A Study of the Evolution and Potential of Landlord Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia - Part II: A Critical Examination and Proposal for Reform

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A STUDY OF THE EVOLUTION AND POTENTIAL OF LANDLORD TENANT LAW AND JUDICIAL DISPUTE SETTLEMENT MECHANISM IN THE DISTRICT OF COLUMBIA

PART II: A CRITICAL EXAMINATION AND PROPOSAL FOR REFORM

Leslie E. Gerwin*

The Supreme Court of the United States and the Courts of Appeal will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the republic will be found in the treatment of the poor and ignorant; in indifference to their misery and helplessness lies disaster.

Charles Evans Hughes1

I. INTRODUCTION: THE PURPOSES SERVED BY A JUDICIAL DISPUTE SETTLEMENT MECHANISM

Over seventy percent of the defendants involved in civil actions in the District of Columbia Superior Court have their cases assigned to the Landlord and Tenant Branch.2 Were each of these defendant-tenants to exercise his right to a “day in court,” the court would be unable to function. Ironically,
the present judicial mechanism for settling landlord-tenant disputes continues to operate only because the majority of litigants do not use its procedures beyond the initial filing stage.³

This article examines the landlord and tenant court in the District of Columbia. It is a study of the conflict that exists between substantive legal doctrines which reflect conditions of modern urban America⁴ and procedural rules designed to meet the needs of an earlier, simpler society. It also concerns the clash between the theoretical and the realistic ability of a dispute settlement mechanism to achieve just results. It is an analysis of failure—the failure of an institution to provide a forum in which disputants in the more than 100,000 cases filed each year will receive the maximum benefits of law to which they are entitled, and the failure to achieve institutional reform that would improve the ability of the mechanism to do justice in individual cases. It examines a legal process, the operation of which is made worse by the participation of lawyers. This article seeks to identify factors to be considered in developing a new judicial mechanism and creating a new procedural framework for the resolution of landlord and tenant disputes in accordance with principles of equal justice and concomitant considerations of efficiency.

To understand the challenge posed by the latter portion of this article, it is important to recognize that the procedures for dispute resolution evolved independently of the substantive legal doctrines governing the rights of disputing parties. Until recently, courts were reluctant to settle disputes between landlords and tenants over the tenant's obligation to pay rent or the landlord's entitlement to repossess the leasehold. Self-help had historically been the more popular and efficient means for the landlord to compel enforcement of payment or performance of services due him by the tenant. The common law had long sanctioned the landlord's distraint of tenant's property upon a default until the tenant performed his obligations.⁵ Simi-

³. Disposition of the overwhelming majority of cases filed each year is accomplished by entry of a judgment by default or confession, and by voluntary dismissal. See discussion pp. 657-58 infra.


⁵. The right of distress without judgment, by which the landlord retained property belonging to the tenant until the latter satisfied the landlord's claim, reportedly has existed ever since English common law took shape and was once the universal civil remedy. F. POLLOCK, THE LAND LAWS 146 (1896). Originally, the landlord would seize the tenant's cattle because the animals were the only movable property of any value. Eventually, the property owner was recognized as entitled to seize any goods which he could find as security for payment. Id. at 145.
larly, judicial proceedings were not required before the landlord could re-enter the property and terminate the lease if the tenant breached a lease covenant.\(^6\) Originally, the primary role of the court in settling landlord-tenant disputes was to provide redress for the tenant who had been wrongfully subjected to the landlord's self-help efforts.\(^7\)

Although a limited right of self-help continued to be recognized in some jurisdictions,\(^8\) changes in society and the conditions surrounding the landlord-tenant relationship made resort to the courts for dispute settlement more attractive. First, the public interest favored the creation of an alternative to the force and violence which often accompanied the landlord's re-entry onto

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6. It was common practice for a landlord to insert such provisions in the lease. The harsh effects of the forfeiture clause with respect to nonpayment of rent were eventually mitigated. The Court of Chancery and later acts of Parliament permitted the tenant to avoid eviction by paying the amount of rent in arrears and the costs associated with his default. \textit{Id.} at 149.

7. Originally, an action in ejectment was a narrow remedy designed to provide a lessee with a cause of action for wrongful eviction. The tenant evicted in breach of his agreement with the landlord could recover both compensation for being turned out and possession of the property. The availability of this remedy to tenants was one of the early common law features which characterized a tenancy for term of years as something more than a contractual obligation. \textit{Id.} at 143-44. The conceptualization of the landlord-tenant transaction as creating a property right accorded the tenant some security against arbitrarily being turned out, but the contract characterization left the lessee at the mercy of the lessor, who controlled the terms of the contract. Pollock wrote that:

In the feudal plan of society there is no place for [the tenant]; and accordingly the legal doctrine starts from the conception that the relation between the landlord and the tenant is simply a personal contract. . . . In one word, which for the lawyer includes all that has been said, a leasehold is not \textit{real} but \textit{personal} estate. From a strictly feudal point of view there is not an estate at all, only a personal claim against the freeholder to be allowed to occupy the land in accordance with agreement. \textit{Id.} This combination of contract and property principles provided the foundation for the development of landlord and tenant law, partly by judicial usage and partly by express legislation. With the increasing involvement of the courts in the settlement of disputes, legislation was directed much more toward preserving landlords' interests than toward protecting tenants' rights. \textit{Id.} at 147. See also F. MAITLAND, \textit{THE FORMS OF ACTION AT COMMON LAW} 47 (1909). For example, ejectment subsequently became the principal judicial means for a landlord to evict a tenant who remained after the termination of the lease or who breached a covenant of the lease agreement. \textit{See id.} at 57. Later, when this remedy proved too slow and cumbersome, the summary proceeding was developed to provide the landlord with relief within a relatively short time span at a reduced cost. \textit{See} Pernell v. Southall Realty Co., 416 U.S. 363, 374 (1974); Lindsey v. Normet, 405 U.S. 56, 72 (1972).

8. \textit{See, e.g.,} Snitman v. Goodman, 118 A.2d 394 (D.C. 1955). In that case, the court determined that the statutory remedies which offered landlords the opportunity to use summary proceedings did not abolish the landlords' common law right to self-help.
and detention of his property. Furthermore, the emphasis of the United States Constitution and American jurisprudence on due process of law served as an incentive to legislators to design a mechanism which would attract landlords to use it to enforce their common law rights.

From the landlord's perspective, increased restrictions on the exercise of self-help created disincentives to its continued use. Thus, the threat of criminal prosecution for forcible entry and detainer, or for forcible detention notwithstanding peaceful entry, encouraged the landlord to seek prior judicial approval. Later, with the development of the summary proceeding, came the real incentive for the landlord to resort to the judicial process. The

9. For example, the Supreme Court observed:

The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with "violence and quarrels and bloodshed." (citation omitted) An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges. Lindsey v. Normet, 405 U.S. at 71.

10. These were the so-called "Forcible Entry and Detainer Statutes," the earliest of which occurred during the reign of Henry VI. See 8 Hen. 6, c. 9 (1429). While such legislation was not specifically directed to the settlement of landlord-tenant disputes, the gravamen of the offense for which the tenant could seek redress was the landlord's use of violence. Although it provided for restitution in some cases, it was essentially a criminal statute. See Pernell v. Southall Realty Co., 416 U.S. at 376-78 & nn.23-25. In Lindsey, the Supreme Court also cited with approval the following language from an 1892 Oregon decision:

But if [the landlord] forcibly enter and expel the tenant, while he may not be liable to him in an action of tort, he is guilty of a violation of the forcible entry and detainer act, which is designed to protect the public peace; and in such case the law will award restitution to the tenant, not because it recognizes any rights in him, but for the reason that out of regard for the peace and good order of society it does not permit a person in the quiet and peaceable possession of land to be disturbed by force, even by one lawfully entitled to the possession. Smith v. Reeder, 21 Ore., at 546-547, 28 P., at 891.

405 U.S. at 72.

The first forcible entry statute in the District of Columbia was the Act of July 4, 1864, c. 243, 13 Stat. 383. It provided a remedy in three types of incidents: forcible entry, peaceful entry and unlawful holding by force, and unlawful holdover after termination. Id. at § II. In 1953, Congress amended the 1864 statute to eliminate the provisions relating to force, thus making the statute entirely civil in character. Act of June 18, 1953, c. 130, 67 Stat. 66. This legislation was the historical predecessor of the present provisions found at D.C. Code § 16-1501 et seq. (1973).

11. The summary proceeding is provided by the legislature to provide Court relief to the landlord, otherwise trapped by the "relatively slow, fairly complex and substantially expensive procedure" of the common law possessory action of ejectment; to avoid resort to self-help and force, condoned at common law as justified; and to permit an expeditious judicial determination of what remains a possessory action.
transaction costs were reduced substantially from those of the old, expensive, and cumbersome ejectment proceeding. Filing fees were low and could be recouped as part of the costs awarded to the prevailing party. The primary burden of proof rested upon the tenant who was required to show cause why the court should not award the relief requested by the landlord in his complaint. Moreover, the rules expedited each procedural phase of the case from its initial filing to its final disposition.\textsuperscript{12}

The dispute resolution proceeding in the District of Columbia is a classic model of the design and purpose of the summary action.\textsuperscript{13} By limiting the tenant's participation in the proceeding to the role of a defendant and restricting the defenses which he could raise, the mechanism became a relatively simple and efficient landlords' court.\textsuperscript{14} Theoretically, the landlord could settle

\begin{quote}
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12. For example, the language of the applicable statute in the District of Columbia is fairly standard. It states:

\begin{quote}
When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath . . . may issue a summons to the party complained of \textit{to appear and show cause why judgment should not be given against him for the restitution of possession},
\end{quote}


At the present time, the filing fee for an action pursuant to the above section brought in the landlord and tenant court is $6.00. Recovery of costs is authorized under D.C. Code § 16-1503 (1973) and D.C. Super. Ct. Rules, Landlord & Tenant Rule 15.

