e.*, the whole rent, would be contracted to cover only a part of the present rent. The remainder could

\(^2\) City of New York, Rules and Regulations of New York City Agencies, §§ 22, 34.2 (1967).
then be treated as fully reciprocal with the service obligation. One of the more startling notes in the history of landlord-tenant law is that something like this was not developed when the ancient two level, no reciprocity of covenants system was established.

Third: The landlord's service obligation should be faced squarely and consciously, and developed on a case by case basis. Frequently, there are contractual provisions in leases. But at present, the prime source of the landlord's service obligation is found in statutes and housing and health codes. This is acceptable, but what we are doing here should be kept clearly in focus. We are imposing on the landlord civic obligations for breach of which the tenant has no remedy, and which are enforceable normally only through the intermediation of municipal authorities. This legislation says nothing about the standards of minimum quality which the landlord should owe to the tenant himself.

What the law has failed to recognize is that the modern landlord is in the business of leasing space, just as the merchant is in the business of selling goods. Like everyone else in the marketplace he too should be held to standards of minimum quality. The courts, therefore, should consciously develop warranty standards in this area.

The landlord is not in the business of leasing space, period, but in the business of leasing habitable space, and that rather obvious point should be clearly seen and consciously enforced by the courts. Where space is leased for living purposes there should be a warranty of habitability.

The warranty's contents should be developed by the court again through case law, guided by the health and housing codes. With


74. See Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (Landlord impliedly warrants that a furnished dwelling is habitable at the beginning of the term. To follow the common law rule of no implied warranty of fitness would be inconsistent with current legislative policy, embodied in housing and health codes, imposing quality standards on property owners). See 1 American Law of Property § 3.45, at 267-69 (A.J. Casner ed. 1952); cf. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (Builder-vendor of new home impliedly warrants to vendee that the house is suitable for human habitation.). See also Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Mun. Ct. App. 1968) (The lease of premises is void and the landlord cannot recover rent when the premises contain housing code violations known to the landlord when the tenant entered into the lease agreement.); Silamar Estates, Inc. v. Bien, 165 Misc. 239, 2 N.Y.S.2d 512 (N.Y.C. Mun. Ct. 1937); N.Y. Mult. Dwell. Law § 302 (1946) (providing that neither rent nor possession for nonpayment may be recovered by the landlord of premises within a multiple dwelling when no certificate of occupancy has been issued).

75. See generally Schoshinski, supra note 22, at 523-28.
time and experience, hopefully more specific concepts such as "reasonable fitness for ordinary habitation," "fair average service," "adequacy of ingress and egress," etc. will emerge.

Precedents for such a development are at hand in abundance. Indeed, it is worth noting that the vast law of warranty liability in the commercial law field was and remains in the final analysis the work of concerned lawyers and judges. They developed it over the centuries through case law for the simple and humane reason that ordinary decency and justice required them to do so. The need is no less intense today in the landlord-tenant field. The real mystery is that so little is being done.

Fourth: The tenant's remedies for the landlord's failure to provide services need reshaping. The place to start is with the rent. Clearly, rent reduction or abatement can be an effective remedy. It is certainly close at hand. Once it is established that there is some degree of reciprocity between the landlord's service obligation and the tenant's rent obligation the way will be open for the development of a common law remedy sanctioning rent impairment by the tenant himself. This is a natural consequence that follows from the establishment of the reciprocity point. Viewed in this light, rent impairment is quite similar to the longstanding right of the buyer to withhold final payment of the price when it is clear that the merchandise or the service is defective.70

This type of right is ancient, sensible and no more difficult to manage in the landlord-tenant field than it is in the marketplace. It is certainly long overdue and is the pattern along which every effort at remedial legislation in the field has been shaped.

The real danger is that over concentration on the rent tends to blind the observer to other elements in the problem that are of equal importance. Since the rent is what the tenant pays for the leased premises, i.e., the habitable space, it is analogous to the price one pays for any item of merchandise purchased on the market. There is a vast difference, however, between the price one pays for merchandise and the possible monetary damages the seller of the merchandise may be called upon to pay. For example, an inexpensive purchase of foodstuffs can result in very serious liability where the food proves defective and the buyer suffers physical injury as a result. The damages here not only eclipse the small cost of the product but also cut deeply and painfully into the seller's substance.

76. Uniform Commercial Code § 2-717. See also Uniform Commercial Code §§ 2-711, 2-609 which state that where the buyer has reasonable grounds for insecurity regarding the seller's performance he can withhold the purchase price if the seller refuses to give adequate assurances of performance.
There is no logical or legal correlation between the price and damages for breach of contract or warranty. The former is what creates the contract. The latter is the law's attempt to assure performance, complete and to the letter. Thus, the buyer's recovery for a breach is not limited to the price paid for the commodity, but reaches to all that is necessary to put him in as good a position as he would have been if the seller had performed properly. It is the risk of being held to this duty which makes nonperformance or defective performance so serious a risk. It keeps the seller honest. This point is basic not only to the law of contract, sales, and every other branch of law, but also is fundamental to the law of damages itself.

Consequently, when the landlord fails in his service obligations he exposes himself to the possibility of both rent impairment and liability for damages. His service failure, therefore, carries with it the risk of liability for the food that spoils in the refrigerator and the furniture that is ruined by leakage. Also costs incident to a tenant's efforts to warm a cold apartment, even to the point of temporarily moving his family into heated quarters, are merely damages consequential to the landlord's breach for which he ought to be liable.

