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The Public Housing Tenancy: Variation on the Common Law That Give Security of Tenure and Control

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ARTICLES

THE PUBLIC HOUSING TENANCY: VARIATIONS ON THE COMMON LAW THAT GIVE SECURITY OF TENURE AND CONTROL

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"A Decent Place to Live"**

I. INTRODUCTION

The purpose of the United States Housing Act[1] is "to promote the general welfare of the Nation by employing its funds and credit . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income."[2] After nearly sixty years, and despite the employment of a wide variety of housing assistance programs providing both in-kind and monetary benefits,[3] the success of the Housing Act in achieving its stated aim is continually debated. The persistent shortage of adequate housing,[4] the dilapidation

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** 42 U.S.C. § 1437f(a) (1988).

1. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437 to 1437j (1988)) [hereinafter Housing Act].

2. 42 U.S.C. § 1437 (1988).

3. Federal housing assistance programs offer in-kind benefits in the form of public housing, subsidized housing, and Section 8 Existing Housing. *See* 42 U.S.C. § 1437f. For convenience, this article refers to recipients of all three types of benefits as public housing tenants. Housing programs also include demand-side subsidies, including vouchers, cash supplements, and cash allowances for recipients to rent housing in the private market, as well as tax benefits and mortgage insurance to enable recipients to purchase housing. *See infra* notes 63-91 and accompanying text.

4. *See, e.g.*, Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619 (1993) (discussing the dichotomy in housing for Americans of different economic means); Michael A. Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545 (1991) (discussing the widening gap between housing costs and household income and the effectiveness of Department of Housing and Urban Development (HUD) programs in addressing

of public housing projects,[5] the plague of drug and other criminal activity in many public housing projects, and the high cost of administering public housing programs reveal the Act's failure in accomplishing its goal.[6]

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this problem). The increase in housing shortages has paralleled the rise in the national rate of poverty. Salsich, *supra*, at 1630-31. A higher rate of poverty or a general decline in the economy produces a decrease in housing starts in the private sector. Over the past two decades, slower real income growth and higher real housing costs have exacerbated the problem of housing shortages for low- and moderate-income households. JOINT CENTER FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2, 15 (1991) [hereinafter STATE OF HOUSING]. Low-income families disproportionately suffer from the effects of a housing shortage because they are unable to outbid more affluent parties for this scarce resource.

In addition to a decline in the rate of new housing starts, from the mid-1970s to the mid-1980s, more than 4.5 million housing units were demolished or structurally converted, permanently removing them from the nation's housing stock. NATIONAL HOUS. TASK FORCE, A DECENT PLACE TO LIVE 6 (1988) [hereinafter HOUSING TASK FORCE].

The same economic factors have stifled the growth of new publicly-owned housing. Between 1965 and 1985, starts of publicly owned housing dramatically decreased—from 36,900 to 3100 units, a decline of 91.6%. *See* Fenna Pit & Willem van Vliet, *Public Housing in the United States*, *in* HANDBOOK OF HOUSING AND THE BUILT ENVIRONMENT IN THE UNITED STATES 199, 201 (Elizabeth Huttman & Willem van Vliet eds., 1988) [hereinafter HANDBOOK OF HOUSING]. *See generally* Lawrence B. Simons, *Toward a New National Housing Policy*, 6 YALE L. & POL'Y REV. 259 (1988) (suggesting that a new housing policy is needed to address changing housing demands).

5. As early as 1957, housing experts and commentators found little to praise in public housing. They criticized the rigidity and paternalism in management, crudity and segregation in project design, and a deplorable fragmentation of general housing policy. Catherine Bauer, *The Dreary Deadlock of Public Housing*, ARCHITECTURAL F., May 1957, at 140, 140 (arguing that the public housing initiatives of the New Deal failed to achieve their goals); *see* Pit & van Vliet, *supra* note 4, at 212. Commentators cited public housing's interior-space deficiencies, unimaginative exterior designs, and poor location planning. These deficiencies "were exacerbated in the late 1950s and 1960s when economizing measures contributed to increasingly 'functional' designs that failed to take account of the sociobehavioral needs of the tenant." *Id.* Furthermore, commentators contended that public housing design failures resulted from social prejudice and the use of military standardization techniques. At that time, governments believed that public housing should be designed with minimum space and no frills because such amenities should be provided only to those who could climb the social ladder on their own. *Id.* at 214.

6. *See* PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 11 (1988) [hereinafter PRIVATIZATION COMMISSION]. The Commission reported that, in 1988, the cost of constructing new public housing was approximately two and one-half times greater than the cost of housing provided through existing rental markets and that the cost of new subsidized housing was approximately twice the existing market rate. *Id.* On a monthly basis, new construction of public housing cost almost $700 per unit; whereas housing obtained with vouchers cost about $300 per month. *Id.* The report explained that the differential is partly a function of higher operating costs. *Id.*; *see* UNITED STATES DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, ALTERNATIVE OPERATING SUBSIDY SYSTEMS FOR THE PUBLIC HOUSING PROGRAM V, 306-26 (1982) (discussing the principles and cost of the voucher system) [hereinafter PROGRAM V].

In the debate over the cost of housing programs, in-kind assistance, whereby public housing is provided, is compared with direct income supplements and direct payments to

Some commentators have proposed privatization as a means of correcting these failures.[7]

In general, "privatization" refers to a shift of governmental functions from the public to the private sector.[8] Privatization is based on the belief that the transfer of control over the distribution of government benefits from a public employee to a private entrepreneur will lead to significant improvements in performance.[9] Proponents of privatization assert that such improvements will result because the private sector can provide goods and services more efficiently than the government.[10] In simple economic terms, privatization is grounded in the theory that the most efficient result is attained if the process is guided solely by economic self-interest, rather than political or social policy.[11] The privatization movement achieved perhaps its greatest momentum during the previous two

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lessors of existing housing. Rachel G. Bratt, *Public Housing: The Controversy and Contribution*, *in* CRITICAL PERSPECTIVES ON HOUSING 335, 350 (Rachel G. Bratt et al. eds., 1986). Additionally, in-kind assistance is compared with other subsidized new construction programs. *Id.* One commentator argued that only the second comparison is legitimate. *Id.* Studies show that, at worst, the cost of operating existing public housing developments is approximately equal to the cost of direct payments to lessors of existing housing. *Id.*

The debate can be characterized as follows:

> First, . . . the comparison [between in-kind assistance and direct payments] is not a fair one because, in the case of public housing, new units are built, and in the housing allowance programs they are not, it is less costly to subsidize a household through [direct payments to lessors in existing housing] than to subsidize the *construction* of a new unit of public housing. Second, the cost of subsidizing households in *existing* public housing units is no higher than the cost of subsidizing households in *existing* private units . . . . Third, no conclusions can be drawn about the cost of building new public housing in comparison to other subsidized new construction programs.

Id. at 353-54.

7. *See* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988) (discussing rationales supporting and opposing privatization); Robert C. Ellickson, *The Legal Dimension of the Privatization Movement*, GEO. MASON U. L. REV., Winter 1988, at 157 (discussing the relationship between the Constitution and privatization); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990) (reviewing the privatization theory and arguing that federal housing assistance for low-income families should consist of housing allowances and vouchers, relying to a greater extent on the private sector for the delivery of services).

8. Schill, *supra* note 7, at 881.

9. *See id.* at 882.

10. *See id.* at 882-87, 900. The proposition may reflect nothing more than the popular belief in the superiority of private enterprise over the presumed intrinsic evil of public ownership. EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 136 (1979) (commenting on the privatization concept).

11. *See generally* Richard P. Appelbaum & John I. Gilderbloom, *Supply-Side Economics and Rents: Are Rental Housing Markets Truly Competitive?*, *in* CRITICAL PERSPECTIVES ON HOUSING, *supra* note 6, at 165 (discussing the inapplicability of traditional supply-side economics to the urban housing market).

presidential administrations.[12]

In the public housing context, privatization calls for the government to withdraw from the business of providing in-kind housing assistance.[13] Two methods of privatizing public housing have been proposed. The first requires selling off or demolishing the federal stock of public housing facilities, terminating all monetary subsidies to housing projects, and substituting a program in which low-income families would receive vouchers or cash allowances to obtain housing in the private market.[14] The second method works in a more sinister fashion, through drastic, but invited, budget reductions.[15]

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12. In 1988, the President's Commission on Privatization recommended the privatization of a broad array of existing governmental services, including education, prison administration, and low-income housing construction. PRIVATIZATION COMMISSION, *supra* note 6; Schill, *supra* note 7, at 878. With respect to low-income housing, the Commission recommended the sale of public housing units to tenants at discounted prices. PRIVATIZATION COMMISSION, *supra* note 6, at 17-18; Schill, *supra* note 7, at 878. In the same year, Congress passed legislation to facilitate these sales. *See* Schill, *supra* note 7, at 878, 879.

13. *See* PRIVATIZATION COMMISSION, *supra* note 6, at 16-18 (suggesting that the government should sell some of the public housing stock to tenants). In 1982, the President's Commission, reflecting the privatization movement, did not support construction of new housing as a method for providing government housing assistance. *Id.* at 13.

14. *Id.* at 14-18. In 1982, then Secretary of HUD, Samuel Pierce, submitted a report to Congress proposing alternative housing subsidy systems that would base payments to agencies administering in-kind housing programs (public housing agencies (PHAs)) on a private rent index, which would represent the costs of supplying private market rental housing to families currently living in public housing. Public housing tenants would receive a direct federal subsidy in the form of a voucher, either to remain in public housing or to move to a private market unit that met the voucher program's housing quality standards. PROGRAM V, *supra* note 6, at xxiii. PHAs could charge rents by the same method as a private landlord. *Id.* This last alternative envisioned that some existing housing projects would disappear entirely. *Id.* at 306-08.

15. In the 1980s, the secretary of HUD forced a reluctant Congress to cut HUD's housing budget by two-thirds, from $23.8 billion to $6.1 billion. Ira S. Lowry, *Housing Policy for the 1990s: A Planner's Guide*, J. AM. PLAN. ASS'N, Winter 1989, at 93, 94; *see* Michael A. Stegman & J. David Holden, NONFEDERAL HOUSING PROGRAMS 9 (1987) (explaining the federal government's decreasing role towards housing assistance in the 1980s); Mary K. Nenno, *Reagan's '88 Budget: Dismantling HUD*, 44 J. HOUS. 103 (1987) (analyzing the Reagan administration's funding of HUD programs). *See generally* M.H. Hoeflich & John E. Thies, *Rethinking American Housing Policy: Defederalizing Subsidized Housing*, 1987 U. ILL. L. REV. 629 (commenting on the benefits of privatization and federal government involvement in housing).

In its 1986 budget proposal, the Reagan administration called for a cut of $600 million in operating subsidies to public housing agencies, a decrease from $1.7 billion to $175 million for the modernization of existing housing facilities (to meet emergency needs only) and a one-year freeze on "fair market rents" under the Section 8 programs. Chester Hartman, *Housing Policies Under the Reagan Administration*, *in* CRITICAL PERSPECTIVES ON HOUSING, *supra* note 6, at 362, 365-66, 373.

The most recent privatization effort is the proposed Housing Voucher Act of 1993, H.R. 1124, 103rd Cong., 1st Sess. (1993). The bill proposes to withdraw federal assistance for new construction of public housing. *Id.* §§ 2-4. Federal funds would instead be appropri-

The idea that the availability and quality of housing will be determined solely by the ability of persons seeking housing to pay rent at market rates provides the rationale for the method of cash allowances.[16] To a great extent, however, this notion is false. In reality, decisions by property owners to enter into or to refuse to enter into landlord-tenant relationships are also based upon factors that do not reflect economic rationality. "Nonmonetary" factors such as racism, low-income status, family composition, and receipt of public benefits operate to exclude low-income families from available housing in the private sector to at least the same degree as monetary limitations.[17] In the past, even public housing agencies receiving federal assistance excluded families on the basis of some of these factors.[18] Moreover, private lease law, to the extent that it does not afford the private sector tenant any form of tenancy security beyond the lease term and gives little control over the other terms of the landlord-tenant relationship, can deny low-income families a decent place to live, even when they are able to pay market-rate rent. The cash allowance method, therefore, considers only one aspect of the housing question—the economic predicate of acquisition—while ignoring the sociological impediments and jurisprudential constraints associated with obtaining adequate housing.

The legal rules governing the "public housing tenancy," while rooted in the common law, have evolved to mitigate the harsh effects of the economic and noneconomic factors that determine the availability and qual-

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ated to provide cash allowances to low-income families to rent dwelling units owned and operated by private landlords. *Id.* § 5.

16. The problem of affordability has been identified as the most critical housing problem of the 1990s. Since affordability and housing supply are interdependent issues, affordability restricts the production of new housing. The price of housing is set by supply and demand. *See* Appelbaum & Gilderbloom, *supra* note 11, at 165, 167. In a tight housing market, homelessness is at its highest level because of the degree of competition for available private units. *Id.* In order for low-income families to manage in this type of market under cash allowance programs, they must have sufficient resources to outbid others. *Id.*

17. *See* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050-51 (1989) (examining the connection between housing and civil rights issues).

18. A provision in the Housing Act of 1949 manifests the early congressional response to this kind of discrimination. It provided that public housing agencies receiving public funds could not discriminate against families whose incomes derived in whole or in part from public assistance. Housing Act of 1949, ch. 338, § 301(8)(c), 63 Stat. 413, 423 (superseded in the 1974 general revision of the Housing Act of 1937 by Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 653 (1974)). The Fair Housing Act, the civil rights acts, and the Americans with Disabilities Act were subsequently enacted and amended to address housing discrimination on the basis of race, religion, gender, and family status. *See* Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 914 (N.D. Ill. 1969) (finding that discriminatory selection of public housing project sites is prohibited by federal law).

ity of public housing. This Article explores the character of the public housing tenancy, comparing it with the common law tenancy under private lease law and evaluating the degree to which private lease law will protect the interests of low-income families if current proposals to abolish existing in-kind housing programs are adopted. Part II of this Article traces the history of federally funded housing programs and describes the various strategies employed. Part III discusses the recent changes in modern private lease law and recounts the basic rights and obligations of the landlord and tenant, which define and govern the rights of low-income families under a cash allowance program. Part IV describes the evolution of the public housing tenancy and demonstrates how its development has outpaced that of the common law tenancy. Part V explores the legal and social policy implications of dismantling the in-kind housing programs. Part VI concludes that the public housing tenancy is necessary to protect public housing tenants from victimization under private lease law.

II. Economic, Political, and Social History

The United States Housing Act of 1937, which was a New Deal measure passed at the height of the Great Depression, established public housing programs.[19] During the Depression, private construction of residential housing came to a virtual halt.[20] Consequently, with no new mortgages to issue, banks foreclosed existing mortgages at a rate of more than a thousand per day by 1933.[21] Those who lost their homes had to move to slum tenements because decent, affordable housing was unavailable.[22] In 1937, there was little public control over the quality, type, and location of housing, except those standards imposed by the tenement codes in the nation's largest cities.[23] These codes were enacted, however, not to address housing shortages, but rather, to address slum housing conditions that were thought to threaten the public health and well-being, such as diseases (smallpox, dysentery, tuberculosis), fire hazards, and

19. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437 to 1437j (1988)).

20. The Depression caused the rates of construction of residential property and expenditures on home repairs to fall by more than 90%. Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 187 (1985).

21. In 1926, banks foreclosed about 68,000 homes; in 1930 this number rose to about 130,000, increasing to nearly 200,000 in 1931 and to 250,000 in 1932. *Id.* at 188-89. In the spring of 1933, 50% of all home mortgages were technically in default, and foreclosures reached the rate of more than one thousand per day. *Id.*

22. Bratt, *supra* note 6, at 337-38.

23. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 Urb. L. Ann. 3, 10-14 (1979).

crime.[24] The codes, which were usually only applicable to multiple-family dwellings, typically "prescribed minimum standards for fire safety, ventilation, sanitation, and weather-tightness of roofs."[25] The codes were not designed to guarantee a decent home, as originally envisioned by Congress when it passed the Housing Act.[26]

The period preceding the Depression has been described as the classical period in the history of American contract and property law—a period which embraced laissez-faire economics and defended vested property interests.[27] In contract law, the prevailing principle obligated the courts simply to enforce contracts, unexceptional on other grounds,[28] precisely as the parties had made them.[29] According to utilitarian and Kantian notions, contract law would promote justice because it permitted parties to contract freely and enforced the result of such freely-made agreement.[30] While all property interests were protected, the law favored entrepreneurial property interests over rentier interests, as well as commercial and large-scale pursuits over the pursuits of farmers, artisans, and the working class.[31] In the area of private lease law, this preference

24. Peter Marcuse, *Housing Policy and the Myth of the Benevolent State*, *in* CRITICAL PERSPECTIVES ON HOUSING, *supra* note 6, at 248, 250-51.

25. *Id.* at 249; *see* Cunningham, *supra* note 23, at 11 (noting code requirements on sanitation for " 'good and sufficient water closets or privies' " (quoting 1867 N.Y. LAWS, ch. 908, §§ 1-19)); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 518-19 (1982) (citing New York and Massachusetts code provisions requiring landlords to maintain the premises). In 1867, New York was the first state to enact a tenement code. These laws were prototypes for the modern housing code. Cunningham, *supra* note 23, at 10-11; Glendon, *supra*, at 519. Housing codes did not, however, become common until the mid-1950s. Cunningham, *supra* note 23, at 13.

26. Nathan Straus, *End the Slums*, *in* NEW DEAL THOUGHT 158, 160-61 (Howard Zinn ed., 1966).

27. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 396-97 (1973); JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM 10-11 (1956); Glendon, *supra* note 25, at 509; Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 724 (1984).

28. Exceptions recognized by the courts included instances in which a party alleged illegality, fraud, mistake, or demanded public policy. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 15-16 (1965).

29. *Id.* at 98. Friedman argues that contract law changed through the application and expansion of the concepts of fraud and mistake as a means of mitigating the harshness of the classical law. *Id.* at 99.

30. HURST, *supra* note 27, at 10-11.

31. *See* Parrish, *supra* note 27, at 724; *see also* FRIEDMAN, *supra* note 27, at 157-247 (discussing the impact of law on the economy between 1776 and 1847); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 212 (1977); Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232, 233-34 (1973). Parrish notes that recent historical works have reconceptualized the legal order during this period and have demonstrated that the law held preferences for those rules and property interests that favored economic growth. Parrish, *supra* note 27, at 724.

meant that a landlord had no duty to the tenant except to deliver the premises.[32]

On a national scale, the Depression produced a stagnant economy and astounding levels of unemployment—in 1937, one-quarter of the work force was unemployed.[33] As a result, a new group of poor emerged, comprised of former members of the middle class, mostly white, who had enjoyed the prosperity of the twenties.[34] Poverty became visible, remarkable, and, in the view of many, undeserved.[35]

Few pretend that the original Housing Act was solely an act of charity.[36] Professor Friedman writes that it is a mistake to suppose that the

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32. During the classical period of American contract and property law, the landlord's principal obligation was to give the tenant the exclusive possession of the premises. John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213, 1261-62 (1983). This required conveyance of a nonfreehold possessory "estate" under the common law. Aside from his reversion, the landlord had no rights in and no obligation regarding the property's physical condition or its state of repair during the term of the lease. *Id.* at 1263-64. A tenant's remedies against a landlord were limited to cases where there had been an actual or constructive eviction. The tenant's principal obligation was to pay rent. This obligation was premised on the notion developed under early English common law that rent issued from the land. *See id.* at 1225-28. Therefore, so long as the tenant retained possession of the land, even if the buildings thereon were destroyed, the duty to pay rent continued. *Id.* at 1232. Under early common law, a landlord could expressly covenant to maintain the leased premises. *Id.* at 1263-64. In addition to an implied warranty that there were no latent defects in the premises, a landlord was held to an implied warranty of fitness for furnished dwellings. *See id.* at 1267-68.

33. Approximately fourteen million Americans were unemployed by early 1933. Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642, 645 (1966) [hereinafter *Public Housing*].

34. *Id.* at 645-47, 649, 651-52; Pit & van Vliet, *supra* note 4, at 201. The 1920s witnessed a decade-long bull market where "middle-class Americans were told that they could reap high profits by blindly investing in just about any collection of common stocks." J. Bradford De Long, *What Morgan Wrought*, WILSON Q., Autumn 1992, at 17, 26-27; *see* EDGAR L. SMITH, COMMON STOCKS AS LONG TERM INVESTMENTS 76-80 (1934) (explaining the stock market's increase in value from the mid-1800s to the 1920s). The subsequent crash of the market was an important factor in the general depression of the middle class.