The legislative authorization and the landlord and tenant court rules in the District allow for trial of a case seven days after the summons is served. D.C. Code § 16-1502 (1973). If the tenant does not appear in court on the date specified on the summons, the landlord is entitled to a judgment by default. D.C. Super. Ct. Rules, Landlord & Tenant Rule 11. In addition, the landlord may seek execution of a writ of restitution upon three days' notice to the tenant. \textit{Id.} Rule 16. Theoretically, the use of procedures which may delay disposition of a case has been restricted. For example, in contested cases the court may only authorize limited discovery upon a showing of "good cause" by the party seeking to utilize such techniques in gathering evidence. \textit{Id.} Rule 10. Further, if the tenant demands a jury trial, the case is to be "certified to the Civil Assignment Office and scheduled for trial on an expedited basis." \textit{Id.} Rule 6.

13. \textit{See} notes 10 & 12 \textit{supra}.


The power of the states to restrict the nature of the issues which may be litigated in the context of a landlord-initiated proceeding for possession was upheld by the Supreme Court in Lindsey v. Normet, 405 U.S. 56 (1972). In dismissing a constitutional challenge to the section of the Oregon Forcible Entry and Wrongful Detainer Statute
the issues of possession and payment in a single action.\textsuperscript{15} If he were awarded possession, the tenant could pay the outstanding rent and avoid eviction.\textsuperscript{16} If the tenant were evicted, the judgment in the possessory action could have a \textit{res judicata} effect in a subsequent action by the landlord to recover the rent unpaid at the time of the eviction.\textsuperscript{17} Realistically, however, with the shift in the community setting from rural to urban, and the shift in living patterns from individual parcels of property to multi-unit apartment dwellings, the court became an effective mechanism for the collection of overdue rents.\textsuperscript{18} which barred the tenant from raising a defense to nonpayment of rent based upon the landlord's failure to maintain the premises in habitable condition, the Court stated:

There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes.

405 U.S. at 72-73.

15. The landlord is permitted to join his action for possession with a claim for rent in arrears. Service Parking Corp. v. Trans-Lux Radio City Corp., 47 A.2d 400 (D.C. 1946). To recover a money judgment, however, the landlord must effect personal service upon the tenant. D.C. SUPER. CT. RULES, LANDLORD \& TENANT RULE 3.


17. See Bess v. David, 140 A.2d 316 (D.C. 1958). But see Tutt v. Doby, 459 F.2d 1195 (D.C. Cir. 1972), in which the court reversed a summary judgment in favor of a landlord seeking to collect back rent from a former tenant. The court defined the issue to be whether a tenant, against whom a default judgment had been entered in an earlier possessory action in which the summons had been served by posting, was collaterally estopped from raising a defense to the landlord's subsequent action for the amount of rent remaining unpaid at the time of the tenant's departure from the premises. In answering this question in the negative, the court determined that the lower court had erred in applying principles of \textit{res judicata} to the case. The D.C. Court of Appeals, however, has specifically refused to concur in this holding of the circuit court which was handed down after the effective date of Court Reorganization. Pernell v. Southall Realty, 294 A.2d 490, 497 n.22 (D.C. 1972). For an explanation of the changes in the appellate procedures effected by Court Reorganization, see Gerwin, \textit{supra} note 4, at 462 n.18.

18. See discussion of the present system pp. 653-60 infra.
Even for the tenant, the status of a defendant in a judicial forum was preferable to falling victim to a landlord's self-help efforts. Besides the obvious protections which the court afforded individual tenants, the landlord's willingness to seek judicial approval prior to eviction held benefits for those tenants who might challenge the landlord's claim, but who would not have sought redress for a wrongful exercise of self-help if required to bring their own independent action. In addition, notwithstanding the tenant's less-than-equal litigation posture, there was always the possibility that he might successfully defend against a landlord's action, and perhaps even be afforded a measure of affirmative relief. Thus, the courts of chancery occasionally mitigated the harsh effects of the forfeiture clause in the lease agreement which had automatically terminated the tenancy if the tenant failed to meet a single rent payment. Such courts instead allowed the tenant to avoid eviction by paying the arrearage, together with the costs incurred by the landlord due to the default.\(^\text{19}\)

In addition, as lawsuits became the more frequent means of resolving landlord-tenant disputes, it was not unreasonable for the tenant to look to the court's potential for changing the law. Since the common law had been shaped originally by judicial decisions, judges sitting in landlord and tenant courts and on the courts of appeals could modify some of the more oppressive judicial doctrines when challenged to do so in the context of a particular dispute. Furthermore, since the settlement mechanism was a legal forum, it soon became apparent that the tenant's cause would be substantially enhanced if it could be advocated by one whose training prepared him to use the process as an instrument of change. Thus a tenant, provided with an opportunity for a hearing, represented by a lawyer, and determined to appeal a case which he might lose in the court below, could possibly convince a court to modernize the law to reflect the changed conditions in society.