Radical as this may seem, it is simply the present law of landlord-tenant. While the two level system of landlord-tenant relationships was developing, the understanding was that there were to be remedies on both levels. The service function situated itself on level two and normally one sued for the damages that flowed from the breach. This was largely abandoned as an effective weapon, no doubt because it was impractical to sue for damages alone while the rental obligation remained. This remedy should be revived.

Clearly, if the landlord is held to warranty liability, and if a common law remedy of rent impairment is recognized, the tenant's power to sue also for damages in order to be made whole for interim losses becomes enormously important. Its availability will have a profound and healthy effect on landlord-tenant relationships. With these remedies available to the tenant, a landlord is well advised to assure the adequacy of his own performances. Clearly, in most cases, it will be far safer and cheaper to maintain at least minimum heat and basic services.

Another easily manageable approach to the same problem would be for the court to read the existing provisions of the building and health codes into the lease as implied covenants and then to permit the tenant damages for their breach.

Fifth: Finally, landlord-tenant law needs a strong infusion of the

78. See Uniform Commercial Code § 2-715; compare Uniform Commercial Code § 2-709 (the price actions) with Uniform Commercial Code § 2-714 (the breach of warranty action).
Landlord-Tenant equitable ideas which are commonplace in other areas of the law. Most important is the requirement of "good faith." The courts should consciously insist that the exercise of every right and the performance of every obligation incident to the landlord-tenant relationship carry with it the obligation of "good faith." This should mean not only basic fairness but also the observance of commercially reasonable standards of conduct. For example, a retaliatory eviction should not be tolerated.79 Not because the landlord is not within his rights in evicting the holdover tenant, but because the law should not assist the landlord where the landlord himself clearly is not acting in good faith. For the court to do otherwise makes it an active member of a vindictive conspiracy.80

Predictably, any effort to strengthen the tenant's position will be matched by efforts fully as vigorous and probably more sophisticated to undo the advances made. It is also predictable that the chief instrument that the landlord will use to maintain his position will be the lease itself. It is enormously important, therefore, that the court refuse to strictly enforce inequitable clauses. A wide range of legal concepts stand ready to assist the court, not to intimidate the landlord but to insure that a decent standard of conduct is required of the contracting parties. To this end, the law's long tradition of dealing with waivers, disclaimers and self-serving limitations is enormously important, as is the developing doctrine of unconscionability,81 and judicial skepticism of the contract of adhesion.

Also, there is the problem of the landlord or the tenant who manifests at an early date that he is definitely not going to perform or that it is highly unlikely that he will perform. To cope with this problem, the law has developed the doctrine of anticipatory breach. The law also imposed the right to assurances of performance in some situations which can and should be applied to landlord-tenant relationships.82

79. See generally Schosbinski, supra note 22, at 541-52.
80. The use of equitable notions such as "good faith" to suppress the retaliatory eviction is offered by way of illustration. It is not meant to suggest that there are not other legal approaches to the solution of the same problem, e.g., the constitutional challenges. See Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968); Schoshinaki, supra note 22, at 543-44.
82. See Uniform Commercial Code §§ 2-609, 2-610, 2-611 for the operation of these ideas in the marketing of goods.
VI. CONCLUSION

One final problem remains. It inevitably arises in any consideration of reform. This is the money problem. Let it be frankly admitted that any real and meaningful effort, however modest, to place the law of landlord-tenant on a sounder footing carries with it obvious monetary consequences. If the landlord is to be effectively compelled to maintain standards of decency in housing, it will surely cost more to run the multi-family unit than it does now. That is one rather obvious point. Another is that you can only push a landlord so far. There is always his ultimate weapon, to simply knock the building down and use the space for other purposes. If that is not feasible, abandonment of the building remains. These are real dangers and honesty compels an admission of their existence. Whether this would actually happen, the degree to which it would happen, with what frequency, and with what options available to remedy the situation should it occur, are open questions. The American businessman has an uncanny ability to operate, when necessary, in a really tight market. He certainly does not invite the opportunity, but somehow he survives and gets the job done. For example, a vigorous ghetto market flourishes, notwithstanding a body of quite modern commercial law. It does so under the surveillance of a vast and complex system of consumer protection legislation. Even assuming that there is a very real risk incident to holding the marginal landlord to standards of basic fairness, does it make sense to parlay a dreadful housing situation into a dreadful body of law? A set of legal rules which are admittedly unjust, not only closes off the possibility of even gradual reform and adjustment, but also takes a hidden toll of everyone involved. The law of landlord-tenant is the law to most low income dwellers and it instructs them everyday on the value society places on basic fairness and the social classes it prefers.

No less affected is the court itself. It maintains its dignity in this area only by applying the received law without reflecting too deeply on its basic fairness or its net effect in terms of human suffering.

The sad thing is that bases for reform lie within the law itself. To reform the law does not require prodigious skills and energy. It does require a genuine concern for the citizens that stand before the bench and an active commitment to the law’s need to be manifestly just. Moreover, one must be willing to tackle the confusion and uncertainty that goes with moving the law, however gradually, along newer and more wholesome lines.