35. *Public Housing*, *supra* note 33, at 645-46. This growing population of former middle-class persons among the poor prompted immediate legislation. Friedman explains that these former middle-class persons

> retained their middle-class culture and their outlook, their articulateness, their habit of expressing their desires at the polls. There were, therefore, millions of candidates for public housing who did not belong (as later was true) to the class of the "problem poor"; rather they were members of what we might call the submerged middle class. . . . Public housing was not supported by the dregs of society; a discontented army of men and women of high demands and high expectations stood ready to insist on decent housing from government or at least stood ready to approve and defend it.

Id.

36. *Id.* at 646 (explaining that lawmakers perceived public housing to be a stimulus to jobs and business); Marcuse, *supra* note 24, at 249-52 (noting that public housing was used

Housing Act "arose solely out of a gradual persuasion of decent-minded people that the slums were odious, crowded, and evil, and that the federal government had a duty to relieve the sufferings of the poor," since reformers long before the Depression had worked to achieve public housing without sufficient results.[37] Other historians note that public housing programs arose from concerns about social unrest among unemployed city workers and that the New Deal housing programs were intended to address those concerns.[38] These programs featured provisions for better housing and, more significantly, additional jobs.[39]

During the Depression, the public housing provision was not thought to have a public purpose, at least as it would justify the condemnation of private property by the government.[40] *United States v. Certain Lands in the City of Louisville*,[41] a federal appeals court decision, reflected this view. The court found that the Progress Works Administration (PWA) had the power of eminent domain for public purposes, but the construction of public housing did not constitute such a purpose.[42] This ruling seemed to foreclose most federal government programs providing for the direct construction of public housing.[43] The exercise of the eminent domain power by local governments for public housing purposes, however, had already been tested and upheld in state courts.[44] Congress, there-

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as a means to facilitate economic productivity and social control); Pit & van Vliet, *supra* note 4, at 205 (noting that public housing programs were intended to stimulate depressed industry, create jobs, and provide affordable housing to the poor).

37. *Public Housing*, *supra* note 33, at 645. Another historian comments that:

> The New Dealers themselves were articulate, humane, and on occasion profound. . . . They had no clearly defined set of goals, beyond that of extricating the nation from the depression of 1929-32. In the course of easing the crisis, however, they found themselves—pushed partly by the cries of alarm on all sides, partly by inner humanitarian impulses—creating new laws and institutions like the Tennessee Valley Authority, the social security system, farm subsidies, minimum wage standards, the National Labor Relations Board, and public housing.

HOWARD ZINN, THE POLITICS OF HISTORY 118 (1970); *see* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, at 134-35 (1963) (commenting on the social, economic, and political repercussions of the New Deal); Jerold S. Auerbach, *New Deal, Old Deal, or Raw Deal: Some Thoughts on New Left Historiography*, J. S. HIST., Feb. 1969, at 18 (same).

38. Marcuse, *supra* note 24, at 254.

39. LEUCHTENBURG, *supra* note 37, at 134.

40. Under the National Industrial Recovery Act, which provided for the creation of the Public Works Administration (PWA), the federal government sought to condemn private property in order to construct public housing. Jane L. McGrew & Ana Fabregas, *The Housing Act of 1937: Legal Origins*, 44 J. HOUS. 156, 156 (1987).

41. 78 F.2d 684 (6th Cir. 1935), *cert. denied*, 297 U.S. 726 (1936).

42. *Id.* at 686.

43. Because of powerful opposition by various interest groups, an appeal of the decision was withdrawn. *See* McGrew & Fabregas, *supra* note 40, at 157.

44. *See, e.g.*, New York City Hous. Auth. v. Muller, 1 N.E.2d 153 (N.Y. 1936); *see also*

fore, was able to enact the Housing Act, which vested the United States Housing Authority with the power to make grants and loans to local housing agencies for the acquisition, development, and administration of housing for low-income families.[45]

President Roosevelt attempted to address the economic effects of the Depression by devising social welfare and relief programs that would address the basic human needs of the benefit recipients, while creating new jobs and stimulating business without placing the government in competition with the private sector.[46] In the context of public housing, this strategy meant that the government would only provide housing to those who could not possibly afford to obtain it on their own. Tenants, however, were not given public housing for free. They were given only a subsidy to cover the unpaid required market-rate rent, ensuring that housing projects would be occupied by "poor but honest workers."[47] Public housing, therefore, was provided in a manner that minimized competition with housing available in the private sector.[48] To avoid a housing oversupply,

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Myres S. McDougal and Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 45-47 (1943) (explaining that other courts determined state expenditures on "activities such as gasoline filling stations, tourists' camps, public golf courses, ice plants, municipal celebrations, city bands, and opera houses" to be within the "public purpose").

45. Congress enacted the Housing Act of 1949, which created the Urban Renewal Program and provided direct subsidies to local governmental agencies to clear decaying areas and provide sites for moderately priced housing. Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (1988)). As part of the Act, Congress authorized the construction of an additional 800,000 public housing units and established the national housing policy of "a decent home and a suitable living environment for every American family." *Id.* The Housing Act of 1954 broadened urban renewal plans to include conservation and rehabilitation requirements. Housing Act of 1954, ch. 649, § 302, 68 Stat. 622 (superseded in the 1974 general revision of the Housing Act of 1937 by Pub. L. No. 93-383, § 116, 88 Stat. 633, 652 (1974)).

46. *See* Straus, *supra* note 26, at 163 (noting that public housing programs did not contemplate competition with private industry); *see also* LEUCHTENBURG, *supra* note 37, at 134-35 (commenting that the purpose of the housing program was to stimulate jobs and business); Pit & van Vliet, *supra* note 4, at 205 (same).

47. *See Public Housing*, *supra* note 33, at 648; *see also* Bratt, *supra* note 6, at 338-39. During the debate, Senator Wagner stated, "[t]here are some people whom we cannot possibly reach; I mean those who have no means to pay the rent minus the subsidy." 81 CONG. REC. 8099 (1937).

48. The 1937 Act provided housing subsidies to low-income families who could not "afford to pay enough to cause private enterprise in their locality . . . to build an adequate supply of decent, safe, and sanitary dwellings for their use." Housing Act of 1937, ch. 896, § 2(2), 50 Stat. 888 (superseded in the 1974 general revision of the Housing Act of 1937 by Pub. L. No. 93-383, 88 Stat. 633 (1974)). A low-income family was one "whose net income at the time of admission [did] not exceed five times the rental" cost. *Id.* § 2(1) (footnote omitted). For families with three or more minor dependents, the ratio was six to one. *Id.*

The 1949 Act provided that no annual contributions contract could be entered into unless the local public housing agency demonstrated "that a gap of at least 20 per centum has

no public housing units could be built without destroying an equal number of existing private sector units, incidentally achieving the end of slum clearance.[49]

Eventually, the New Deal economic recovery measures revived the economy and the submerged middle class. By the early 1950s, the middle class resumed its original place in the economic hierarchy.[50] As the middle class emerged from public housing,[51] World War II shifted national priorities away from public housing construction.[52] The end of the war produced a different class of persons asserting a claim to public housing subsidies—veterans.[53] Indeed, the legal and moral claims of veterans forced the adoption of an aggressive strategy to remove the revived middle class from public housing, where it had grown comfortable and wanted to remain.[54]

During the 1950s, another group, comprised largely of blacks, immi-

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been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing . . . decent, safe, and sanitary housing." Housing Act of 1949, ch. 338, § 301(7)(b), 63 Stat. 413, 422 (superseded in the 1974 general revision of the Housing Act of 1937 by Pub. L. No. 93-383, 88 Stat. 633 (1974)).

49. *See* ch. 896, § 15, 50 Stat. 888, 895 (superseded by 42 U.S.C. §§ 1437c, 1437d, 1437f); *see also* LEUCHTENBURG, *supra* note 37, at 133-34 (discussing the failures of the PWA's slum clearance); Bratt, *supra* note 6, at 337 (describing the "equivalent elimination" process).

50. Friedman cites a typical example and explains that in 1944, with rising incomes and the federal housing subsidy, one-quarter of the families in public housing were able to save enough money to buy their own homes. *Public Housing*, *supra* note 33, at 649. Other historians explain that although there were still nine million unemployed, the New Deal began to wane in 1938 and 1939 because its urgency was gone.

> What the New Deal did was to refurbish middle-class America, which had taken a dizzying fall in the depression, to restore jobs to half the jobless, and to give just enough to the lowest classes (a layer of public housing, a minimum of social security) to create an aura of good will.

ZINN, *supra* note 37, at 119.

51. For the middle class, moving away from "public housing" did not mean giving up federal housing assistance. Instead, middle-class relief took the form of federal mortgage insurance and tax benefits. For a further discussion of these types of federal housing assistance, see *infra* text accompanying notes 83-91.

52. Pit & van Vliet, *supra* note 4, at 206. The authors report that when the war began, fewer than 40,000 public housing units had been constructed. *Id.* Thus, when economic efforts were directed at the war, the serious housing shortage continued. *Id.*

53. The National Defense Housing Amendment, for example, authorized the Housing Administrator to use his powers "to provide housing for distressed families of servicemen and for veterans and their families." National Defense Housing Amendment, ch. 192, § 501, 59 Stat. 260 (1945) (repealed by executive order). In 1946, the Veterans' Emergency Housing Act was passed, creating an emergency housing plan to benefit World War II veterans. Veterans Emergency Housing Act, ch. 268, 60 Stat. 207 (1946) (codified as amended at 12 U.S.C. §§ 1738, 1739, 1743 (1988)).

54. *See Public Housing*, *supra* note 33, at 650-51.

grants from the South, and female-headed and elderly households, took the veterans' place in public housing.[55] Unlike prior inhabitants of public housing, this group did not generate any sympathy. It could offer no causes to champion, nor could it convince the nation that its need was the result of some fault other than its own.[56] In this latest era, fringe areas of cities and suburban communities resisted the introduction of public housing. As a result, the new group of public housing claimants was confined to the cores of cities.[57] Unlike land in the undisturbed suburbs, however, urban land had to be purchased, cleared, and redeveloped, making urban residence more expensive.[58] The higher price for public housing made cost-cutting measures inevitable.[59] Aesthetic interest was no longer an essential element of any public housing construction project. Instead of low-rise developments on sprawling acres,[60] local housing agencies built concentrated high-rise structures.[61] These projects suffered the effects of their circumstances, including crime, producing calls for reform of the housing projects and of the conduct of the problem poor.[62]

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55. PROGRAM V, *supra* note 6, at 2-3; *Public Housing*, *supra* note 33, at 651; *see also* DANIEL R. FUSFELD & TIMOTHY BATES, THE POLITICAL ECONOMY OF THE URBAN GHETTO 45-66 (1984) (describing the urbanization of African-Americans during the World War II era).

56. *See Public Housing*, *supra* note 33, at 654-55 (discussing the correlation between an increase in the number of African-American poor in public housing and the decline in quality and popularity of public housing programs). Friedman explains that:

> The [public housing] program could adapt only with difficulty to its new conditions, because it had been originally designed for a different clientele. To suit the programs to the needs of the new tenant would require fresh legislation; and yet change would be difficult to enact and to implement precisely because the new clientele would be so poor, so powerless, so inarticulate. The political attractiveness of public housing would diminish. Maladaptations to reality in the program would disenchant housing reformers; they would declare the program a failure and abandon it to search out fresh cures for bad housing and slums.

Id. at 649.

57. *Id.* at 652.

58. *Id.*

59. *Id.*

60. For example, in 1944, the Middletown Gardens project in Indiana consisted of "a '112-unit low-rent housing community built on an 80-acre outlying tract: 15 acres in houses, 33 in gardens, 7 a recreation grove, 4 a ball field, 21 untouched timber.' " *Id.* at 649 (quoting 1 J. OF HOUSING 47 (1944)).

61. *Id.* at 652; Marcuse, *supra* note 24, at 259. Recently, HUD reported that 32% of all public housing projects are multifamily garden apartments, 16% are low-rise walkups, 27% are high-rise buildings, and 25% are single-family detached or townhouse units. PROGRAM V, *supra* note 6, at 3. Almost two-thirds of all public housing projects are in urban locations, while 23% are suburban and 13% rural. Moreover, about 30% of public housing projects are in neighborhoods predominantly populated by minority residents. *Id.*; *see* Bratt, *supra* note 6, at 344 (reporting public housing statistics and describing current public housing conditions as satisfactory).

62. In response, public housing agencies adopted strict rules to control the conduct of

A. Politics and Forms of Federal Housing Assistance

Federal housing policy is manifested in four broad categories of housing assistance programs: (1) providing funding to local agencies for the construction of public housing projects (public housing); (2) providing direct payments to owners of existing housing who then provide housing to low-income families (Section 8 Existing Housing); (3) providing funds to private housing builders (subsidized housing); and (4) providing funds directly to housing consumers who then use the funds to obtain housing in the private sector (demand-side subsidies).[63] From their inception until the early 1960s, federal housing efforts focused on the first category, public housing. From the early 1960s until the 1970s, efforts focused on the second and third categories, Section 8 and subsidized housing. In the 1980s, business groups and their political supporters advocated programs in the fourth group, demand-side subsidies.[64]

By focusing on public housing, New Deal politicians thought that the direct provision of in-kind housing would best achieve the dual aims of Roosevelt's strategy, that is, providing relief to those in need, while avoiding competition with private business interests. Demand-side subsidies were rejected on the assumptions that they were unworkable, more costly, and ineffective in creating additional housing. In addition, New Deal politicians thought that such subsidies would fail to eliminate substandard housing, and would only cause an increase in the number of families on the relief rolls.[65] Conversely, contemporary proponents of the demand-side subsidies approach argue that such subsidies would encourage both rehabilitation of existing housing and construction of new

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tenants. *See infra* text accompanying notes 303-13 (discussing the various rules and policies adopted toward these ends).

63. *See* John R. Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 249, 250 (1982) (summarizing public housing proposals made during the Reagan administration).

64. *See id.*; *see also* R. Allen Hays, *Housing Subsidy Strategies in the United States: A Typology*, *in* HANDBOOK OF HOUSING, *supra* note 4, at 183, 188-89; J. Paul Mitchell, *The Historical Context for Housing Policy*, *in* FEDERAL HOUSING POLICY AND PROGRAMS 3, 3-17 (J. Paul Mitchell ed., 1985) (discussing federal housing programs in the post-World War II era); Pit & van Vliet, *supra* note 4, at 200 (explaining various definitions of public housing); Simons, *supra* note 4, at 264-68 (reviewing the shift from supply-side to demand-side housing subsidies during the 1980s).

65. *See* Marc Bendick, Jr. & Raymond J. Struyk, *Origins of An Experimental Approach*, *in* HOUSING VOUCHERS FOR THE POOR: LESSONS FROM A NATIONAL EXPERIMENT 23, 25-26 (Raymond J. Struyk & Marc Bendick, Jr. eds., 1981) (explaining the advantages and disadvantages of demand-side housing allowances); *see also* Bernard J. Frieden, *The Housing Allowance as a Subsidy Approach*, *in* HANDBOOK OF HOUSING, *supra* note 4, at 237, 237 (same).

housing, since these payments would increase the demand for housing.[66] Furthermore, proponents argue that demand-side subsidies would provide benefits that could be limited to the persons, amounts, and time periods actually needed, thereby avoiding the stigma of providing "housing relief."[67]

1. Public Housing

Congress adopted the federal public housing program advocated during the New Deal through the enactment of the Housing Act of 1937, which incorporated programs in the broad category of public housing.[68] While federally funded in part, public housing is owned directly by Public Housing Agencies (PHAs),[69] which are local municipal corporations created pursuant to state legislation for the purpose of constructing, owning, and operating housing for low-income households.[70] Under the Housing Act, a PHA and the federal government execute a contract setting out their respective rights and obligations.[71] The PHA finances the land purchase and housing construction by issuing long-term bonds, which typically have a forty-year maturity.[72] The federal government subsidizes the project by assuming all debt service payments on the bonds or by making direct loans and grants to fund the construction of public hous-

66. *See* Bendick & Struyk, *supra* note 65, at 25.

67. *Id.* at 26. In 1953, Congress reconsidered demand-side strategies, but once again acted in favor of retaining a supply-side framework featuring in-kind benefits. *Id.* at 25; *see* PRESIDENT'S ADVISORY COMM. ON GOV'T HOUS. POLICIES AND PROGRAMS, GOVERNMENT HOUSING POLICIES AND PROGRAMS 5-20 (1953) (stating that any action taken by the government would support "a strong, free, [and] competitive economy"). In 1968, a presidential commission appointed to study housing programs and their impact on households and housing markets recommended an experiment using the demand-side housing allowance approach. PRESIDENT'S COMM. ON URBAN HOUS., A DECENT HOME 14 (1968). *See infra* notes 93-104 and accompanying text (discussing the experiment). The committee based its recommendation on the fact that increasing suburban resistance to public housing projects was forcing such projects into urban slum areas. PRESIDENT'S COMM. ON URBAN HOUS., *supra*. This raised concerns over the "ghettoization" of the poor and minority beneficiaries of public housing. *See id.* The committee believed that a housing allowance system would reduce economic dependence on slum housing by increasing demand for standard units, thereby inducing suppliers to upgrade slum properties or commence new construction. *See id.*

68. ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437 et seq. (1988)).

69. 42 U.S.C. §§ 1437a-1437e, 1437g-1437m (1988).

70. *Id.* A PHA is typically governed by a board of commissioners appointed by the mayor and city council of the jurisdiction in which it is located. The administration of the PHA is usually vested in an executive or managing director and his or her staff. *Id.* § 1437a(b)(6).

71. *Id.* §§ 1437b-1437c.

72. *Id.* § 1437b(a).

ing.[73] Initially, only construction and financing costs were paid by the government, leaving operating and maintenance costs to be covered by rents collected from public housing tenants. In the 1960s, however, sharp increases in operating and maintenance costs prompted PHAs to defer maintenance while still charging higher rents. In response to this trend, Congress originally imposed a rent ceiling of twenty-five percent of a tenant's income, and began providing operating subsidies to PHAs.[74]

2. Section 8 Existing Housing Program

The Housing and Community Development Act of 1974 created the Section 8 program.[75] Originally, the Program comprised several subprograms, including new construction, substantial rehabilitation, and existing housing.[76] Under the Section 8 Program, housing is owned by private parties who enter into contracts with PHAs to provide the housing to eligible low-income families.[77] In exchange, the private owners receive direct government payments equal to the difference between the fair market rent on the Section 8 housing and the rent that the tenant can afford to pay, an amount limited to thirty percent of the tenant's income.[78] Housing will qualify as Section 8 housing when the units meet government quality standards and have a market rental value no greater than an amount that HUD determines to represent a fair market rent for suitable housing in that locality.[79]

Under the Section 8 Housing Voucher Program, low-income families are given vouchers to obtain housing in the private market. The amount of the voucher represents fair market rent, but recipients may pay more if they choose to spend more of their own funds, or may pay less and keep the difference, provided that they find a unit in suitable condition. The

73. *Id.*

74. Hays, *supra* note 64, at 184.

75. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 201, §§ 1-12, 88 Stat. 633, 662 (codified as amended at 42 U.S.C. § 1437f (1988)). This Act eliminated most of the previously established urban development programs, including the Urban Renewal Program and most housing subsidy programs. The Act also expanded local governments' control over the use of federal housing funds by providing block grants under the Community Development Block Grant (CDBG) program. Professor Nolon argues that because of the 1974 Act, these funds were used less frequently for functions, and therefore, less control was exercised over housing providers. *See* Nolon, *supra* note 63, at 255-56.

76. Spending authority for the new construction program slowly dwindled until its ultimate repeal in 1983. Housing and Urban Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1181 (codified at 42 U.S.C. § 1437f (1988)).

77. 42 U.S.C. § 1437f (1988).

78. *Id.*; 24 C.F.R. §§ 882.106, 882.105 (1993). The Section 8 Existing Housing Program is administered by PHAs.

79. 42 U.S.C. § 1437f; 24 C.F.R. §§ 882.106, 882.105.

vouchers do not correspond to any specific unit.[80]

3. Subsidized Housing

Beginning in the early 1960s and continuing through the 1970s, federal housing efforts focused on two programs within the context of subsidized housing. Under the first, the federal government provided capital subsidies for housing construction for the elderly and handicapped.[81] Under the second, the federal government provided low-interest mortgage loans to private housing developers, who were required to offer housing to low-income families at a rate below the market rental rate.[82]

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80. 42 U.S.C. § 1437f.

81. *See* Housing Act of 1959, Pub. L. No. 86-372, § 202, 73 Stat. 654, 667 (codified as amended at 12 U.S.C. § 1701q (1988)).

82. Under section 221(d)(3) of the Housing Act of 1954, ch. 649, 68 Stat. 590, 601, the Below Market Interest Rate Program (BMIR) provided subsidies in the form of low-interest mortgage loans to private housing developers. Savings were to be passed to lower-income tenants. 12 U.S.C. § 1715*l*(d)(2) (1988). Eligible participants included private nonprofit sponsors, public sponsors, limited dividend corporations, and cooperatives. 12 U.S.C. 1715*l*(d)(3) (1988). Regulations require eligible housing projects for nonprofit sponsors to consist of 10 or more units that were either "detached, semi-detached, or row houses, or multi-family structures." 24 C.F.R. § 221.545(b)(1) (1970). Once the mortgage was paid in full, the property owner could withdraw from the program and be released from the affordability restrictions. § 221(e), 68 Stat. at 601. The program was phased out in 1968. At that time, the total number of units in the program represented only one percent of the total volume of private construction. *See* Hays, *supra* note 64, at 188; Randi L. Engel, Comment, *Critical Housing Needs and the Emergency Low Income Housing Preservation Act of 1987: A Short-Term Solution to a Long-Term Problem*, 40 EMORY L.J. 163, 169-72 (1991).

The Section 236 Program replaced the Section 221(d)(3) Program. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), 82 Stat. 476, 498. Under this section, Congress provided funding for federal mortgage insurance and subsidized interest payments to lenders. *Id.* at 498-99. Nonprofit organizations, limited-dividend sponsors, and cooperatives remained eligible participants. Eligible housing projects for all participants were required to consist of five or more units that were either "detached, semidetached, or row construction" and offered at affordable rental rates. *See* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201(a), 90 Stat. 476, 498. The program allowed owners to prepay their mortgages in full after 20 years, withdraw from the program after such prepayment, and be released from affordability and use restrictions. Section 236 was eliminated during the 1973 Nixon moratorium on subsidized housing programs. At that time, 142,000 units had been constructed with section 236 funding and more than one-half million units had been issued section 236 financing or contract authority.

The Emergency Low Income Housing Preservation Act of 1987 was enacted "(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance; [and] (2) to minimize the involuntary displacement of tenants currently residing in such housing." Pub. L. No. 100-242, § 202(b)(1)-(2), 101 Stat. 1877, 1878 (1988) (superseded in the general revision of the Emergency Low Income Housing Preservation Act of 1987 by Pub. L. No. 101-625, § 601(a), 104 Stat. 4249 (1990)). The Act placed conditions on a property owner's right to prepay her mortgage and withdraw from other requirements of the program, including the lower income affordability

4. *Demand-Side Subsidies*

During the 1980s, political and ideological trends caused a shift in the focus of federal housing efforts toward demand-side subsidies. Demand-side subsidies, such as mortgage insurance[83] and tax benefits,[84] are programs intended to benefit all persons, regardless of income level or need. Specifically, these subsidies include measures designed for "lower income families," defined by law as "families whose incomes do not exceed 80 per centum of the median income for the area."[85]

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and use restrictions. *Id.* § 221. The Act was replaced by the Low Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, § 601(a), 104 Stat. 4249 (codified at 12 U.S.C. § 4101 et seq. (Supp. V 1993)). Among other things, the Act offered fair market value incentives to private owners to continue to use their property as low-income housing projects but retained restrictions on prepayment of mortgages. *Id.*

83. The FHA program, under the National Housing Act, along with the Veterans Administration (VA), under the Servicemen's Readjustment Act of 1944, provide private loans for housing. 12 U.S.C. §§ 1701-1750g (1988). The FHA mortgage insurance program covers low-equity loans, sets interest rate ceilings, and establishes uniform lending criteria. The program was instrumental in originating and standardizing the long-term self-amortizing fixed-rate mortgage, thus increasing the potential market for mortgages and the possibility of homeownership. Lily M. Hoffman & Barbara S. Heisler, *Home Finance: Buying and Keeping a House in a Changing Financial Environment*, *in* HANDBOOK OF HOUSING, *supra* note 4, at 149, 152.

The Federal National Mortgage Association (Fannie Mae), 12 U.S.C. §§ 1716-1723h (1988), and the Federal Home Loan Mortgage Corporation (Freddie Mac), 12 U.S.C. §§ 1451-1459 (1988), also purchase loans made by private lenders. Hoffman & Heisler, *supra*, at 152-53. Fannie Mae was originally intended to draw more funds into the residential housing market, to redistribute these funds regionally, and to insulate housing markets from monetary and fiscal policy. *Id.* In the secondary market, " 'lenders can sell or trade the loans they originate, thus lowering their risk while allowing them to retain fees for continuing to service the loans.' " *Id.* (citation omitted). Freddie Mac was established in 1970 as a subsidiary to the Federal Home Loan Bank system to establish a pass-through program for conventional mortgages. *Id.* at 153.

The government purchases mortgages made by private lenders through the Government National Mortgage Association (Ginnie Mae). 12 U.S.C. §§ 1716-1723h (1988). Ginnie Mae buys and packages FHA/VA-insured mortgages and sells them directly to investors, creating a pass-through by guaranteeing principal and interest to the ultimate investor, and servicing fees to the originator. *Id.* § 1721(g); *see* Charles L. Edson, *Public Assistance for Housing—Past, Present, and Future*, 3 PUB. L. F. 77 (1983) (discussing the role of the government as a purchaser of mortgages made by private lenders).

84. The tax benefits include: a deduction for home mortgage interest and real property taxes, I.R.C. §§ 163, 164 (1988), the deferral of capital gains tax upon the sale of one principal residence house and purchase of another within two years, *id.* § 1034, and the nonrecognition of capital gain upon the sale of a home by persons over the age of 55. *Id.* § 121.

85. 42 U.S.C. § 1437a(b)(2) (1988). In general, occupancy of public housing is limited to "lower income families." *Id.* The class of lower income families is divided into two subclasses: *low* income families, whose incomes are from 80% to 50% of the median, and *very low* income families, whose incomes are below 50% of the median. *Id.*

The rent supplements program[86] is one example of the demand-side approach.[87] Under this program, the government makes rent payments on behalf of low-income families, enabling them to occupy housing units built by private nonprofit or limited dividend corporations.[88] These units are financed by FHA-insured mortgages bearing interest at the market rate. The rent supplement payment is determined by the amount necessary for the eligible family to fulfill its rental obligations, an amount that exceeds thirty percent of the family's income.[89] The program was designed to provide decent housing for low-income families while stimulating private sector housing investment in urban areas.[90] Although still in existence, the rent supplement program remains small, restricted to renters of units in housing projects that already receive federal mortgage subsidies under other federal programs.[91]

B. Experiment with Cash Housing Allowances

In 1970, Congress authorized an experimental housing allowance program (EHAP), a form of demand-side subsidy.[92] The program provided cash payments to low-income families for the purpose of securing rental housing in the private market.[93] While the theory of direct subsidies pro-

86. Pub. L. No. 89-117, § 101(a), 79 Stat. 451 (1965) (codified as amended at 12 U.S.C. § 1701s (1988)).

87. The Section 23 Leasing Program is another demand-side program through which local housing agencies lease privately owned and managed dwelling units, which are then subleased to low-income families at a subsidized rental charge. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 103(a), 79 Stat. 451, 455 (amending the United States Housing Act of 1937 which was superseded in the 1974 general revision of the Act by Pub. L. No. 93-383, 88 Stat. 633 (1974)). This program was phased out by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 653.

88. 12 U.S.C. § 1701s (1988).

89. *Id.*

90. *Id.*

91. *Id.*

92. Housing and Urban Development Act of 1970, Pub. L. No. 91-609 § 504(a), 84 Stat. 1770, 1786.

93. During the period from January 1971 through March 1972, HUD worked with the Urban Institute to design and implement an EHAP. Frieden, *supra* note 65, at 237. The experiment began in 1973 and ended in 1980, involved more than 25,000 families in 12 cities, and cost over $160 million. *Id.* The program was open to individual elderly and handicapped persons and families of two or more people. *Id.* at 238. It set income eligibility standards, taking the local cost of adequate housing and the size of the household into account. *Id.* The maximum income limit for a family of four was less than $7000. *Id.* The housing allowance payments were equivalent to the difference between the estimated cost of adequate housing and 25% of the family's income. *Id.* Payments averaged $75 per month. *Id.* The program permitted families to spend more or less than the estimated cost of housing, so long as the housing met minimum quality standards set by the experiment. *Id.*

viding for basic human needs generally prevails in our welfare system, in the case of housing, this demand-side strategy failed.

The EHAP had three components: the demand experiment, the supply experiment, and the administrative agency experiment.[94] The demand experiment analyzed the degree of satisfaction among families who participated in the experiment.[95] It examined the choices families made with respect to the quality and location of their housing and the degree of their satisfaction with these choices.[96] The supply experiment tested the effects of cash allowances on the cost and quality of housing, on the behavior of landlords and realtors, and on the patterns of residential mobility.[97] The administrative agency experiment tested the performance of agencies in screening and enrolling applicants, certifying eligibility, providing counseling, and making household inspections.[98]

In the demand experiment, researchers found that less than half of the eligible families actually participated in the program.[99] Cash allowances were shown to have little, if any, impact on a family's choice of living location, the economic or racial concentration in available locations, or the quality of neighborhoods in which participating families lived.[100] Researchers discovered that the EHAP experiment did not result in a pro-

94. The demand experiment was conducted in Pittsburgh and Phoenix. *Id.* at 238. The supply experiment was conducted in Green Bay, Wisconsin and South Bend, Indiana. *Id.* The administrative agency experiment selected eight different agencies in different cities around the country. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 238-39.

99. *Id.* at 247. Studies attempted to explain this phenomenon by suggesting that some people were content with their original choice of living arrangements. *Id.* Others proposed that some people doubted whether their homes could pass the inspection or whether the landlord would agree to rent to people in the program. *Id.* People were concerned about the stigma associated with the program and possible demeaning treatment by agency personnel. *Id.* Moreover, searching for a new home was burdensome, administrative procedures were overwhelming, and the housing standards set were very high. *Id.* Furthermore, minority families were less likely than other enrollees to meet the standards for payment. Hartman, *supra* note 15, at 370.

100. Bendick & Struyk, *supra* note 65, at 107-08. Program participants were generally reluctant to move. Frieden, *supra* note 65, at 245. A sizable portion of the participating families, however, did move: 45% in the administrative experiment cities, 39% in the demand experiment cities, and 16% in the supply experiment cities. *Id.* Although the recorded information was "scattered," it showed that people who moved tended to enter better neighborhoods. *Id.* at 245-46. Generally, "most people who moved went into census tracts with a higher socioeconomic index rating (based on resident income, education, and employment) than the places they left. Of black households who moved, 30 percent moved to areas with lower minority concentrations than their original neighborhoods." *Id.* at 246. The program, however, did not present significant opportunities to poor families living in suburban areas. *Id.*

portional increase in the overall satisfaction with the housing experience, including the location and quality of housing.[101] Furthermore, in at least half the cases, the cash allowances failed to reduce the rent payment to an amount within twenty-five percent of the family's income.[102]

In the supply experiment, researchers found no substantial expansion or improvement in the quality of housing stock,[103] or in the overall condition of cities. Nor did the experiment result in any major increases in freedom of choice in housing.[104]

C. Efficacy of the Forms of Assistance

A comparison of housing programs in the first three categories (public housing, Section 8 Existing Housing, and subsidized housing) with those in the fourth group (demand-side subsidies) reveals that the former have a greater impact on housing supply and quality. The value of Section 8 Existing Housing Program certificates, however, is limited by the willingness of private landowners to enter into contracts with local PHAs.[105]

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101. Frieden, *supra* note 65, at 248. Under the program, "a 10 percent increase in income for renters led to only a 1.9 percent increase in rent payments." *Id.* Moreover, the majority of the housing allowance was used to obtain goods and services, with only 25% of the allowance used to obtain better housing. Hartman, *supra* note 15, at 370.

102. Frieden, *supra* note 65, at 243.

103. The experiment produced virtually no effect on housing costs, either increases or decreases, nor did it stimulate new construction or rehabilitation (beyond minor repairs). *Id.* at 248-49; Hartman, *supra* note 15, at 371. Repairs that were undertaken were extremely modest in scope. Bendick & Struyk, *supra* note 65, at 187; Frieden, *supra* note 65, at 244. Windows were fixed and handrails were installed on stairs. *Id.* Some work, however, was done on certain structural components, such as plumbing and heating systems. *Id.* at 244-45. "Three out of four below-standard dwellings were brought up to an acceptable level at cash costs of less than $25 in Green Bay and less than $30 in South Bend." *Id.* at 245.

104. Frieden, *supra* note 65, at 245. In general, the Program V Report drew similar but somewhat more positive conclusions.

> Public housing units had only slightly lower value than the housing units occupied by voucher recipients in Pittsburgh and Phoenix when value is expressed as an estimated rent. Public housing was *less* likely than private market housing to have physical deficiencies relating to health and safety of occupants, but public housing tenants were also less likely to express satisfaction with their units and, especially, with their neighborhoods.
>
> The offer of a voucher to public housing tenants in South Bend resulted in, at most, a slight increase in public housing vacancies and a slight decrease in the size of the public housing waiting list.

PROGRAM V, *supra* note 6, at 325.

105. The *New York Times* recently reported on the success of the "Underground Railroad" in Chicago. Jason DeParle, *An Underground Railroad From Projects to Suburbs*, N.Y. TIMES, Dec. 1, 1993, at A1. This "Underground Railroad" is a national program that provides inner-city families Section 8 certificates to move to the suburbs. *Id.*

A large percentage of minority households and families with children were unable to use

The program has an even smaller impact on the housing market when there are relatively few certificates available.[106]

While the goal of demand-side subsidies is to increase the demand for housing, thereby increasing supply as the market responds, the EHAP experiment showed that, in fact, such subsidies have no significant effect on the housing construction industry. Moreover, subsidies do not necessarily increase the supply of affordable housing or improve the quality of existing housing. Instead, the experiment demonstrated that cash allowances became income supplements for low-income families already living in good housing. Conversely, if a family did not live in good housing, it was unlikely that the family would be able to take advantage of the program either by moving to better housing or by inducing the property owner to upgrade the physical condition of their current housing.[107] Furthermore, racial and class discrimination, combined with housing shortages, continued to prevent low-income families from moving into better, more integrated neighborhoods, offsetting the real value of cash allowances.[108] As the EHAP experiment apparently illustrates, demand-side subsidies often benefit those least in need—builders, lenders, middle-class homeowners, and low-income families at the upper end of the eligibility range.[109]

III. Revolution in Private Lease Law

A tenant's ability to pay market rent through the receipt of a demand-side subsidy does not directly alter the behavior of private builders and landowners in improving the quantity and quality of available housing. Instead, a tenant must rely upon the various principles of private lease

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their Section 8 Existing Housing certificates. Hartman, *supra* note 15, at 372. The President's Commission on Housing reported that large families, single-parent households, and minority families are less likely to participate in the Section 8 Existing Housing Program. The Report of the President's Commission on Housing 26-27 (1982).

106. During the previous two presidential administrations, HUD's budget for public housing was cut by two-thirds. As a result, there was no new authority for housing assistance in 1986. In 1987, budget authority existed for only 50,000 housing vouchers, while in 1988, such authority existed for only 79,000 vouchers. By 1988, HUD's budget provided for only 3000 units of new construction subsidy. *See* Lowry, *supra* note 15, at 94.

107. *See* Hartman, *supra* note 15, at 372.

108. *See* Marc Bendick, Jr. & James P. Zais, Incomes and Housing: Lessons from Experiments with Housing Allowances 2 (Urban Institute ed., 1978).

109. These demand-side subsidies also can be criticized because they offered families little choice in deciding where to live. To receive the benefit of the subsidy, eligible families had to move to a development of a government selected sponsor. Frieden, *supra* note 65, at 240. As a result, "allocation of subsidized housing to communities across the country did not correspond as much to the needs of low-income residents as it did to the energy, activity, and political muscle of local sponsors." *Id.*

law to achieve these ends. Two private lease law principles that have historically barred low-income families from access to safe, decent, and affordable housing are still in existence. These are the "no-repair" rule and the "termination or nonrenewal without cause" rule. The no-repair rule emerged from the common law concept of the lease as a conveyance, through which the tenant received an estate in the premises. The natural conclusion under this legal framework is that, absent an express agreement to the contrary, the landlord is not concerned with the condition of the premises.[110] The termination or nonrenewal without cause rule involves an aspect of the duration of occupancy provisions most commonly used in urban leases—the tenancy for years[111] and the periodic tenancy.[112] Under both, the tenant receives the right to exclusive possession of the property for a stated period of time (the term or period). In a tenancy for years, the landlord is entitled to resume possession of the property at the end of the stated term. In a periodic tenancy, the landlord may resume possession at the end of the period only after notifying the tenant.[113]

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110. *See infra* notes 150-72 and accompanying text.

111. The tenancy for years first appeared in England at the end of the 12th century. William M. McGovern, *The Historical Conception of a Lease for Years*, 23 UCLA L. REV. 501, 501 (1976). Initially, the tenancy for years was not regarded as a freehold, a possessory interest in land, but rather as a chattel. *Id.* at 526-27. As such, the tenant for years had only a personal claim against the lessor and could not sue third parties for injury to the land or for disseisin. *Id.* at 505-06. The tenancy for years became common only later in the Middle Ages when many of the ideas associated with "feudalism" had disappeared. *Id.* at 504. By that time, tenants acquired better remedies, such as the action in ejectment, than those given to freeholders. *Id.* at 520, 526 (citing A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 136 (1961)). Based on the availability of the remedy of ejectment, the tenant for years was considered to have an interest in real property, the result of a conveyance, but only during the term. *Id.* at 527-28.

112. In a periodic tenancy, the landlord-tenant relationship begins with a fixed period and continues by successive like periods until the tenancy is terminated. *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 65 (2d ed. 1988).

113. Either party is free to terminate a periodic tenancy at the end of a period. *Id.* at 66. Termination, however, requires notice. At common law, the required notice for a tenancy from year to year was six months. *Id.* at 65. For shorter lease periods, the required notice was equal to the term of the lease. Currently, most statutes require only 30 days notice. A tenancy for years ends upon its terms and does not require notice for termination. *Id.* at 58. Where a tenant remains in possession after the expiration of a tenancy for years, an implied periodic tenancy is created in many jurisdictions. *Id.* at 67. For a complete discussion of the periodic tenancy and the tenancy for years, see generally CHARLES DONAHUE, JR. ET AL., PROPERTY, AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 435, 676-80 (3d ed. 1993) (periodic tenancy and holdover tenants); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 570-74 (5th ed. 1956) (tenancy for years); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 2:10 to :15 (1980 & Supp. 1994) (periodic tenancy); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 235-37 (2d ed. 1986) (periodic tenancy).

Recent doctrinal changes, to some degree, have disturbed the traditional principles of private lease law. As a result, new burdens have been imposed on the landlord, such that "[t]enants' rights have increased dramatically; landlords' rights have decreased dramatically."[114] These doctrinal changes, particularly as they developed from Supreme Court decisions interpreting New Deal legislation, reflect the overall jurisprudential transition from classical to neo-classical legal thought. Prior to the New Deal era, the majority of the Court expansively read the Fourteenth Amendment Due Process Clause while narrowly construing Congress' commerce and taxing power. These judicial philosophies limited the range of governmental involvement in private economic decisionmaking,[115] threatening those New Deal programs that proposed to expand the existing scope of congressional, presidential, or federal administrative authority.[116] In the mid-1930s, however, the Supreme Court abruptly narrowed its views on substantive due process and freedom of contract, thus permitting greater governmental intervention in private commerce.[117] New Deal programs such as social security and public housing

114. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984). *See generally* Symposium, *The Revolution in Residential Landlord Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (tracing the development of landlord and tenant rights).

115. Parrish, *supra* note 27, at 728-29. Parrish's work provides an insightful review of the constitutional revolution that took place in the 1930s. In significant rulings, the Supreme Court struck down state and federal laws attempting to alter the existing legal order. *Id.* Such laws prescribed minimum standards for employment and attempted to regulate manufacturing. *Id.* at 728.

116. *Id.* at 730-31. The Court invalidated the National Industrial Recovery Act and the Frazier-Lemke Farm Relief Act and sought to require President Roosevelt to obtain the specific approval of Congress before using his power to remove members of independent regulatory commissions. *Id.* at 731; *see* LEUCHTENBURG, *supra* note 37, at 231-74 (discussing judicial restriction of New Deal programs).

117. *See generally* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (1989) (reviewing the Supreme Court's policy reversal during the New Deal era). Many theories attempt to explain the Supreme Court's apparent reversal. Parrish contends that the reversal could have resulted from "the fact that statutes were more carefully drafted as the emergency of the Hundred Days passed and as the administration recruited more experienced legislative draftsmen." Parrish, *supra* note 27, at 732. Alternatively, he suggests that the Court did *not* reverse its position at all, but rather, "before and after 1937 the justices engaged in scrupulous line-drawing between acceptable and unacceptable regulatory schemes." *Id.* Parrish writes:

> In the final analysis, both the impasse and its solution were more political than doctrinal. [Justices] Hughes and Roberts, both moderate Republicans, looked upon many of the New Deal's reforms and some state level programs as radical, especially with respect to the redistribution of social and economic power.
>
> Other old progressives . . . fought the New Deal for these same reasons after 1935. By joining with the conservative justices in 1935-36, Hughes and Roberts hoped to portray FDR and his advisers as dangerous subversives who were tampering with constitutional verities. . . . Faced with a choice between an administra-

reflected this shift. As these new entitlements became embodied in federal legislation, the receipt of assistance to meet basic human needs became viewed not as a matter of charity, but of right.[118]

The new rights created by New Deal programs triggered the development of new legal theories. These new theories affected existing common law theories, as courts were increasingly asked to construe statutes and regulations to decide issues once governed exclusively by common law rules.[119] In contract law (from which private lease law borrowed heavily), legislation and regulation removed some contract matters, such as insurance, labor, wages, product pricing and standards, from the free market altogether. Consequently, there was a decided shift from private to public regulation of economic decisionmaking. Contrary to the pre-Depression classical period, "public policy" became as significant a factor in interpreting contracts as the parties' private bargain itself. The neoclassical notion of unconscionability circumscribed the range of judicially enforceable private agreements, narrowing a party's ability to limit or disclaim liability to within the bounds of public concern.[120] Consequently,

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> tion that had arrested the economic decline and a group of Justices who argued that this administration often behaved unconstitutionally, the voters placed their immediate self-interest above abstract lawyers' arguments. Roosevelt's landslide [in 1936] left Hughes and Roberts with no alternative but capitulation.

Id. at 733-34.

Other aspects of the Court's work during the decade had profound and lasting significance, including civil liberties and civil rights decisions, federal habeas corpus relief, and the expansion of the in forma pauperis docket. *Id.* at 734-35.

118. These new-found "rights" have never achieved the same status as those originating in the common law. Instead, they are qualified as "entitlements." The array of claims that Americans assert against the government, however, is quite diverse, leading to a description of American society as

> built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), *quoted in* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); *see* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (examining the growth of government entitlement programs).

119. *See* HALL, *supra* note 117, at 292-95.

120. For a discussion of the movement of law away from the late-nineteenth century faith in objectivity and formalism, see HALL, *supra* note 117, at 297. Unconscionability as a bar to enforceability has been incorporated into the Uniform Commercial Code at § 2-

caveat emptor, to some extent, was eclipsed by new concerns of fairness and efficiency.[121]

A. Reasons for the Revolution in Private Lease Law

The transition in private lease law reached its greatest momentum in the 1960s. Professor Rabin offers four reasons for the pace and nature of the "revolutionary" transition.[122] First, he explains that "some of the more well-known changes [in private lease law] strike at the core of the landlord-tenant relationship, both in legal and practical terms."[123] These include limitations on the landlord's right to determine the amount of rent, to gain possession when the term ends, and to select tenants, in addition to limitations on the parties' right to decide the extent of landlord services.[124] Second, Rabin states that "both courts and legislatures have significantly participated in the revolution."[125] Third, Rabin explains that the doctrinal changes have been rapid, with the most significant movement occurring between 1968 and 1973.[126] Finally, and what Rabin refers to as the "most important" reason, "almost all of the changes have favored the tenant as against the landlord."[127] Specifically, these doctrinal changes have produced and influenced the development of an implied warranty of habitability, rent control legislation, an expansion of the landlord's tort liability, antidiscrimination laws, limitations on the landlord's right to evict, and limitations on the landlord's right of self-help.[128]

Professor Rabin argues that the civil rights movement was the motivating factor behind this transformation because it "created a climate of activism that demanded prompt, dramatic changes."[129] Another factor he recognizes is the resistance to the Vietnam War and the influence of the antiwar protestors' victory over the "establishment" on the American political atmosphere.[130] Rabin also identifies institutional and legal

302. U.C.C. § 2-302, 1A U.L.A. 15-16 (1989). See U.C.C. §§ 2-316(1) and 2-316(2), 1A U.L.A. 465 (1989) for limitations on disclaimers.

121. Notwithstanding the proclamation of "The Death of Contract" in 1974, contracts continue to sustain important social and economic relationships though limited by new concepts. GRANT GILMORE, THE DEATH OF CONTRACT 5 (1974).

122. Rabin, *supra* note 114, at 521.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See infra* notes 150-213 and accompanying text.

129. Rabin, *supra* note 114, at 546-47; *see* Glendon, *supra* note 25, at 511 (giving some credit for private lease law developments to legal services organizations challenging the old regime).

130. Rabin, *supra* note 114, at 550.

changes that affected landlord tenant relations. In particular, he highlights reapportionment, which realigned state legislatures to reflect urban constituencies, therefore bringing urban grievances to the public attention.[131] Developments in legal theory, precedents, and legislation that provided tenants with enforceable rights as to the condition of the premises were also significant.[132] Finally, Professor Rabin cites the economic basis for the transformation. He states that the economic health of the nation during this era "made it seem feasible to launch and win a 'war against poverty'. . . . Judges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord's economic position, like that of everyone else, was improving."[133]

Professor Friedman does not agree that a "revolution" in private lease law occurred.[134] Rather, he suggests that the change developed because the modern "modal fact situations" differ significantly from the older cases that formed the basis of private lease law.[135] Professor Friedman notes that until the 1960s, there were few contemporary-style apartment buildings, and thus, little case law concerning them.[136] Consequently, the law that did exist applied loosely to contemporary residential and commercial property leases.[137] "Impressions about the 'revolution' in landlord-tenant law," Professor Friedman contends, "are reinforced by looking at parallel changes in other fields of law."[138]

In an important work that preceded Professor Rabin's article, Profes-

131. *Id.* at 550-51.

132. *Id.* at 551-53.

133. *Id.* at 554.

134. Lawrence M. Friedman, *Comments on Edward H. Rabin*, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 CORNELL L. REV. 585, 585 (1984).

135. *Id.*

136. *Id.* at 586. He states that "none of the earlier cases involved slum poverty." *Id.* at 585.

137. *Id.* at 586. For example, the remedy of distraint would apply more appropriately in an agricultural community; it could permit a landlord to enter the land and gather crops and livestock. *Id.* It would be viewed quite differently if it permitted a landlord to enter an apartment and "start rummaging around in the drawers and closets for jewelry and furs." *Id.* Professor Friedman rejects the notion that the greatest impetus for the private lease law movement was concern over slum housing and problems of dilapidation, human suffering, and violations of housing codes. *Id.* Instead, he argues that wealthy tenants, who did not receive what they thought they contracted for from their landlords, influenced the law. *Id.* at 586-87. He suggests "that the trend Professor Rabin describes is largely independent of class and political ideology. Otherwise, why would the new rules be so uncommonly infectious?" *Id.* at 587.

138. *Id.* at 588. For other comments on the doctrinal changes occurring in private lease law, see Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974). *See also* Cunningham, *supra* note 23.

sor Glendon argues that the so-called "revolution" in private lease law "appears, in historical perspective, to have been no more or less than the culmination, in one area of the law, of certain long-standing trends that have transformed not only landlord-tenant law, but private law generally over the past century."[139] This was a trend away from private ordering and toward public regulation.[140] While property law never completely encompassed lease law, by the turn of the century, and up to the 1960s, lease law employed real and personal property principles as well as some contract notions.[141] Over the course of the twentieth century, lease law principles began to reflect modern contract, tort, civil procedure, and commercial law.[142] According to Glendon, "[t]he decisive element in the transformation of the residential landlord-tenant relationship has been its subjection to pervasive, mostly statutory, regulation of its incidents."[143]

B. Rejection of the "No-Repair" Rule

One of the significant doctrinal changes in private lease law was the reconceptualization of the lease. Many courts declared that a lease, to some extent, is both an estate in land and a contract. This enabled courts to ameliorate the seeming harshness of private lease law by applying the new "public policy" gloss of contract law.[144] Contract doctrine permitted courts to recognize the dependence of covenants and to demand mutuality of obligation and remedies between landlords and tenants.[145] Therefore, the tenant could raise the lessor's failure to perform a covenant or promise as a basis for withholding the payment of rent while still remain-

139. Glendon, *supra* note 25, at 504.

140. *Id.* at 505, 575-76.

141. *Id.* at 504.

142. *Id.*

143. *Id.* at 504-05.

144. *See id.* at 575-76; *see also* Humbach, *supra* note 32, at 1215-17 (contending that an application of traditional contract principles to leases may prove to be an obstacle to reform of landlord-tenant law). Humbach notes that courts treat leases and ordinary contracts differently. *Id.* at 1215. In fact, reformists may be better served by traditional conceptions, rather than ordinary contract law. *Id.* at 1215, 1288. Humbach argues that "[r]esort to a contract theory of leasing can be criticized for its flawed understanding of contract law and for its nonrecognition of certain factual realities and interpretational consequences which would rationalize results under the conveyance approach." *Id.* at 1288. As Humbach explains, the common law courts' choice of the conveyance theory was thought to better protect the tenant's possession under the common law system. *Id.*; *see* Subcommittee on the Model Landlord-Tenant Act of Committee on Leases, Proposed Uniform Residential Landlord and Tenant Act, 8 REAL PROP., PROB. & TRUST J. 104, 105 (1973) (suggesting that residential lease arrangement should be founded in contract law).

145. *See* Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984); Pines v. Perssion, 111 N.W.2d 409, 413 (Wis. 1961); Humbach, *supra* note 32, at 1215-17.

ing in possession.[146] The tenant could assert the same defense in a summary proceeding brought by the landlord to recover possession.[147] Moreover, contract doctrine enabled courts to imply lease terms[148] and to refuse to enforce terms that were found unconscionable.[149]

Perhaps the most significant implied term is the implied warranty of habitability as discussed in *Javins v. First National Realty Corp.*[150] In *Javins*, the United States Court of Appeals for the District of Columbia Circuit rejected the common law no-repair rule and held that, in the context of an urban residential lease, tenants have the benefit of an implied warranty of the landlord to maintain the premises in a state that is fit for human habitation.[151] The court explained that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."[152] The court offered three reasons for its decision. First, the court noted that the no-repair rule was based on factual assumptions that are not applicable to the modern residential lease.[153] The rule arose in an agrarian economy where the land itself was the essence of the landlord-tenant relationship, and the tenant farmer was capable of making his own repairs.[154] This stands in marked contrast to the modern, urban apartment dweller's lease that has value because it gives the tenant a place to live.[155] Furthermore, given the increased structural complexity

146. *See* Berzito v. Gambino, 308 A.2d 17, 21 (N.J. 1973); P.H. Inv. v. Oliver, 818 P.2d 1018, 1020 (Utah 1991); *Hilder*, 478 A.2d at 209-10. *But see* Lindsey v. Normet, 405 U.S. 56 (1972) (holding that a statute that precluded a tenant from raising the landlord's failure to maintain the leased premises as a defense in a summary eviction proceeding did not violate due process). *See generally* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 7.1 (1977) (discussing the remedies available to a tenant when a landlord fails to perform a promise contained in a lease).

147. *See, e.g.*, *Berzito*, 308 A.2d at 21-22.

148. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.303, 7B U.L.A. 44 (1985).

149. *See id.*

150. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

151. *Id.* at 1078-79. In fact, a number of court decisions foreshadowed *Javins*. In Delamater v. Foreman, 239 N.W. 148 (Minn. 1931), the Minnesota Supreme Court held that the old common law rules had to be adapted to the circumstances of modern apartment buildings. *Id.* at 148-49. In the modern context, the landlord should be held to an implied covenant that guarantees the habitability of the premises. *Id.* However, a court did not make a similar ruling for another 30 years. In Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961), the Wisconsin Supreme Court held that there was an implied warranty of habitability in a one-year residential lease and that the covenants to pay rent and to provide a habitable house were mutually dependent. *Id.* at 413.

152. *Javins*, 428 F.2d at 1077.

153. *Id.* at 1074.

154. *Id.*

155. *Id.* When "city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, se-

of buildings, it is difficult for the typical tenant to make repairs.[156]

Second, the court reasoned that the no-repair rule had to be abandoned in order to bring residential landlord-tenant law into harmony with emerging principles in consumer protection and contract law.[157] In interpreting most contracts, courts sought to protect the legitimate expectations of the buyer by steadily broadening the seller's responsibility for the quality of goods and services through implied warranties of quality.[158] Based on these same theories, courts began to hold sellers and developers of real property responsible for the quality of the residential unit. Thus, a tenant may rely on the expectation that his apartment will be habitable for the term of the lease, just as a purchaser of goods or services and a consumer renter may rely on the honesty of the supplier's assurance that the goods are of merchantable quality.[159]

Third, the *Javins* court explained that the nature of the modern urban housing market dictated the abandonment of the old rule. It noted that housing codes regulate certain aspects of the housing market, specifically those pertaining to conditions affecting the health and well-being of the community.[160] The court noted that "the social impact of bad housing had led to the realization that poor housing is detrimental to the whole society."[161] Moreover, it found that housing codes required an implied warranty, given their purpose of keeping premises sanitary and safe and the socio-political policy of imposing the duty to repair on a property owner.[162]

The warranty of habitability requires a landlord to deliver and maintain premises in a condition that is fit for human habitation. It applies to defects existing at the commencement of the lease term as well as those arising thereafter.[163] The landlord has a continuing duty or covenant to

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cure windows and doors, proper sanitation, and proper maintenance." *Id.* (footnote omitted).

156. *Id.* at 1077-78.

157. *Id.* at 1078-79.

158. *Id.* at 1078-80.

159. *Id.* at 1079.

160. *Id.* at 1080.

161. *Id.*

162. *See id.* at 1080; *see also* Hilder v. St. Peter, 478 A.2d 202, 206-07 (Vt. 1984) (discussing the theory of the implied warranty). Prior to *Javins*, the District of Columbia Court of Appeals ruled that renting premises which, at the inception of the lease, fail to meet housing code requirements is illegal, making the lease unenforceable. *See* Brown v. Southall Realty Co., 237 A.2d 834, 837 (D.C. 1968).

163. Later, some courts and statutes extended the warranty to single-family residences and to units not subject to a housing or building code. *See* Glasoe v. Trinkle, 479 N.E.2d 915, 918 (Ill. 1985); *Hilder*, 478 A.2d at 202.

repair.[164] In most jurisdictions, a tenant does not assume the risk if she enters into a lease agreement with knowledge of a defect,[165] nor can the warranty be waived by the tenant or disclaimed by a landlord through a written provision in the lease or an oral agreement.[166] In other jurisdictions, the warranty cannot be waived as to housing code violations.[167]

Most states have enacted statutes codifying a warranty of habitability.[168] These statutes provide a number of remedies to enforce the warranty, including rescission of the lease agreement, rent withholding, rent abatement, right to repair and deduct costs from rent, and injunctive relief or specific performance.[169] Through these statutes, tenants who assert the warranty are protected from retaliatory action by the landlord,

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164. *See* Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Park West Management Corp. v. Mitchell, 391 N.E.2d 1288 (N.Y.), *cert. denied*, 444 U.S. 992 (1979); *Hilder*, 478 A.2d at 202. *See generally* Cunningham, *supra* note 23, at 59-69 (outlining legislation creating a warranty of habitability).

165. *E.g.*, *Hilder*, 478 A.2d at 208.

166. *Id.*; *see, e.g.*, Moity v. Guillory, 430 So. 2d 1243, 1247 (La. Ct. App.), *cert. denied* 437 So. 2d 1148 (La. 1983); *Boston Hous. Auth.*, 293 N.E.2d at 831; Fair v. Negley, 390 A.2d 240, 242 (Pa. Super. Ct. 1978); Teller v. McCoy, 253 S.E.2d 114, 130-31 (W. Va. 1978). The New York statute provides that "[a]ny agreement by a tenant of a dwelling waiving or modifying his rights . . . shall be void as contrary to public policy." N.Y. MULT. DWELL. LAW § 302-c(9) (McKinney Supp. 1994). *See generally* 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 233[2][d] (Patrick J. Rohan ed., 1994) (discussing waiver and disclaimer of the implied warranty of habitability).

Courts allowing waiver of the warranty of habitability cite the need to protect the expectations of the parties and their freedom to contract. *See, e.g.*, Mease v. Fox, 200 N.W.2d 791, 796-97 (Iowa 1972); Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971); Berzito v. Gambino, 308 A.2d 17, 22 (N.J. 1973); Kamarath v. Bennett, 568 S.W.2d 658, 660 n.2 (Tex. 1978); Garza-Vale v. Kwiecien, 796 S.W.2d 500, 502-03 (Tex. Ct. App. 1990); P.H. Inv. v. Oliver, 818 P.2d 1018, 1021-22 (Utah 1991). Section 2.104(c) of the Uniform Residential Landlord Tenant Act seems to support a waiver to the extent that it provides for written agreements that shift some of the landlord's statutory duties to the tenant. UNIF. RESIDENTIAL LANDLORD TENANT ACT § 2.104(c), 7B U.L.A. 260 (1985). In jurisdictions that permit waivers, courts tend to construe them narrowly and require that they be express and in writing. For example, a court may limit waiver coverage to the specific listed defects. *See, e.g.*, *P.H. Inv.*, 818 P.2d at 1018.

167. *See, e.g.*, *Boston Hous. Auth.*, 293 N.E.2d at 831. *See generally* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT §§ 5.1-5.6 (1977) (reviewing parties' obligations and remedies for unsuitable leased property). The Restatement allows waivers unless they are unconscionable or significantly against public policy. A waiver of the warranty of habitability may be found to be contrary to public policy if it "will materially and unreasonably obstruct achievement of a well defined statutory, regulatory, or common law policy." *Id.* § 5.6 cmt. e. Furthermore, "[t]he tenant as a matter of law is unable to waive any remedies [for breach of the landlord's duty] available to him at the time of entry, if at the time of entry it would be unsafe or unhealthy to use the leased premises in the manner contemplated by the parties." *Id.* § 5.3 cmt. c; *see* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.303, 7B U.L.A. 444 (1985).

168. *See* SCHOSHINSKI, *supra* note 113, at §§ 12.1 to .13.

169. *Id.*

such as eviction, increase in rent, change in the lease terms, or nonrenewal.[170]

Despite the substantial changes in lease law, commentators argue that remedies under habitability laws generally fail to improve the welfare of indigent tenants, and may even have the negative effect of producing a shrinkage of substandard housing.[171] Others argue that the model codes produced by the revolution (for example, the Uniform Residential Landlord-Tenant Act) are "only marginally effective, benefitting primarily middle-income tenants in the suburbs or in the cities' better neighborhoods, while largely failing in the aim of helping the inner-city poor and upgrading the quality of slum housing."[172]

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170. *See, e.g.*, Robinson v. Diamond Hous. Corp., 463 F.2d 853, 857 (D.C. Cir. 1972); Edwards v. Habib, 397 F.2d 687, 689 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). Most states have enacted statutory provisions forbidding retaliation. *See* SCHOSHINSKI, *supra* note 113, §§ 12.1 to .13.

171. *See* Werner Z. Hirsch, *From "Food For Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984). In a national study, Hirsch found that only the remedy of receivership significantly affected demand and supply regarding low-income tenants. *Id.* at 606. Statistically, repair/deduct and withholding laws had no significant effects. *Id.* The study also considered habitability laws as they affected two particular classes of indigent tenants—senior citizens and blacks. *Id.* at 607. Receivership laws affect both the rental housing supply and demand functions of indigent elderly tenants equally. *Id.* In the case of indigent black tenants, however, Hirsch found that receivership laws affect the supply function much more than the demand function. *Id.* As a result, Hirsch concluded that the habitability laws do not aid indigent black tenants to the same extent as they aid indigent elderly tenants. *Id.*

Hirsch also studied the effects of habitability laws on the quality of rental housing stock. *Id.* at 608. He found that receivership laws significantly affected the shrinkage of substandard housing. *Id.* at 608. A shrinkage of *substandard* housing may seem to be a positive result, but when the withdrawal or abandonment of substandard housing is not replaced with standard, affordable housing, an increase in absolute homelessness results. Hirsch concluded that since a strict habitability law, such as receivership, imposed substantial costs on landlords, landlords were more likely to abide by its provisions. *Id.* at 609. Conversely, landlords were less likely to honor the less costly and less compelling repair and deduct laws. *Id. But see* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485 (1987). Kennedy argued that "enforcement of a nondisclaimable warranty of habitability . . . under particular market and institutional circumstances, benefits low-income tenants at the expense of their landlords." *Id.* at 485; *see* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L. J. 1093, 1093-95 (1971) (arguing that housing code enforcement will not benefit the tenants because landlords will simply pass on the costs); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976) (arguing that enforcement of ideal housing codes will benefit low-income housing tenants).

172. Samuel J. Brakel & Donald M. McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports*, 1980 AM. B. FOUND. RES. J. 555, 559 (1980).

While America's housing quality has steadily improved over the past 40 years, 21.6% of

Even with the establishment of the warranty of habitability, the contract theory of leases made no significant adjustment in the bargaining positions of the landlord and tenant with regard to the particular terms of the lease. Although some limitations were imposed by and rights were derived from judicially or statutorily implied terms, particular lease provisions, such as consideration (the rent and the term of the tenant's possession) and conditions and limitations (permissible uses of the property and liability for utilities and taxes), remained favorable to the landlord. In sum, the typical residential tenant receives a form lease—a standardized document offered to all tenants on a take-it-or-leave-it basis, with no negotiation over terms.[173]

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all poor renters (1,417,000 households) in the United States lived in inadequate housing in 1989. STATE OF HOUSING, *supra* note 4, at 15. The Joint Center for Housing Studies reported that although 77.2% of poor renters directed more than half of their household incomes towards rents in 1989, 1,417,000 poor renter households lived in structurally inadequate housing. *Id.* at 16. This lack of adequate housing has a greater effect on black and Hispanic households because these groups have a higher percentage of poor. *Id.* at 16-17. Housing assistance programs have upgraded housing conditions for many poor households, but the rate of growth in the nation's poor has far outpaced the rate of subsidy increase. *Id.* at 16. As a result, the number of unassisted poor renters increased from 4.2 million in 1974 to 5.5 million in 1985. *Id.*

Only a small number of public housing projects (approximately six percent) suffer from "chronic problems" that would require a per-unit payment of more than $2500 to correct violations of basic health and safety standards and to bring the building up to minimum property standards. Bratt, *supra* note 6 at 345; *see* PROGRAM V, *supra* note 6, at 306-26 (reporting that public housing was less likely than private sector housing to have physical deficiencies relating to health and safety); MEEHAN, *supra* note 10, at 135-36, 195-96 (criticizing design and construction flaws, including the inadequate number of large units, poor quality of materials, high density and spare quality); Mary J. Huth, *An Examination of Public Housing in the United States After Forty Years*, 8 J. SOC. & SOC. WELFARE 471, 482 (noting that little publicity is "given to many smaller projects, consisting of highly attractive clusters of one- and two- story townhouses and garden apartments surrounded by lawns, trees, and playgrounds").

173. *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 835 (1974). Berger studied 16 standard form leases used in major cities throughout the country. These leases were typically long (one used in New York City had more than 9000 words). Berger concluded:

> The leases almost all treat the residential tenant as a latter-day serf. One sees a near-pathological concern with tenant duties and landlord remedies, occupying from 50 to 80 percent of virtually every form. Much of the remaining text seeks to immunize landlord against the claims of his tenant. One looks vainly for any recognition of the fact that the tenant may have remedies or the landlord duties. And only two forms . . . begin to suggest the bilateral contract that defines today's landlord-tenant relationship.

Id.; *see* Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970). Mueller's article presents a study of how tenants actually behave with regard to their leases. Mueller reports that about half of the tenants surveyed carefully read their leases, although with widely varying degrees of understanding. *Id.* at 256. Many tenants regarded conventional provisions, including those favorable to land-

C. Persistence of "Termination or Nonrenewal Without Cause" Rule

The other common law private lease law rule that operates to deny the low-income family safe, decent, and affordable housing is the "termination or nonrenewal without cause" rule. This rule has been left largely intact by the doctrinal changes of the last three decades. This rule, as it developed at common law, provides that a property owner is free to refuse to enter into, or to continue, a landlord-tenant relationship for any or no reason. It is not clear why the transition in private lease law failed to repudiate this second rule. Perhaps courts and legislatures believed that repudiation would threaten fundamental principles of individual freedom—to contract and to enjoy private property. A rejection of this rule would alter the present form of these freedoms. It is difficult, however, to see how the consequences of the intrusion would differ significantly from the effects of the rejection of the no-repair rule.

The termination or nonrenewal without cause rule would be nullified by recognition of a right to continued possession beyond the lease term. Such a right could be characterized as an implied contract right or as an incident of the property interest in a leasehold. The right to continued possession beyond the lease term may be an aspect of a fundamental right to housing based in the Constitution.

1. Constitutional Right to Housing

Establishing a constitutional right to continued possession of a leased premises beyond the stated term may be foreclosed by the Supreme Court's ruling in *Lindsey v. Normet*.[174] In *Lindsey*, the plaintiffs were tenants of an apartment declared unfit for habitation due to substandard conditions. The plaintiffs requested that the landlord make certain repairs, but the landlord refused with one minor exception.[175] The plaintiffs then refused to pay rent and the landlord threatened suit.[176] Thereafter, the plaintiffs commenced an action seeking a declaratory

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lords and expressed in fine print, as fair. *Id.* at 263-64. Few tenants attempted to negotiate lease terms; yet those who did enjoyed some success. *Id.* at 264-65. Mueller notes that

> when the data, which does reveal some bargaining success, is subjected to close scrutiny, it is evident that the small number of tenants who secured alteration in these terms had only a limited degree of success and are generally persons whose occupational skills make them better equipped than the average person for the bargaining process.

Id. at 275. Most likely, these persons also had some choice of tenancies. *Cf.* Steven A. Arbittier, Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197, 1197 (1963) (discussing the elements of an adhesion lease).

174. 405 U.S. 56 (1972).

175. *Id.* at 58.

176. *Id.* at 58-59.

judgment that the state summary possession statute was unconstitutional because it denied tenants due process of law.[177] The plaintiffs argued that certain provisions of the statute, such as those requiring a trial no later than six days after service of the complaint unless security for accruing rent is deposited with the court, limited the triable issues, precluded consideration of defenses based on the landlord's breach of a duty to maintain the premises, and violated the Due Process Clause of the Constitution.[178]

In rejecting the due process claim, the Supreme Court explained that procedural due process required only that there be an opportunity to present every available defense.[179] The state statute provided such an opportunity, but mandated a different forum and a different time for the presentation.[180] According to the Court, nothing in the Constitution forbids a state "from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants."[181]

In response to the plaintiffs' assertion that the "need for decent shelter" and "the right to retain peaceful possession of one's home" should be recognized as fundamental interests, the Court stated that it was "unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease . . . contrary to the terms of the relevant agreement."[182]

2. *Implied Contract Right to Continued Possession*

Establishing a right to continued possession beyond the lease term and abandoning the termination or nonrenewal without cause rule may be the next logical step in the "lease as a contract" paradigm. In this paradigm, the landlord-tenant relationship is essentially an exchange of goods and services, such as the physical premises and running water, for money con-

177. *Id.* at 59-60.

178. *Id.* at 64-67.

179. *Id.* at 65-66.

180. *Id.* at 66. The Court noted that its prior holdings found it "permissible to segregate an action for possession of property from other actions arising out of the same factual situation that may assert valid legal or equitable defenses or counterclaims." *Id.* at 67.

181. *Id.* at 68.

182. *Id.* at 74. Despite *Lindsey*, there continue to be arguments for constitutional rights to such fundamental needs as housing, food, health care, and education. *See* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); William W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 66.

sideration (the rent).[183] At the center of the paradigm is the implied right to the habitable condition of the premises *during* the stated term, based upon the expectations of the parties in the context of modern urban housing conditions.[184] This model facilitates an equally forceful argument for an implied right to possession of housing *beyond* the stated term. In *Javins v. First National Realty Corp.*,[185] the District of Columbia Court of Appeals pointed out that the common law no-repair rule had been superseded because its underlying factual assumptions were no longer valid.[186] The expectations of the landlord and the agrarian tenant at the time that the rule was initially developed are different from those of the contemporary landlord and the urban tenant. In the modern context of urban housing shortages, the termination or nonrenewal without cause rule fails to reflect the parties' expectations to the same extent as the no-repair rule. At common law, the landlord's primary expectations were a market rental and acceptable tenant behavior, while the tenant's primary expectation was undisturbed possession during the term of the lease. In modern times, the tenant's expectations also include a habitable premises and possession beyond the stated term. While the landlord's expectations do not require termination or nonrenewal without cause, both of the modern tenant's expectations are defeated by such a rule.

In *Javins*, the Supreme Court explained that the social policy underlying the enactment of modern housing codes required abandonment of the no-repair rule because the rule conflicted with the codified legislative policy against unsafe and unsanitary dwellings.[187] In the same sense, the termination or nonrenewal without cause rule conflicts with the equally well-defined legislative policy against displacement and homelessness. Moreover, the social impact of homelessness resulting from the termina-

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

184. *See* Humbach, *supra* note 32, at 1283-86. Even during the lease term, the contract theory has produced the unfortunate situation where a default by the tenant can result in the forfeiture of the estate. Under the common law rules, however, a tenant's right of possession would nonetheless have to be terminated in accordance with a different and more protective set of rules. Humbach explains that "[b]ecause the traditional conception views the tenant as having a property right to possession, enforcement of a forfeiture for nonpayment means that a property right, in this case the tenant's estate, must be terminated." *Id.* at 1284 (footnote omitted).

185. 428 F.2d at 1071,

186. *Id.* at 1076-77. The court held: "In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability." *Id.* (footnotes omitted).

187. *Id.* at 1077-78.

tion or nonrenewal without cause rule is equivalent to the social impact of unsafe housing resulting from the no-repair rule.

The *Javins* Court further explained that freedom of contract has already yielded to greater societal concerns in other contractual situations.[188] Consumer protection and product liability laws, in recognition of the unequal bargaining positions between buyer and seller and the general societal interest in protecting the health and safety of citizens, limit the exclusive right of private parties to determine the terms of their bargain.[189] Furthermore, under both state and federal statutes, neither sellers nor renters of real property may refuse to sell, lease, or continue a landlord-tenant relationship on the basis of the tenant's race, religion, national origin, gender, or family composition to the extent that it includes children.[190] Therefore, an additional limitation on the right to contract in the interest of preventing homelessness seems consistent with these existing restrictions.

3. *An Incident of the Property Interest in a Leasehold*

A right to continued possession beyond the stated lease term is not a property interest at common law, but it may be recognized as an incident of the property interest in a leasehold. As social and economic conditions have changed in the last several decades, the concept of property has undergone a remarkable transition. As a result, the modern concept of property is determined to a greater extent by reference to community interests.[191] Property is said to involve a bundle of rights inherent in a person's relation to others with respect to a physical thing. In the context of a leasehold, that bundle includes the right to possess, use, exclude

188. *Id.* at 1075 (citing the judicial adoption of implied warranties in the context of contracts for the sale of goods).

189. *Id.* at 1079.

190. *See* Civil Rights Act of 1866, 42 U.S.C. § 1982 (1988); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. III 1991). In some jurisdictions, discrimination based on sexual orientation is prohibited. *See, e.g.*, D.C. CODE ANN. § 1-2515 (1987); WIS. STAT. ANN. § 101.22 (West Supp. 1993). These laws, however, may not preclude a landlord from refusing to rent to an unmarried heterosexual couple. *See* Baxter v. City of Belleville, 720 F. Supp. 720, 728, 734 (S.D. Ill. 1989) (holding that denying HIV-infected persons a special use permit for a residence violated the Fair Housing Act's prohibition against discrimination in the sale or rental of housing on basis of the handicap of the buyer). *See generally* Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055 (1992) (reviewing the law's failure to prevent housing discrimination against unmarried couples).

191. *See* John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1; *see also* Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530 (1989) (noting that property rights may come to exist "principally in the form of specific use-rights").

others, enjoy the fruits and profits, destroy, and alienate.[192] Although these incidents of ownership are necessary for full ownership, as defined by the existing legal framework, they are not necessary to constitute ownership per se because ownership can exist in various restricted senses.[193] One might, for example, have the right to the income from a trust, but not the right to the principal.[194] Similarly, a person may have the right to the income from real property that is leased but not the right to use or possess the property.[195] Moreover, each of the property incidents is subject to multiple definitions, such that the practical consequences of ownership are altered.[196] For example, the right to alienate may be limited by rules regarding perpetuities or by prohibitions on racial discrimination. The right to use may be limited by the existence of harmful effects produced by particular uses,[197] or by a legislature's perception of the general community interest.[198]

Considerations of societal interest influenced the New Jersey Supreme Court in an innovative opinion interpreting the right to exclude. In *New Jersey v. Shack*,[199] a landowner sought to invoke a state criminal trespass statute to exclude staff of various organizations seeking to provide legal and medical services to migrant laborers working on his land.[200] The court held that the unauthorized entry by the staff was beyond the scope of the criminal trespass statute because ownership of real property in New Jersey does not include the right to bar access to governmental services available to migrant workers.[201] The court explained that

192. A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A.G. Guest ed., 1961). Actually, Honore maintains that the liberal conception of property embraces 11 elements. In addition to the rights mentioned, ownership also includes the right to security (immunity from expropriation); the absence of term (the indeterminate length of ownership); the prohibition of harmful use (the duty to forbear from using the thing in certain ways harmful to others); liability to execution (for repayment of a debt); and residuary character (the existence of rules governing the reversion of lapsed ownership rights). *Id.*; *see* LAWRENCE C. BECKER, PROPERTY RIGHTS, PHILOSOPHIC FOUNDATIONS 18-19 (1977) (discussing Honore's account of property rights).

193. BECKER, *supra* note 192, at 19 (citing Honore).

194. *Id.*

195. *Id.* For example, one in bankruptcy might have the right to sell assets, but not the right to give assets away. *See* 11 U.S.C. § 548(a) (1988). Similarly, a sportsman might have the right to give away wild fish or game caught or killed pursuant to his license, but not the right to sell it. *See, e.g.*, CAL. FISH & GAME CODE §§ 3039, 7121 (West 1984 & Supp. 1994).

196. BECKER, *supra* note 192, at 19.

197. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 413-14 (1915) (upholding a municipal ordinance prohibiting residents from brickmaking).

198. Zoning laws are the primary source of these limitations.

199. 277 A.2d 369 (N.J. 1971).

200. *Id.* at 370-71.

201. *Id.* at 371-72.

"[p]roperty rights serve human values. They are recognized to that end, and are limited by it."[202] As such, a property owner's bundle of rights will be confined by the government's interest in preserving the health and welfare of its citizens.[203] In its opinion, the court found "it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[204] While the farmer is entitled to pursue his farming activities without interference, the court could see "no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him."[205]

The *Shack* opinion suggests that the dimensions of "property" are not fixed;[206] they are defined by societal conditions. The scarcity of land and, by implication, the shortage of housing, increases society's stake in this resource.[207] As the concept of property evolves to respond to current societal conditions, few believe that, after *Javins*, the nonfreehold estate is the same as that known at common law. A further redefinition of the concept would include, as an incident of the nonfreehold estate, the tenant's right to continue in possession absent cause to evict. The prevailing housing conditions seem to compel such a redefinition.[208]

Legislatures in New Jersey and the District of Columbia have taken an important redefinitional step. They have altered the common law rules pertaining to the tenancy for years and the periodic tenancy as to tenure and duration.[209] The New Jersey and District of Columbia anti-eviction statutes deny a landlord the right to terminate a month-to-month tenancy, except for good cause as specified by the statute.[210] Good cause includes failure to pay rent, destruction of the rental property, disturbance of neighbors, and breach of covenants in the lease. It does not,

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202. *Id.* at 372.

203. *Id.* at 373 (quoting 5A RICHARD R. POWELL, POWELL ON REAL PROPERTY § 745, at 493-94 (Patrick J. Rohan ed., 1994)).

204. *Id.* at 374.

205. *Id.*

206. Property interests are created and their dimensions are defined by existing rules or understandings that are grounded in an independent source, such as state law. *See* Texaco, Inc. v. Short, 454 U.S. 516, 525 (1982); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

207. *See* Cribbet, *supra*, note 191, at 3.

208. Under such a rule, a landlord would be entitled to increase the rent, although rent levels would be constrained by the demand for housing. A proposed rent level that is grossly in excess of the prevailing levels on comparable property could be scrutinized as a pretext.

209. D.C. CODE ANN. § 45-2551 (1990); N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1993).

210. D.C. CODE ANN. § 45-2551(a); N.J. STAT. ANN. § 2A:18-61.1.

however, include the landlord's desire to occupy the premises himself.[211]

Rent control legislation[212] also includes some form of eviction control, a variation on the right to continued possession. Typically, such legislation provides tenants in rent controlled buildings a right to renew their lease and limits the landlord's eviction right to certain specified grounds. These grounds include the resumption of possession for the landlord's own occupancy, nonpayment of rent, serious tenant misconduct, removal of the property from the housing market, and the failure of the tenant to use the unit as a primary residence.[213]

IV. Evolution of Public Housing Law

The public housing tenancy has undergone doctrinal changes in con-

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211. *See* D.C. Code Ann. § 45-2551(b)(i); N.J. Stat. Ann. § 2A:18-61.1(a) to (p). Under the District of Columbia law, however, an owner of a residential unit who personally seeks to occupy a unit can evict a tenant on these grounds. D.C. Code Ann. § 45-2551(d). The New Jersey statute was upheld when challenged on constitutional grounds. Puttrich v. Smith, 407 A.2d 842 (N.J. Super. Ct. App. Div. 1979); Stamboulos v. McKee, 342 A.2d 529 (N.J. Super. Ct. App. Div. 1975). *See generally* Harold N. Hensel, Note, 11 Seton Hall L. Rev. 311 (1980) (discussing the application and interpretation of New Jersey's anti-eviction statute by New Jersey courts).

The New Jersey legislature enacted the eviction statute because:

> At present, there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant. As a result, residential tenants frequently have been unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems. This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey. This act shall limit the eviction of tenants by landlords to reasonable grounds and provide that suitable notice shall be given to tenants when an action for eviction is instituted by the landlord.

Hensel, Note, *supra*, at 312 n.11 (quoting N.J. Assembly Bill 1586 (1974)); *cf.* Minn. Stat. §§ 566.02 to .17 (1988 & Supp. 1994) (setting forth remedies available to tenants for unlawful or forcible entry into tenements).

212. Rent control legislation began as a post-war, emergency measure to address the shortage of available rental housing and the monopolistic effects of such shortages. Schoshinski, *supra* note 113, § 7:1, at 502-03. During World War II, Congress authorized the imposition of rent controls in much of the nation as part of its wartime price control program. *Id.* When these federal controls were terminated in the late 1940s, they were often replaced by state and local control. Unlike the earlier temporary wartime controls, the new ordinances were designed to prevent expected perpetual inflationary rent increases. *See generally id.*, §§ 7:1-7:10, at 501-30 (providing an overview of the various types of rent control legislation); Marc J. Korpus, Note, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived*, 33 Rutgers L. Rev. 165 (1980) (suggesting that courts should require rents to be set at a level that would not force landlords out of the housing market).

213. *See* N.Y. Unconsol. Law §§ 26-501 to -520 (McKinney 1987); *see also* Schoshinski, *supra* note 113, § 7:10, at 528-30. Under typical rent control legislation, a landlord must seek the approval of the administering agency before withdrawing a unit from the market, even when his repair costs are overwhelming. *Id.*

junction with the transformations in property, contract, and privacy law. These transformations have developed simultaneously with changes in the prevailing attitudes toward welfare and other government benefits. Contrary to the "revolution" that dismantled aspects of the old private lease law regime, the doctrinal changes occurring in public housing law have been incremental. Once the movement began, however, the development of the character and dimensions of the public housing tenancy exceeded that of the private sector tenancy. Significantly, public housing law rejected the termination or nonrenewal without cause rule. Thus, to the low-income family, public housing law provides security of tenure, some measure of economic stability, and a degree of personal autonomy.

A. Security of Tenure as a Constitutional Right

In 1937, the tenancies available to low-income families through public housing programs resembled those existing in the private sector. Most were month-to-month, periodic tenancies.[214] Ironically, a family, which, by virtue of its public housing eligibility, was unable to obtain housing on the private market and would otherwise be homeless, could be evicted from public housing with as little as ten days notice, without explanation or cause.[215] Some courts reinforced this policy by declaring that there was no security of tenure[216] or constitutional right to continue living in

214. *See* Friedman, *supra* note 33, at 660.

215. *See* Chicago Hous. Auth. v. Stewart, 237 N.E.2d 463, 464-65 (Ill. 1968) (holding that, absent a showing that the tenant was being evicted for exercising some constitutionally protected right, neither due process nor the HUD regulations required the housing authority to furnish the tenant with the reasons for his eviction, prior to giving him notice to vacate), *vacated*, 393 U.S. 482 (1969); *see also* Edward J. Fruchtman, *Court Decisions*, 7 J. HOUS. 432 (1950) (citing cases upholding the power of housing authorities to evict tenants without stating the grounds for eviction); Edward J. Fruchtman, *Court Decisions*, 6 J. HOUS. 150 (1949) (same). Until 1968, an applicant for public housing could be turned away without explanation. In Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968), the United States Court of Appeals for the Second Circuit held that an applicant who is denied public housing is entitled to prompt notice and an opportunity for a hearing. *Id.* at 267. Thereafter, Congress amended the Housing Act in accordance with the *Holmes* decision. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 214, 83 Stat. 379, 389.

216. *E.g.*, Walton v. City of Phoenix, 208 P.2d 309 (Ariz. 1949). The court stated:

> It would certainly create an anomalous situation if a person once obtaining possession had a continuing and indefinite right of tenure. To so construe the statute would be to rule that a person after becoming a tenant need not care for the premises and need not do anything except in accordance with his own will and conscience, thus leaving the plaintiff powerless to perform its functions under the Act and in effect negativing the purpose and the expressed intention of the legislature.

Id. at 311.

public housing projects.[217] Other courts found it inconceivable that a housing authority should be required to provide the tenant with a hearing prior to each decision to increase the rent or to terminate a month-to-month tenancy.[218] For example, a New York court held that "tenants [could] not, in a dispossess proceeding, litigate the propriety of the [housing] authority's determination that they were undesirable, or had failed to pay rent or that there was some other authorized ground for termination."[219]

The Supreme Court first addressed the issue of whether a public housing tenant has a vested property right entitling her to procedural safeguards prior to eviction in *Thorpe v. Housing Authority*.[220] In *Thorpe*, a tenant in a federally assisted housing project held a month-to-month lease, which allowed the tenant to automatically renew for successive one-month terms, provided that she maintained the same income level and family composition and that she abided by the terms of the lease.[221] The lease further provided that either the tenant or the housing authority could terminate the lease by providing notice at least fifteen days prior to the end of any monthly term.[222]

One day after the tenant in *Thorpe* was elected president of a tenants' organization, the executive director of the housing authority, providing no explanation, notified the tenant that her lease would terminate in fifteen days.[223] The tenant was not informed of the basis for the executive director's decision. While the termination proceedings were pending, HUD issued a circular requiring that, prior to eviction, the PHA must provide a tenant with the specific reasons for the action and an opportu-

217. *See Chicago Hous. Auth.*, 122 N.E.2d at 524; Municipal Hous. Auth. v. Walck, 97 N.Y.S.2d 488 (N.Y. App. Div. 1950).

218. *E.g.*, Smalls v. White Plains Hous. Auth., 230 N.Y.S.2d 106, 109 (N.Y. Sup. Ct. 1962) (citing Gefland v. New York City Hous. Auth., 111 N.Y.S.2d 256, 258 (N.Y. Sup. Ct. 1952)).

219. New York City Hous. Auth. v. Greenbaum, 140 N.Y.S.2d 321, 321-22 (N.Y. App. Term 1955) (finding that the tenants could compel the landlord to prove that an authorized ground for termination existed); *see* New York City Hous. Auth. v. Bernstein, 147 N.Y.S.2d 262, 262 (N.Y. App. Term 1955) (holding that the propriety of the housing authority's determination of tenant ineligibility was reviewable, but was not open to question in a summary proceeding); New York City Hous. Auth. v. Russ, 134 N.Y.S.2d 812, 813 (N.Y. App. Term 1954) (holding that although tenant was denied a hearing, where the landlord's tenant review board reached the decision to terminate the tenancy, the housing authority was not required to offer evidence supporting its finding of nondesirability in a summary proceeding).

220. 393 U.S. 268 (1969).

221. *Id.* at 270.

222. *Id.*

223. *Id.* at 271.

nity to respond.[224] The Supreme Court did not rule on the constitutional issue raised by the tenant, but held that the HUD circular was binding on the PHA, and that a tenant could not be evicted where the PHA had not complied with the circular's requirements.[225]

One year after the *Thorpe* decision, the Supreme Court decided *Goldberg v. Kelly*.[226] The Court in *Goldberg* held that welfare benefits are statutory entitlements, and that recipients of these benefits are entitled to procedural due process before such benefits can be terminated.[227] Three subsequent circuit court opinions addressed the *Goldberg* issue and refined the dimensions of the constitutional rights of public housing tenants.

1. Escalera

In *Escalera v. New York City Housing Authority*,[228] tenants in a public housing project held month-to-month tenancies that allowed for the ter-

224. *Id.* at 272.

225. *Id.* at 274. In the first *Thorpe* case, the Supreme Court of North Carolina affirmed the eviction of the tenant. Housing Auth. v. Thorpe, 148 S.E.2d 290, 292 (N.C. 1966), *vacated*, 386 U.S. 670 (1967). The United States Supreme Court granted certiorari, vacated the North Carolina Supreme Court judgment, and remanded the case for further determination in light of the newly adopted HUD circular containing new procedures for evicting tenants. 386 U.S. 670, 673 (1967) [*Thorpe I*]. These new procedures then became the subject of further litigation in Thorpe v. Housing Auth., 393 U.S. 268 (1969) [*Thorpe II*]. In *Thorpe I*, Justice Douglas seemed inclined, however, to definitively rule on the constitutional question, stating that "[i]t is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment." 386 U.S. at 678 (Douglas, J., concurring).

226. 397 U.S. 254 (1970).

227. *Id.* at 262-63. Within a year of the *Goldberg* decision, the Court clearly distinguished entitlements and traditional property rights. Entitlements only exist to the extent that the government chooses to offer them. *See* Dandridge v. Williams, 397 U.S. 471, 479-80 (1970). The rights of welfare recipients became more tenuous following the ruling in Wyman v. James, 400 U.S. 309 (1971). In *Wyman*, the Court held that a welfare caseworker's visit and search of the recipient's home without consent, without notice, and without a warrant did not violate any rights granted by the Fourth Amendment. *Id.* at 390.

228. 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). A thoughtful and perhaps ground-breaking state court decision preceded *Escalera*. Vinson v. Greenburgh Hous. Auth., 288 N.Y.S.2d 159 (1968). In *Vinson*, the housing authority sought to terminate a tenant's month-to-month tenancy by giving the required notice, but without stating a reason. *Id.* at 161. When the tenant held over, the housing authority brought action. The court ruled that the housing authority was not an ordinary landlord, and that "[w]hat may be complete freedom of action under private contractual arrangements falls to restricted action under public housing leases." *Id.* at 163 (citations omitted). The court explained that the housing authority could not arbitrarily deprive a tenant of his right to continued occupancy through the exercise of a contractual provision which terminates the lease. *Id.*

mination of undesirable tenants with one month's notice.[229] The housing authority's policy provided that if, as a result of a tenant's undesirable acts, a project manager recommended termination of the lease, the manager would arrange a meeting with that tenant.[230] At this meeting, the project manager would notify the tenant of his proposed recommendations, review any information in the tenant's file, and discuss the tenant's undesirable activity.[231] The tenant was then given an opportunity to explain his behavior. If, following the meeting, the project manager again recommended termination for nondesirability, the tenant could submit a written statement to accompany the project manager's recommendation and the tenant's file, which would then be forwarded to the Housing Authority Tenant Review Board (TRB).[232]

In this case, the New York City Housing Authority brought proceedings against one tenant family, alleging that their son committed statutory rape, against another tenant because of his arrest on a narcotics charge that was not connected to the project, and against various other tenants for failure to pay "additional rent."[233] Each tenant requested a hearing;[234] one tenant, however, demanded a variety of additional safeguards, including advance notice of the charge, a hearing transcript, the right to confront and cross-examine witnesses, and an impartial hearing examiner.[235] Although the TRB panel permitted this tenant's counsel to in-

229. *Escalera*, 425 F.2d at 857. A family was considered nondesirable if the behavior of any member was considered

> "a detriment to health, safety or morals of its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or a cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants, or a nuisance."

Id. at 857 n.1 (quoting TENANT REVIEW HANDBOOK, ch. VII, ¶ I, App. B, at 4).

230. *Id.* at 857.

231. *Id.*

232. *Id.* If the TRB initially determined that a particular tenant was non-desirable, it would notify the tenant in writing that it was " 'considering a recommendation' of termination," and that he could appear before the TRB to plead the merits of his case. *Id.* at 857-58. A panel of three persons would conduct a hearing. *Id.* at 858. Instead of calling witnesses, the housing authority simply read a summary of the tenant's file. *Id.* The tenant or his representative was allowed to comment or to present and examine relevant witnesses. *Id.* However, the tenant was generally not allowed to review the contents of his file, the list of complainants against him, or the summary of the file entries. *Id.*

233. *Id.* at 859. Additional rent charges were assessed against tenants for clogging a toilet, permitting undesirable behavior by a relative, playing ball on housing authority property, and riding a bicycle on housing authority walkways. *Id.* at 860. The project manager had the discretion to determine the amount of additional rent to be charged. *Id.* If he believed an additional charge was warranted, he was authorized to impose such a charge after providing the tenant with notice. *Id.* If the tenant failed to pay the additional amount, the landlord could bring an action to collect the unpaid rent. *Id.*

234. *Id.*

235. *Id.*

spect his file, it did not grant the other requests, and the tenant refused to proceed. Another tenant participated in the hearing even though he was not permitted to inspect his file. Subsequently, he was found to be undesirable, given notice of termination, and ordered to vacate the premises.[236]

The United States Court of Appeals for the Second Circuit considered procedural challenges to three different types of action taken by the housing authority: (1) termination for nondesirability; (2) termination for violation of rules and regulations; and (3) assessment of "additional rent" for tenants' nondesirable acts.[237] Addressing the question of whether the housing authority procedures denied the tenants procedural due process, the court distinguished the rules and procedures mandated by the HUD circular, which were considered when *Thorpe* came to the Supreme Court a second time, from the rules and procedures required by the Fourteenth Amendment.[238] The court explained that the fact that the tenancy termination procedures in *Thorpe* satisfied the HUD circular requirements did not conclusively determine the issue of whether the procedures satisfied the Fourteenth Amendment's due process requirements.[239] Nor did the termination procedures foreclose a constitutional right to continued residence in public housing projects.[240] According to the court, "[t]he government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege."[241] The court explained that the nature of the particular government function and the substance of the private interest affected will determine the "minimum procedural safeguards required by due process."[242] Under these principles, the court held that the housing authority procedures for terminating tenancies on the ground of nondesirability were deficient.[243]

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236. *Id.*

237. *Id.* at 857.

238. *Id.* at 861.

239. *Id.*

240. *Id.*

241. *Id.* (citing Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)).

242. *Id.* (citing *Goldberg*, 397 U.S. at 263).

243. *Id.* at 862. The court found the housing authority's procedures deficient for four reasons. First, the court found the one-sentence summary notice to be inadequate in that it did not notify a tenant of the nature of the evidence against him so that he could effectively rebut that evidence. *Id.* Similarly, the court held that the project manager conference was insufficient since the manager did not reveal all of the information contained in the file that might influence the TRB decision. *Id.* Second, the provisions denying the tenant access to the material in her file, upon which the TRB based its determination, violated due process. *Id.* Such denial rendered the hearing at which the tenant is provided an opportunity to rebut evidence against her meaningless because she had no knowledge of the material in

The Second Circuit further found that the PHA's procedures for assessing additional rent charges based on a tenant's nondesirable acts were similarly inadequate.[244] It determined that the housing authority was unjustified in failing to provide procedural safeguards merely because the housing authority lease provided for additional rent charges.[245] The court fashioned a rule favorable to public housing tenants, stating that due process requires that a public housing tenant be afforded an administrative hearing on any proposed adverse action which could potentially result in a deprivation of benefits, even if the tenant had recourse in a state court.[246] The court believed that an entitlement such as public housing could not be adequately protected against wrongful deprivation in a summary proceeding. The court remarked that "[t]he cost of defending in court and the hazards envisioned by a public housing tenant in refusing to pay rent, would probably dissuade all but the boldest tenant from contesting an 'additional rent' charge in this manner."[247]

2. Caulder

In *Caulder v. Durham Housing Authority*,[248] the tenant held a lease similar to those held by the tenants in *Escalera*. The lease provided for a month-to-month tenancy, which was automatically renewed for the next month unless either party gave notice fifteen days prior to the end of the month.[249] The housing authority advised the tenant that her lease would be terminated because of complaints from anonymous neighbors.[250] At a subsequent hearing, the hearing commissioners denied the tenant's request to learn the nature of the specific allegations, the complainants' names, and the procedural rules governing the hearing.[251] The judge

her file. *Id.* Third, the denial of an opportunity to confront and cross-examine witnesses who supplied the information in the tenant's file violated due process because " '[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' " *Id.* (quoting *Goldberg*, 397 U.S. at 269). The housing authority rarely advised the tenant as to the source of many of the entries in his file. *Id.* Finally, the court stated that failure to inform the tenant of the rules and regulations governing the TRB panel would be improper when "[t]he decision maker's conclusion . . . must rely solely on the *legal rules* and evidence adduced at the hearing." *Id.* at 863 (quoting *Goldberg*, 397 U.S. at 271). The court concluded that if this information is necessary for adequate trial preparation, the information must be disclosed prior to the TRB hearing. *Id.*

244. *Id.* at 863-64.
245. *Id.* at 864.
246. *Id.* at 863-64.
247. *Id.* at 864.
248. 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).
249. *Id.* at 1000.
250. *Id.*
251. *Id.*

heard the evidence of the complaining witnesses *in camera*, and the tenant did not have an opportunity to challenge or cross-examine these witnesses.[252] Consequently, the tenant brought a suit challenging the termination of her lease on the theory that she was denied due process of law.[253]

The United States Court of Appeals for the Fourth Circuit stated that the Supreme Court's decision in *Goldberg v. Kelly* resolved any uncertainty concerning the application of the Due Process Clause to the rights of public housing tenants.[254] The court determined that the hearing was procedurally flawed, and stated that "[t]he 'privilege' or the 'right' to occupy publicly subsidized low-rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or the other rights and privileges referred to in *Goldberg*."[255] The court agreed with the *Escalera* decision[256] and ruled that the tenants were entitled to specific procedural safeguards, including timely and adequate notice specifically outlining the reasons for the proposed termination, the right to cross-examine adverse witnesses, the right to representation by counsel, the right to a hearing decision based on evidence presented, the right to have the reasons for the hearing decision and the evidence relied upon are set forth in writing, and the right to a nonpartisan decision-maker.[257]

3. Joy

While *Escalera* and *Caulder* are landmark decisions that defined the required procedures to be used when public housing tenants faced adverse action, neither case addressed the question of whether a PHA needed a legitimate reason to evict a public housing tenant or to refuse to renew a lease at the end of the term. In *Escalera*, resolution of these issues was not necessary because the housing authority's own rules required that the tenant be found nondesirable.[258] Similarly, in *Caulder*, the court never reached the issue of whether it would require the PHA to state a legitimate reason because the housing authority voluntarily offered reasons for the termination.[259] In *Joy v. Davies*, the United States

252. *Id.*
253. *Id.* at 1000-01.
254. *Id.* at 1002 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).
255. *Id.* at 1003.
256. 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970); *see supra* notes 228-47 and accompanying text.
257. *Caulder*, 433 F.2d at 1003-04.
258. *Escalera*, 425 F.2d 857.
259. *Caulder*, 433 F.2d at 1000-01.

Court of Appeals for the Fourth Circuit answered the question left unresolved by *Escalera* and *Caulder*.[260] In *Joy*, the tenant lived in a quasi-public apartment project, constructed and operated with federal subsidies.[261] The tenant's lease provided that "[a]t the end of one year, lease is automatically renewed from month to month [and] . . . [e]ither party may terminate lease at end of term or any successive term by giving 30 days' notice in advance to other party."[262] In accordance with these provisions, the landlord sought to terminate the tenant's lease at the end of the term.[263] The district court upheld the termination, finding that the tenant "had no right of occupancy upon expiration of the term of the lease."[264] The district court also determined that the tenant was not entitled to procedural due process upon termination because she did not have a property right in the lease extending beyond its term.[265]

On appeal to the Fourth Circuit, the court concluded that procedural due process only applied when a party was deprived of an interest protected by the Fourteenth Amendment, and therefore it was necessary to determine whether the tenant had any such substantive right extending beyond the lease term.[266] Relying on the specific language of earlier Supreme Court decisions articulating the standards for determining whether a property right existed, the court stated that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[267]

For due process purposes, "[a] person's interest in a benefit is a 'property' interest . . . if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit."[268] To determine whether such circumstances existed in *Joy*, the court looked to the applicable statutes, governmental regulations, and the customs and understandings of public landlords in the operation of their apartments. The court determined that the legislative history of the housing subsidy program supported its finding that a property interest may extend beyond

260. 479 F.2d 1236 (4th Cir. 1973).

261. *Id.* at 1237. The tenant was a participant in the Section 221(d)(3) Program of the National Housing Act. *Id.* at 1237-38. This would be considered subsidized housing under the typology offered earlier. *See supra* notes 81-82 and accompanying text.

262. *Joy*, 479 F.2d at 1238.

263. *Id.*

264. *Id.* at 1239.

265. *See id.*

266. *Id.*

267. *Id.* (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

268. *Id.* at 1240 (quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972)).

the stated term of the lease.[269] Congress explicitly declared that " '[t]he national goal . . . [is to provide] a decent home and suitable living environment for every American family.' "[270] Moreover, Congress expressed its concern that no person be denied participation in public housing on the basis of race, color, or national origin.[271] The federal regulations also imply a right to be free from arbitrary and discriminatory action, for example, by prohibiting discrimination by a landlord against a family because of the presence of children.[272] Further, the legislative history indicates that a tenant should be allowed to continue occupying a subsidized apartment even if she becomes ineligible for a government subsidy, although she would then be required to pay the full rent.[273] According to the *Joy* court, "[t]he tenant's expectation of some degree of permanency, [was] seemingly shared by Congress, if not by the landlord, [and was] bolstered by 'custom,' " whereby eviction was the exception.[274]

The *Joy* court concluded that a tenant in a public housing project has "a property right or entitlement to continue occupancy until there exists a cause to evict other than the mere expiration of the lease."[275] Therefore, "the lease provision purporting to give the landlord power to terminate without cause at the expiration of a fixed term is invalid."[276] The court explained that the reasoning in *Caulder* dictated its holding.[277] Procedural safeguards against deprivation of a property interest would be meaningless if they could be circumvented simply by executing a lease provision allowing for eviction without cause. The court concluded that "[t]o allow a quasi public landlord to evict upon expiration of a fixed term is to enable secret and silent discrimination and would wholly emasculate . . . *Caulder*."[278]

Following the Fourth Circuit's decision in *Joy*, other courts declared

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269. *Id.*

270. *Id.* (quoting 12 U.S.C. § 1701t (1988)). Congress also intended to improve the "living environment of urban areas" when it enacted the Housing and Urban Development Act of 1965. *Id.* "This [policy] includes adequate, safe, and sanitary quarters. But it also implies an atmosphere of stability, security, neighborliness, and social justice.' " *Id.* (alteration in original) (quoting McQueen v. Druker, 317 F. Supp. 1122, 1130 (D. Mass. 1970), *aff'd in part*, 438 F.2d 781 (1st Cir. 1971)).

271. *Id.* at 1240-41 (citing 42 U.S.C. § 2000a (1988)).

272. *Id.* at 1241 (citing 24 C.F.R. § 221.536 (1971)).

273. *Id.* (citing H.R. REP. NO. 365, 89th Cong., 1st Sess. (1965)).

274. *Id.* (footnote omitted).

275. *Id.* Therefore, an eviction seeking to deprive a tenant of this expectation constitutes state action.

276. *Id.*

277. *Id.* at 1242.

278. *Id.*; *see* Glover v. Hous. Auth., 444 F.2d 158, 161-62 n.4 (5th Cir. 1971). A public housing tenancy may not be terminated in retaliation for tenant complaints to government agencies or for engaging in protected speech. *See, e.g.*, McQueen v. Druker, 317 F. Supp.

that the same expectation of permanency exists in tenancies under the Section 8 Existing Housing Program.[279] Similarly, HUD regulations now provide that a public housing tenancy may only be terminated for serious or repeated violations of the lease or other good cause.[280] According to these regulations, a public housing tenant must be afforded an opportunity to express his discontent concerning any dispute arising out of the tenancy, except where a PHA seeks termination because the tenant is engaged in criminal or drug-related criminal activity.[281]

1122, 1130-32 (D. Mass. 1970), *aff'd in part*, 438 F.2d 781 (1st Cir. 1971); Holt v. Richmond Redevelopment & Hous. Auth., 266 F. Supp. 397, 400-01 (E.D. Va. 1966).

279. Notice, some type of pretermination hearing, and good cause are required to terminate a tenancy under the Section 8 Existing Housing Programs. *See* Simmons v. Drew, 716 F.2d 1160, 1164 (7th Cir. 1983); Swann v. Gastonia Hous. Auth., 675 F.2d 1342, 1345-47 (4th Cir. 1982); Ferguson v. Metropolitan Dev. & Hous. Agency, 485 F. Supp. 517, 522-24 (M.D. Tenn. 1980). *But see* Hill v. Group Three Hous. Dev. Corp., 799 F.2d 385, 390-91 (8th Cir. 1986) (rejecting the proposition that Section 8 applicants have a property right simply because of their status as low-income families); Eidson v. Pierce, 745 F.2d 453, 460 (7th Cir. 1984) (holding that Section 8 benefits applicants have no constitutionally protected property interests). *See generally* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880 (1973) (explaining the rights afforded tenants in subsidized housing); Martin J. McMahon, Annotation, *Tenant Selection Criterion Under § 8 of Housing Act of 1937 (42 U.S.C.S. § 1437f)*, 80 A.L.R. FED. 470 (addressing the issue of tenant selection under Section 8).

These constitutional rights function only when an application for housing benefits is completed. In this highly regulated area, the application process is complicated and daunting for many. Uneducated or unsophisticated applicants may, through ignorance, fail to complete the required documents and be denied benefits. However, because the purpose of the Housing Act is to aid lower-income families in obtaining a decent place to live, substantial compliance with the application requirements may be sufficient. *See* Brezina v. Dowdall, 472 F. Supp. 82, 85 (N.D. Ill. 1979) (finding that a plaintiff who failed to complete and sign HUD's application for obtaining another certificate of participation for the Section 8 Program was nevertheless entitled to consideration and due process where she otherwise notified the PHA that she sought continuation of benefits).

Public housing tenants may also use a section 1983 civil rights action as an enforcement vehicle. *See* Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423-29 (1987) (finding that neither the Housing Act nor the Brooke Amendment precluded plaintiffs from bringing suit under section 1983). *But see* Roberts v. Cameron-Brown Co., 556 F.2d 356, 360-61 (5th Cir. 1977) (finding that a mortgagee did not have a private cause of action under the National Housing Act to enforce a contract with HUD); Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1571-73 (S.D. Fla. 1992) (finding no implied private right of action in the Housing Act or the National Housing Act to force HUD and the PHA to repair defects in the physical condition of the premises).

280. 24 C.F.R. § 966.4(*l*)(2)(i) (1993).

281. 24 C.F.R. § 966.51(a)(2)(i) (1993); *see* 24 C.F.R. § 966.50-.59 (1993) (detailing the requirements to secure a hearing when a tenancy dispute arises); Housing Auth. v. Jackson, 749 F. Supp. 622, 634 (D.N.J. 1990) (holding that due process requires that public housing tenants be provided a grievance hearing before eviction). A grievance is defined as "any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." 24 C.F.R. § 966.53(a). With the stated excep-

In 1982, the Reagan administration proposed an extensive revision of all federal regulations governing local PHA responsibilities.[282] In particular, the administration proposed to limit the availability of grievance procedures to disputes regarding rent calculation and tenant selection.[283] These revisions also sought to eliminate administrative forums provided by PHAs in which tenant complaints concerning PHA lease obligations were made.[284] In response to these proposals, Congress amended the Housing Act to require PHAs to establish and maintain administrative grievance procedures for the resolution of *all* tenant disputes concerning adverse PHA action.[285]

The establishment of proprietary rights for public housing tenants, which are now reinforced by the courts and embodied in statutes and regulations, suggest that the public housing tenancy, the tenancy in subsidized housing, and the Section 8 Existing Program tenancy are no longer mere month-to-month tenancies, despite contrary language in any lease agreement. Consequently, a tenant living in any of these types of housing has a right to remain unless she breaches reasonable rules or no longer meets the means requirements. More importantly, however, a public housing tenant's right to continued possession, to notice of a proposed eviction, and to an administrative hearing on such adverse action as outlined in *Escalera*, *Caulder*, and *Joy*, do not depend exclusively on HUD regulations. Instead, these rights are based in the Constitution.

B. Economic Security

A public housing tenant is required by law to pay no more than thirty percent of her income toward rent.[286] This ceiling was imposed by the

tions, these procedures imposed by HUD are mandatory and must be extended to all grievances arising between public housing tenants and PHAs. *Id.* § 966.51(a)(1). Generally, courts have found that administrative grievance procedures, which are calculated to improve management-tenant relationships, promote improved housing to the advantage of the public housing program. *See, e.g.*, Samuels v. District of Columbia, 770 F.2d 184, 188-89 (D.C. Cir. 1985); Brown v. Housing Auth., 471 F.2d 63, 65-67 (7th Cir. 1972); Glover v. Housing Auth., 444 F.2d 158, 161-62 (5th Cir. 1971); Sims v. Kemp, 781 F. Supp. 1264, 1267-68 (N.D. Ill. 1991).

282. 47 Fed. Reg. 55,689 (1982).

283. *Id.*

284. 47 Fed. Reg. 55,692 (1982).

285. House and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 204, 97 Stat. 1153, 1178 (codified as amended at 42 U.S.C. § 1437d(k) (1988)). However in 1990, Congress passed legislation permitting PHAs to exclude grievances based on drug-related and criminal activity. National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079, 4185.

286. Section 1437a of the Housing Act provides that a lower-income family receiving housing assistance shall pay the greater of the following amounts as rent:

(A) 30 per centum of the family's monthly adjusted income;

Brooke Amendment to the Housing Act,[287] which also committed the federal government to pay PHAs any additional operating subsidies that became necessary as a result of reduced rent collections caused by the ceiling.[288] When a tenant's rent is under the thirty percent ceiling, however, courts have held that no increase can become effective unless the tenant is given notice and an opportunity to make written presentations.[289]

(B) 10 per centum of the family's monthly income; or

(C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

42 U.S.C. § 1437a(a)(1) (1988).

287. Pub. L. No. 91-152, § 213(b), 83 Stat. 379, 389 (1969) (codified at 42 U.S.C. § 1402(1) but subsequently omitted). Originally, the ceiling was 25%, but in 1981 it was raised to 30%. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 322, 95 Stat. 357, 400 (codified as amended at 42 U.S.C. § 1437a(a)(1) (1988)). *See supra* note 286.

288. The maximum rent charged is understood to cover both shelter and a reasonable amount of utilities. Dorsey v. Housing Auth., 984 F.2d 622, 625 (4th Cir. 1993). When a tenant exceeds the utility allowance, she is surcharged for the amount in excess of the allowance. 24 C.F.R. § 965.477 (1993). The utility allowance is determined by the local PHA in accordance with HUD regulations. *Id.* §§ 965.470-.480. The regulations require the PHA to take into account relevant factors in establishing the allowances, including the equipment and function to be covered by the allowance, the energy efficiency of PHA-supplied appliances and equipment, climate, dwelling unit size, number of occupants, type of construction and project design, the physical condition of the property, and the intended temperature levels. *Id.* §§ 965.474, 965.476(a)-(d). The regulations further require the PHA to maintain an administrative record documenting the basis for the allowances. *Id.* § 965.473(b). These records must be available for tenant inspection. *Id.* A PHA must give notice to all tenants describing the basis for these determinations, including a statement of the specific equipment used to calculate the allowances. *Id.* § 965.473(c). A PHA must also afford all tenants an "opportunity to submit written comments during a period expiring not less than 30 days prior to the proposed effective date of the Allowances . . . or revisions." *Id.*

The Supreme Court held that tenants could sue to enforce these provisions. Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987). In *Wright*, the tenants alleged that the housing authority violated HUD regulations by overbilling them for utility services to which the tenants were entitled. *Id.* at 421. The tenants claimed they were charged for "excess" utility consumption that should have been included in their rent. *Id.*; *see Dorsey*, 984 F.2d at 629-30 (holding that tenants may sue based on the housing authority's method of computing allowances, which was not in accordance with HUD's regulations).

289. *Compare* Burr v. New Rochelle Mun. Hous. Auth., 479 F.2d 1165, 1169 (2d Cir. 1973) (holding that due process does not require an adversary hearing before a rent increase but it does require notice) *and* Thompson v. Washington, 497 F.2d 626, 639-41 (D.C. Cir. 1973) (holding that tenants have a right to be heard before a local housing authority increases the rent) *and* Marshall v. Lynn, 497 F.2d 643, 647 (D.C. Cir. 1973) (holding that tenants are entitled under the applicable statute and the constitution to a hearing before a rent increase becomes effective), *cert. denied*, 419 U.S. 970 (1974) *with* Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) (holding that neither the applicable

In the private sector, rent levels, like prices of other commercial goods and services, are a product of the economy.[290] Jurisdictions having rent control legislation, however, are an exception because rent levels are to some degree determined by the government.[291] Under many rent control ordinances, landlords are allowed to impose a uniform maximum periodic rent increase—a certain percentage each year as determined by a rent control board.[292] In setting the increase, the board considers the inflation rate or the cost of living index, unusual changes in property taxes, utility bills affecting the entire community, and other factors on the demand side of the market, such as the unemployment rate.[293]

Accordingly, these rent control ordinances and the Housing Act provisions regarding rent levels expand the property interest in public housing, providing the low-income family with a measure of economic security through procedural safeguards that must be met before rent levels are increased. This expanded property interest places the public housing tenant in a more favorable position than the private sector tenant in rent-controlled housing and in a far better position than the private sector law tenant who does not live in rent-controlled housing.[294]

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statute nor due process mandate that tenants be given a hearing before a proposed rent increase becomes effective).

290. Between 1970 and 1983, the median rent increased at about twice the rate of the median income. *See* Simons, *supra* note 4, at 269 n.38 (citing HOUSING TASK FORCE, *supra* note 4, at 5).

291. Rent control ordinances typically identify some "base" rent for each rental unit in the controlled area—often the rent being charged on a specific date before the ordinance is enacted. When rental units are introduced into the market after the ordinance is in effect, the base rent may be agreed to by the landlord and the first tenant. *See* N.Y. UNCONSOL. LAW § 8584(1) (McKinney 1987). The Supreme Court ruled that rent control legislation does not effect a taking of property for which compensation is required, so long as the landowner is assured a fair return on her investment. Pennell v. City of San Jose, 485 U.S. 1, 9-10 (1988). *But see* Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1062-63 (N.Y.) (holding that rent control constituted a taking because it drastically interfered with the owners' rights to possess and to exclude others from the property), *cert. denied*, 493 U.S. 976 (1989).

292. RALPH E. BOYER ET AL., THE LAW OF PROPERTY 306 (4th ed. 1991).

293. *See id.* Section 5703.28(c) of the San Jose Municipal Ordinance 19,696, provides that seven factors be considered: (1) the cost of servicing the landlord's debt (mortgage); (2) the rental history of the unit; (3) the principal condition of the unit; (4) changes in the amount of landlord-provided services; (5) any additional financial information supplied by the landlord; (6) the market value for similar units; and (7) hardship to tenants. San Jose, Cal., Ordinance 19,696 (1979), *quoted in* Pennell v. City of San Jose, 485 U.S. 1, 5 (1987).

294. In New York City, 46.7% of all rent stabilized households paid 30.3% of their income for rent; 32.3% paid more than 40%; and 24.3% paid more than 50%. Stephen Dobkin, *Confiscating Reality: The Illusion of Controls in the Big Apple*, 54 BROOK. L. REV. 1249, 1249 n.1 (1989). The author derived these statistics from the Bureau of the Census, Housing Division in 1987 and reported in the New York City Housing and Vacancy Survey 77. *Id.*

C. Security Against Involuntary Displacement

The public housing tenant is afforded security of tenure in several other ways. Under applicable regulations, if some casualty renders the original housing unit uninhabitable, the tenant is entitled to an alternative unit.[295] If the tenant is forced to relocate because her building is destroyed or demolished, she may be entitled to relocation assistance under the Relocation Assistance and Real Property Acquisition Act.[296]

A public housing tenant's security of tenure is also protected from indirect termination efforts, such as demolition of the project. A PHA must obtain HUD approval before it takes any action to demolish or dispose of a public housing project.[297] HUD may not approve a PHA application for demolition unless the application was developed in consultation with tenants in the project.[298] Demolition is then permitted only if it is determined that the project or portion of the project to be demolished is obsolete as to physical condition, location, or other factors. Thus, the project's condition must be unusable and unsalvageable for housing purposes.[299]

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295. 24 C.F.R. § 966.4(h) (1993).

296. Pub. L. No. 91-646, 84 Stat. 1894 (1971) (codified as amended at 42 U.S.C. §§ 4601-4655 (1988)). The Act provides relocation assistance to certain displaced persons. Section 4601(6)(A) provides two definitions of a "displaced person," one of which is:

> (i) any person who moves from real property, or moves his personal property from real property—
> (I) as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or part for a program or project undertaken by a Federal agency or with Federal financial assistance . . . .

42 U.S.C. § 4601(6)(A)(i)(I).

Prior to the enactment of this statute, two other legislative provisions offered relocation assistance. Amendments to the Federal Housing Act for relocation assistance, Pub. L. No. 91-609, § 212, 84 Stat. 1770, 1779 (1970) (repealed 1971), provided relocation assistance benefits to persons displaced by urban renewal projects, and the Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 117, 84 Stat. 1713, 1724 (codified as amended at 23 U.S.C. § 101 et seq.), provided assistance benefits in connection with federally aided highway construction projects.

The Supreme Court ruled, however, that these benefits are limited to persons who have been displaced " 'for a program or project undertaken by a federal agency.' " Alexander v. United States Dep't of Hous. & Urban Dev., 441 U.S. 39, 62-63 (1979) (quoting 42 U.S.C. § 4601(6)). Only those persons forced to vacate property due to its acquisition for a federal program may receive benefits. *See id.* at 62; Jones v. United States Dep't of Hous. & Urban Dev., 390 F. Supp. 579, 583 (E.D. La. 1974); *see also* Caramico v. Secretary of United States Dep't of Hous. & Urban Dev., 509 F.2d 694, 698 (2d Cir. 1974) (stating that "construction programs are the type Congress had in mind in providing displaced person assistance"). However, displaced person assistance is not available following HUD's acquisition of property when a project sponsor defaults on federally insured loans. *Alexander*, 441 U.S. at 63-67.

297. 24 C.F.R. § 970.4 (1993).

298. *Id.*

299. 42 U.S.C. § 1437p(a)(1) (1988); 24 C.F.R. § 970.6. In Cole v. Lynn, 389 F. Supp. 99

During the 1980s, some PHAs elected to demolish public housing projects rather than undertake necessary repairs.[300] Although PHAs were required to make an informed decision to demolish, it was not until 1987 that PHAs and HUD were required to adopt plans to prevent resulting tenant displacement and homelessness. In 1987, Congress passed the Anti-Demolition Act to halt the razing of public housing projects and to require construction or acquisition of replacement housing that could be expected to last at least fifteen years.[301] The Anti-Demolition Act also regulates the de facto demolition of public housing projects, which occurs when the housing becomes uninhabitable because of the failure to maintain and repair, or to restrain deterioration.[302]

(D.D.C.), *enforced sub nom.* Cole v. Hills, 396 F. Supp. 1235 (D.D.C. 1975), HUD sought to demolish a housing project as economically infeasible. *Id.* at 101. The court granted the tenants an injunction, which required HUD to discontinue demolition, restore already demolished units to minimally habitable conditions existing as of the date of HUD's decision to demolish, and permit former tenants to return on the same terms. *Id.* at 105-06. The court found that HUD failed to consider fully alternatives to demolition and to afford a hearing to tenants. *Id.* at 103; *see* Marvin Krislov, Note, *Ensuring Tenant Consultation Before Public Housing is Demolished or Sold*, 97 YALE L.J. 1745, 1763 (1988) (stating that a litigant challenging HUD decisions must prove an abuse of discretion). *But see* Resident Council v. United States Dep't of Hous. & Urb. Dev., 980 F.2d 1043, 1054 (5th Cir.) (finding no private right of action to enforce the Frost-Leland Act because the Act was merely an appropriations bill), *cert. denied*, 114 S. Ct. 75 (1993).

300. The Frost-Leland Amendment to the 1988 HUD-independent agencies appropriations bill sought to prohibit HUD "from expending any money for demolition of 2,600 public housing units" in two congressional districts. 133 CONG. REC. H7741, H7742 (daily ed. Sept. 22, 1987). The plan to demolish these projects was condemned as a

> cynical action by the Reagan administration to eliminate one-third of the public housing units in Dallas at a time when the problem of the homeless is increasing and at a time when there is an increasing number of poor people in the seventh largest city of the United States.

133 CONG. REC. H7745, H7774 (daily ed. Sept 22, 1987).

301. *See* Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121, 101 Stat. 1815, 1837-39 (codified as amended at 42 U.S.C. §§ 1437p, 1437p(b)(3)(A)(v), 1437p(b)(3)(B)); H.R. CONF. REP. No. 426, 100th Cong., 1st Sess. 172 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3458, 3469. In Project B.A.S.I.C. v. O'Rourke, 907 F.2d 1242 (1st Cir. 1990), the PHA and HUD appealed the district court's order setting a time schedule for the construction of replacement housing following demolition of a public housing facility. *Id.* at 1243. A tenant advocacy organization sought an injunction forbidding the housing authority from demolishing several high-rise towers on the ground that the proposed demolition violated the federal statute. *Id.* at 1243-44. The PHA and HUD argued that the district court misconstrued the statute in holding that the replacement housing requirement applied to a demolition already approved or in progress before the Act was amended. *Id.* at 1244. The United States Court of Appeals for the First Circuit held that the Frost-Leland Amendment requiring a replacement plan did not apply to post-amendment activities of the sort in this case. *Id.* at 1245; *see* Walker v. United States Dep't of Hous. & Urban Dev., 912 F.2d 819, 829-31 (5th Cir. 1990) (upholding Frost-Leland Amendment and Anti-Demolition Act).

302. *See, e.g.*, Gomez v. Housing Auth., 805 F. Supp. 1363, 1375 (W.D. Tex. 1992) (finding insufficient evidence of de facto demolition); Henry Horner Mothers Guild v. Chicago

D. Individual Autonomy and Control

Prior to the 1960s, a public housing tenant had little personal autonomy or control in public housing projects.[303] As the nation emerged from the Depression, administrators of public housing, the courts, and the former public housing tenant—the revived middle class—all seemed to share the same hostility against the new class of tenants, the problem poor.[304] Public housing tenants were stereotyped as people who had low moral standards. Consequently, moral codes were adopted to screen undesirables and to reclaim existing tenants. Housing authorities maintained policies against illegitimacy, thereby denying admission to or threatening eviction of a family if any member had a child out of wedlock. Similarly, housing authorities imposed durational requirements for admission eligibility.[305] These policies persisted until the late 1960s when the Supreme Court made landmark privacy decisions that declared the right of individuals to be free from governmental intrusion in fundamental, private matters.[306] The logic of this new jurisprudence displaced the aforemen-

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Hous. Auth., 780 F. Supp. 511, 515 (N.D. Ill. 1991) (holding that § 1437(p) should be broadly construed to include both actual and de facto demolition); Tinsley v. Kemp, 750 F. Supp. 1001, 1012 (W.D. Mo. 1990) (holding that plaintiffs' claims of § 1437(p) violations can be based on either actual or de facto demolition); Concerned Tenants Ass'n v. Pierce, 685 F. Supp. 316, 319-21 (D. Conn. 1988) (stating that § 1437(p) applies to either actual or de facto demolition).

303. Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 736 (1990) (arguing that "[c]ontrol is as important as food and shelter. Control is necessary to health, critical to self-esteem.").

304. *See Public Housing*, *supra* note 33 at 651-53.

305. *See* Thomas v. Housing Auth., 282 F. Supp. 575, 579 (E.D. Ark. 1967). In *Thomas*, the plaintiffs complained that they were denied admission to housing because they were mothers of illegitimate children. The court stated:

> That evils result from slum living is generally accepted; the wide range of alleged evils need not be detailed here. The theory of the low rent housing program is that if families of low income can be removed from the slums and placed in safe, sanitary and decent housing they will be motivated and enabled to lead better, healthier and more productive lives.

Id.

Although the court found the illegitimacy policy to be invalid because it was inflexible, it stated that the housing authority was not required to ignore the fact that families with illegitimate children were seeking admission to public housing. *Id.* at 581. The court suggested that the housing authority may formulate a policy that gives some consideration to the presence of illegitimate children in a family seeking public housing, particularly where there were multiple illegitimate children, where they were recently born, and where the births had followed each other in rapid succession. *Id.* For example, if a woman had three illegitimate children in three years, the court reasoned that before admitting a woman's family to tenancy in one of its facilities, a housing authority may require some assurance that the family members would be acceptable tenants, notwithstanding the "past conduct of the mother." *Id.*

306. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (addressing

tioned housing authority policies.[307] Since then, HUD adopted regulations[308] prohibiting PHAs from establishing or implementing tenant selection criteria that exclude persons from public housing because they are welfare recipients,[309] are unwed mothers,[310] have a nontraditional family composition,[311] or have not lived as a family for a particular duration.[312]

Other limitations on tenants' autonomy, however, persisted into the 1980s. For example, housing authorities adopted rules requiring public

choices in matters of family living arrangements); *see also* Roe v. Wade, 410 U.S. 113, 162-66 (1973) (ruling on the right to an abortion in the first trimester of pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (addressing the right to privacy as to matters of procreation outside of the marital relationship); Loving v. Virginia, 388 U.S. 1, 10-11 (1967) (addressing interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (addressing the right to privacy as to matters of procreation within the marital relationship).

307. *See* Lewis v. Housing Auth., 397 F.2d 178, 181 (5th Cir. 1968) (addressing an illegitimacy policy); Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 379 (Cal. Ct. App. 1976) (affirming the lower court's determination that local housing authorities may not adopt a policy that automatically "den[ied] admission or continued occupancy to a particular class, such as unmarried mothers, families having one or more children born out of wedlock, families having police records or poor rent-paying habits, etc.").

308. 24 C.F.R. § 960.204 (1993).

309. *See* Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 137 (S.D.N.Y. 1968) (finding that the housing authority violated the Equal Protection Clause of the Fourteenth Amendment by rejecting applicants from a federally funded housing project solely on the basis of their status as welfare recipients).

310. 24 C.F.R. § 960.204(c)(1).

311. *Id.*; *see* Hann v. Housing Auth., 709 F. Supp. 605, 606 (E.D. Pa. 1989). In *Hann*, the unmarried, natural parents of three children applied as a couple for Section 8 benefits, but were found to be ineligible because the housing authority did " 'not accept common-law relationships.' " *Id.* (citation omitted). The housing authority's board of commissioners determined "family" to mean " 'two or more persons who will live together in the dwelling and are related by blood, marriage or adoption.' " *Id.* (citation omitted). The housing authority stated that the primary reason for this definition was the board of commissioner's belief that cohabitation was "immoral." *Id.* The court found, however, that the housing authority did not have the statutory authority to adopt this regulatory definition. *Id.* at 608-09. The court concluded that the housing authority improperly sought to advance its personal moral code, rather than some specific statutory policy or HUD directive. *Id.* at 609-10.

Moreover, the court found that HUD had previously recognized that unmarried couples with children often create a positive family situation. The housing authority's definition of family was so restrictive that it excluded those common-law relationships recognized under state law as the equivalent of traditional marriages. *Id.* at 610. Statistics showed that more than two million couples lived together in 1986 and that cohabitation was more likely among those in the low- to lower- middle-economic classes. Allowing PHAs to exclude this group from rental assistance would be unconscionable. Consequently, the court concluded that Congress could not have intended such a result. *Id.*

312. James v. New York City Hous. Auth., 622 F. Supp. 1356, 1359-63 (S.D.N.Y. 1985) (holding that mandatory duration-of-family composition requirements violated the Housing Act since the regulations did not permit selection criteria on that ground).

housing tenants to seek management's approval of overnight guests through a registration system. Management claimed that these rules were necessary to maintain decent and affordable housing projects. In 1981, the United States Court of Appeals for the Second Circuit held that such rules were invalid because they unduly infringed upon tenants' freedom of association and intruded on their right of privacy.[313]

E. Preferences Based on Hardships

Public housing tenants are afforded a preference in obtaining public housing because they are entitled to assert personal circumstances and hardships as factors motivating the decision to create the landlord-tenant relationship. Applicants whose families have the greatest need are entitled to priority for public housing. PHAs are required to give a tenancy preference to applicants who are "involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent."[314]

Prior to 1990, however, HUD allowed PHAs and private subsidized landlords to disregard federal preferences in ten percent of their rental units, which enabled them to direct some of the housing assistance to higher-income families.[315] In 1990, Congress raised the local preference allowance to thirty percent, but provided that the allowance could be used only if PHAs and landlords followed the local preference system set by a PHA after a public hearing.[316] Again in 1992, Congress raised the number of units to be rented to local preference holders to fifty percent.[317] Private subsidized landlords, however, did not benefit from this increase.[318]

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313. McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 336 (2d Cir. 1981). In *McKenna*, the housing authority required tenants to disclose to the landlord the identities of every individual they wished to have as an overnight guest, to have those guests approved under a broad reasonableness standard, and to have the guests' identities recorded in their tenant files. *Id.* at 333-34. While the court recognized the legitimate interests of the housing authority in maintaining safe, decent housing, and in insuring that only authorized persons occupied the units, it found that these requirements were not specifically calculated to achieve those ends. *Id.* at 336.

314. 24 C.F.R. § 960.204(b)(4) (1993). These statutory preferences take priority over other general admission criteria. *See* Pruticka v. Posner, 714 F. Supp. 119, 120-21 (D.N.J. 1989) (acknowledging statutory preferences); Gomez v. Housing Auth., 805 F. Supp. 1363, 1367 (W.D. Tex. 1992) (same).

315. *See* 42 U.S.C. § 1437d(c)(4)(A) (1988) (amended 1990).

316. 42 U.S.C. § 1437d(c)(4)(A)(i) (Supp. II 1990) (amended 1992). However, HUD failed to implement regulations, which prompted Congress to pass legislation directing HUD to adopt such regulations within six months. *See* Pub. L. No. 102-550, § 104, 106 Stat. 3672, 3684 (1992).

317. 42 U.S.C. § 1437d(c)(4)(A)(i) (1988 & Supp. IV 1992).

318. *See id.*

In addition to priorities for certain preference holders, existing admission criteria require PHAs to select tenants in such a way that each project is composed of families who represent a broad range of incomes and rent-paying abilities, thus reflecting the range of incomes for lower-income families in the project area.[319] The ultimate objective of the income-mix provision is to produce housing developments that are not occupied exclusively by the very poor, but by a cross-section of lower income households, representing a variety of household types.[320] However, there was debate over the issue of the legality of an income-mix objective that passes over applicants with lower incomes in order to select higher-income applicants. Housing authorities argued that the income-mix formula created a cross-section of occupancy that was an essential ingredient in creating economically viable housing as well as a healthy social environment.[321] The United States Court of Appeals for the First Circuit attempted to resolve this controversy in *Paris v. United States Department of Housing & Urban Development*.[322] In *Paris*, the court accepted the housing authorities' arguments, holding that an income-mix policy was consistent with the policies and objectives of Housing Act.[323]

The *Paris* decision provoked substantial criticism. Congress responded with legislation prohibiting a PHA from adopting or implementing policies that passed over very low-income families in favor of higher-income families,[324] or from holding units vacant to await higher-income applicants when applicants from lower-income ranges are available.[325] Even under this legislation, however, PHAs can use their local preferences to

319. 24 C.F.R. §§ 960.204(b), 960.205(c) (1993).

320. *Id.*

321. *See* Fletcher v. Housing Auth., 525 F.2d 532, 534 (6th Cir. 1975).

322. 843 F.2d 561 (1st Cir. 1988).

323. *Id.* at 569. The court rejected the argument that a conference report disapproving of the preference for higher-income families indicated a congressional intent to repeal the income-mixing provisions. *Id.* at 568-69.

324. The Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 105, 106 Stat. 3672, 3684.

325. Congress overruled *Paris* in an amendment to the Stewart B. McKinney Homeless Assistance Act Amendments. *See* Pub. L. No. 100-628, § 1001, 102 Stat. 3263 (1988) (amending 42 U.S.C. §§ 1437d(c)(4)(A), 1437n(c) (1981), and codified at 42 U.S.C. § 1437d(c)(4)(A)(i) (Supp. II 1990)). The 1988 amendment provided that PHAs may not by-pass the waiting list for the purpose of assisting higher-income families over lower-income families. The conference report stated that these amendments were necessary in light of the *Paris* decision. H.R. CONF. REP. No. 1089, 100th Cong., 2d Sess. 91-92 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4450, 4475-76. The 1988 amendment also was consistent with earlier court decisions. *See* Gholston v. Housing Auth., 818 F.2d 776, 785-86 (11th Cir. 1987) (holding that the preference provision was not self-executing and that local authorities may grant the preference on their own initiative if it complies with the Homeless Assistance Act); Tedder v. Housing Auth., 574 F. Supp. 240, 247 (W.D. Ky. 1983) (denying a motion to dismiss a complaint containing these allegations).

select higher-income applicants before applicants on waiting lists with lower incomes.[326]

F. Control Over Governance and Condition of Premises

While many of the important public housing lease terms are determined by HUD, a public housing tenant retains some control over the existence and content of other rules and policies that affect the tenancy.[327] A PHA may not adopt rules and policies governing the tenancy unless it has first given notice of the proposed rules and allowed tenants to comment.[328] Current HUD policy encourages tenant participation in the management of the PHA through resident councils, membership on PHA governing boards, and resident management corporations.[329] Moreover, the public housing tenant, like the private sector tenant, has the right to insist on repairs and maintenance of the premises in a habitable condition.[330] While courts have declined to find an implied warranty

326. *See* 24 C.F.R. § 960.205(c)(8) (1993).

327. *See* 24 C.F.R. § 966.4 (1993) (setting forth public housing lease requirements).

328. 24 C.F.R. § 966.5 (1993).

329. *See* 24 C.F.R. §§ 964.100, 964.110, 964.120; *see, e.g.*, N.Y. PUB. HOUS. LAW § 30(5) (requiring two members of the housing authority's governing body to be tenants). *See generally* Dep't of Hous. & Urban Dev., Final Rule, 59 Fed. Reg. 43,622 (1994) (to be codified at 24 C.F.R. §§ 905, 913, 964, 990) (improving programs for tenant participation and opportunity).

330. When the issue of habitability in public housing projects was first raised, the United States Court of Appeals for the Seventh Circuit rejected the theory of an implied warranty of habitability in public housing leases. Alexander v. United States Dep't of Hous. & Urban Dev., 555 F.2d 166, 167 (7th Cir. 1977), *aff'd*, 441 U.S. 39 (1979). In *Alexander*, tenants sued HUD claiming that they were entitled to relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act because their housing project was beyond repair. *Id.* at 168. They sought to have their security deposits returned. The court rejected arguments supporting an implied warranty of habitability, reasoning that in contrast to housing projects in the private sector, construction and operation of public housing effectuates a stated national policy " 'to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income.' " *Id.* at 171 (quoting 42 U.S.C. § 1401). The court concluded that if it implied a warranty of habitability into these leases, it would be insinuating that the stated national policy objectives had and were being met. *Id.* The court believed that such a warranty was best left to the legislature. *Id.* The court further rejected arguments that the national policy imposed affirmative obligations upon HUD to maintain suitable dwellings, concluding that these words only conveyed Congress' lofty objectives. *Id.*

Thus, *Alexander* created an anomaly. While Congress aimed to provide a decent, safe living environment through the Housing Act, *see* 42 U.S.C. § 1441 (1988), under *Alexander*, Congress apparently had imposed no obligation to maintain or to ensure that the public housing was, in fact, decent or safe. Not surprisingly, few courts followed *Alexander* to the extent of relieving public housing landlords of all responsibility over the condition of the premises. Instead, courts enforced state law warranties of habitability to the extent that they were consistent with federal housing law. *See* Mann v. Pierce, 803 F.2d 1552, 1556 (11th Cir. 1986); Federal Property Management Corp. v. Harris, 603 F.2d 1226, 1229

of habitability under the Housing Act, they have adopted state law warranties as the federal rule of decision governing the condition of federally sponsored public housing.[331]

V. Privatization Means Shift from Public Housing Law to Private Lease Law

Privatization of federal housing assistance would entail a shift from in-kind housing benefits to demand-side benefits. For low-income families, privatization would also involve a shift in the legal rules governing the landlord-tenant relationship from public housing law, with its statutory, constitutional, and regulatory protections, to private lease law. The re-

(6th Cir. 1979); Techer v. Roberts-Harris, 83 F.R.D. 124, 128-29 (D. Conn. 1979); Chase v. Theodore Mayer Bros., 592 F. Supp. 90, 96 (S.D. Ohio 1983). *But see* Ramos Perez v. United States, 594 F.2d 280, 287-88 (1st Cir. 1979) (finding that HUD was under no affirmative duty to keep tenants safe). *See generally* Rachel Camber, Note, *The Incorporation of the Implied Warranty of Habitability in Public Housing Programs*, 38 WASH. U. J. URB. & CONTEMP. L. 205 (1990) (analyzing courts' incorporation of the implied warranty of habitability under state law and proposing that Congress should amend the federal housing laws to incorporate such a warranty).

331. In the most recent significant ruling on the issue, the United States Court of Appeals for the First Circuit rejected *Alexander* and adopted state law warranties as the federal rule of decision in suits seeking the enforcement of the Housing Act. Conille v. Secretary of United States Dep't of Hous. & Urban Dev., 840 F.2d 105, 108 (1st Cir. 1988). In *Conille*, the tenant alleged that HUD failed to maintain her apartment in a habitable condition and thereby breached an implied warranty of habitability and infringed on her right of quiet enjoyment. *Id.* at 108. The court stated that the general rule requires that federal law be applied to a controversy concerning the rights or obligations of the United States under a lease, which was entered into in the furtherance of the national housing programs. *Id.* at 109. If the contractual obligations of the United States are not addressed by statute, but are resolvable under state law without any conflict with federal policy, then state law is said to be " 'incorporated as the federal rule of decision.' " *Id.* at 110 (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)). The court found that nothing in the statute purported to regulate contractual relations in any way between the Secretary of HUD, as landlord, and his tenants under HUD leases. *Id.* at 111. Since Congress did not comprehensively occupy the field of landlord-tenant law, it had not preempted a judicially fashioned federal rule. *Id.* Therefore, state law, including the warranty of habitability, would be applied as the federal rule to the extent that it did not conflict with the federal statute. *Id.* at 114. *But see* Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd., 792 F. Supp. 1566, 1547 (S.D. Fla. 1992) (adopting the reasoning of *Alexander*).

While other courts have recognized a federal common law warranty of habitability, they limited the remedies available for a breach of the warranty. These remedies usually include the equitable enforcement of lease obligations to provide decent, safe, and sanitary housing, excluding monetary damages designed to address a prior breach. *See Chase*, 592 F. Supp. at 97.

Public housing tenants also sued housing authorities in actions seeking enforcement of local housing, health, and safety codes. *See generally* Otto J. Hetzel, *The Search for Effective and Cost-Efficient Housing Strategies: Enforcing Housing Condition Standards Through Code Inspections at Time of Sale or Transfer*, 36 WASH. U. J. URB. & CONTEMP. L. 25 (1989) (advocating inspections at the time of sale as a means of enforcement).

moval of the government as a party to the landlord-tenant relationship would cause this shift in governing legal rules. As a result, the rights and protections available to the low-income family would be limited to those now available under private lease law. Private lease law does not adequately address the needs of public housing tenants. It offers few solutions to their problems. Despite chronic housing shortages, private lease law provides no security of tenure, and no control over the cost of housing for tenants who do not live in rent-controlled housing. The new rights that private lease law does bestow, such as the right to insist on repairs during the lease term, may have little practical meaning to the low-income family. In other words, while private lease law gives the tenant a warranty for repairs and contract rights upon which to insist on repairs, she may have to resort to litigation in order to enforce these rights. Indeed, the tenant may have to settle for money damages or the right to quit the premises if the landlord is unwilling or unable to perform his lease obligations. While private lease law gives the tenant a remedy against invidious discrimination, she is still faced with rejection on grounds that may be arbitrary, elitist, unduly strict, or insensitive to her particular needs.

Thus, while the rules governing the landlord-tenant relationship would change doctrinally, the only practical difference would be a change in the public character of the lessor. The imperatives underlying the protections afforded by public housing law, however, would continue. On the practical level, those facets of public housing law that provide security of tenure and control exist not only because the government is involved, but because of the needs of the low-income family.[332] Under privatization, the harsh and persistent aspects of private lease law as described here could operate to exclude low-income families from safe, affordable housing. The resulting exacerbation of the housing problem should serve as a needed impetus for further reform of private lease law. Unfortunately, much of the costs of achieving such reform would fall on those tenants originally disadvantaged by the common law, but who are now aided by public housing law.

VI. Conclusion

In 1994, more than fifteen percent of the nation's population lives in poverty.[333] For most of these families and individuals, the American

332. Mathews v. Eldridge, 424 U.S. 319 (1976).

333. Robert Pear, *Poverty in U.S. Grew Faster than Population Last Year*, N.Y. Times, Oct. 5, 1993, at A20. In 1991, 14.2% of all Americans and 21.8% of all children lived below

dream of home ownership is an elusive concept, an impossible goal.[334] Unfortunately, increasing poverty has meant that millions of Americans may not even have the option of obtaining a rental unit in the private market.[335] Public housing programs have attempted to address the housing issues confronting low-income families. Through these programs, millions of families are provided a decent place to live that would otherwise be unavailable on the private rental market.

Public housing law has evolved to serve human needs, as all law should. The public housing tenancy promises security of tenure in safe, decent, and affordable housing. Moreover, it enables the individual to control some of the circumstances in his life. Public housing programs can certainly be criticized on the basis of the quality and the performance of the programs. But any failing is not simply a function of public ownership and does not justify privatization, given the attendant noneconomic

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the official poverty line. Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1362-64 (1993).

334. Most poor people rent housing, spending a larger share of their income on housing than other groups. In 1987, one report noted that 63% of poverty-level households were renters. *See* HOUSING TASK FORCE, *supra* note 4, at 5. According to 1984 census data, the median income of public housing tenants was 51% of the homeowner median, decreasing from 65% in 1970. Michael Harloe, *Private Rental Housing*, *in* HANDBOOK OF HOUSING, *supra* note 4, at 131, 134; *see* GEORGE STERNLIEB & JAMES W. HUGHES, AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 72 (1980) (reporting similar statistics from 1978 census data). In 1983, more than half of low-income renters spent more than 50% of their income on rent. *See* Simons, *supra* note 4, at 268 (citing HOUSING TASK FORCE, *supra* note 4, at 6); *see also* PRIVATIZATION COMMISSION, *supra* note 6, at 7 (reporting similar statistics).

Most of these renters find themselves trapped in the inner city. David Listoken, *A Statement of Appropriate Private and Public Responses to Urban Housing Needs*, 36 WASH. U. J. URB. & CONTEMP. LAW 63, 64 (1989). The number of poor persons living in the nation's 50 largest cities rose by 12% between 1969 and 1979. *Id.* at 67. During this same period, the population in areas where over half of the residents were poor increased by 75%. *Id.*; Harloe, *supra*, at 132-33 (providing a history of the private rental market and explaining how this market emerged as a product of capitalist urbanization).

335. According to the 1989 American Housing Survey, 4.3 million households received public housing assistance or subsidized housing from the federal, state, or local government. STATE OF HOUSING, *supra* note 4, at 16. Yet in 1991, sources reported 35.7 million people living in poverty. *See* Pear, *supra* note 333.

Other characteristics that distinguish renters from homeowners and public housing from private sector renters include gender, family composition, and race. One-third of all renter households are single-person households, compared with one-sixth of homeowner households. Harloe, *supra* note 334, at 133. While more than 70% of the homeowners were members of households consisting of married couples with or without children, only 38% of renter households were such. *Id.* at 134. Additionally, the majority of all female-headed households live in rental housing, and one-half of all black- and Hispanic-headed households rent. *Id.* (citing UNITED STATES BUREAU OF THE CENSUS 1984, Tables A-7, A-9); *see* HUGHES & STERNLIEB, *supra* note 334, at 14-16 (reporting 56.4% of all black families renting compared to 32.3% of white households based on 1976 census data).

losses. Instead, any failings are correctable by adequate operating subsidies to PHAs, additional appropriations for subsidized housing, increased tenant involvement in management, and improved design and construction quality standards. If such corrections are made, public housing programs that include in-kind benefits and provide security of tenure and control should be continued and expanded, at least until the anachronistic aspects of the common law have been corrected.