It was in this spirit that the appellate courts began to substitute principles of law more appropriate to a transaction in an urban environment for those real property concepts developed for an agrarian economy. The United States Court of Appeals for the District of Columbia Circuit, in taking the relatively unprecedented step of recognizing that a warranty of habitability was implied in the lease of every urban dwelling, stated that, "[c]ourts have a duty to reappraise old doctrines in light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed."\(^\text{20}\)

19. F. Pollock, supra note 5, at 149.
Similarly, when confronted by the possibility that a tenant who sought to enforce the warranty of habitability could be evicted in retaliation for such activity, that court restricted the right of "selfishly motivated" landlords to enjoy the benefits of the absolute freedom to contract. The court explained that "[t]his result is required by the clear wording of the applicable statute, by the dictates of legislatively declared social policy, and, in the final analysis, by respect for the separation of powers and the rule of law."21 While these decisions signaled a beginning in the trend towards modernization of the rules governing the landlord-tenant relationship, in order to penetrate beyond the context of the isolated dispute, they would have to be acknowledged and enforced by the decisionmakers in the trial court.

It is at the trial level, however, that tenants have encountered the most resistance to judicial application of the new legal doctrines. They have found the judicial mechanism which had been designed for mass handling of cases inadequate to accommodate the new substantive rules which required customization of the dispute settlement process to the particular facts of each controversy. Even sympathetic decisionmakers were often powerless to implement the law at its present stage of evolutionary development because they lacked both the human and financial resources which would allow them to consider the merits of each case on the daily courtroom calendar.

Nearly half a century ago, Karl Llewellyn touched off a storm of criticism when he pointed out that disputes call for officials to act, but that rules of law only take on meaning in the context of their predictive or compelling force for judicial behavior. He wrote: "What these officials do about disputes is, to my mind, the law itself."22 Twenty years later, in response to the controversy these words had aroused, he explained:

These words express a deep and often sad truth for any counsellor: he can get for his client what he can actually get, and no more. They express a deeper and often even sadder truth for any litigant: "rights" which cannot be realized are worse than useless; they are traps of delay, expense and heartache. The words pose the problem of reform of institutions and press upon us the eternal problem of the need for personnel careful, upright, wise. They signal the possibility of differential favoritism and prejudice on the one hand; the possibility, on the other, of much good being brought out of an ill-designed and limping machinery of measures. In so far the words are useful words, and true ones . . . , and I have let them stand.23

23. Id. at 9.
Society does not easily accept change. Institutional change which requires affirmative action to effectuate is likely to be vigorously resisted by those who have a vested interest in the status quo. Regrettably, the residents and legislators in the District of Columbia have thus far tolerated injustice by its landlord and tenant court. The judicial mechanism for settling landlord-tenant disputes is becoming intolerable for all who are affected by its operation. The reasons for and the nature of the change needed is the focus of the discussion which follows.

A. The Mechanism Employed

1. Bringing an Action in Landlord and Tenant Court

The Landlord and Tenant Branch only has jurisdiction over actions initiated by landlords. In commencing a suit to recover possession of real property, a landlord must file a verified complaint, pay a nominal filing fee, and arrange for service of process. Most of the complaints filed in this court are based upon either the tenant’s failure to pay rent which has become due or the tenant’s refusal to vacate the premises upon expiration of a written lease or notice to quit. Before filing, a landlord must serve upon a tenant a thirty day notice to quit, unless this requirement is specifically waived in writing. Such a waiver provision is included in the overwhelming majority of written leases in the District of Columbia.

For the landlord’s convenience, the court makes available a printed form which serves as a combination complaint and summons. This form permits the plaintiff merely to check the box next to the reason which is the most appropriate explanation for initiating the action. The landlord may combine a suit for possession based upon nonpayment of rent with a request for a money judgment equal to the amount of rent in arrears by completing an additional blank on the complaint form. The summons directing the

25. D.C. Code §§ 45-902-04 (1973). A notice to quit is not required when a landlord seeks possession upon the expiration of a tenancy for a fixed term. Id. § 45-901.
26. Landlord-Tenant Form 1 (Complaint for Possession of Real Estate). These forms are available in the clerk’s office, Landlord and Tenant Branch, District of Columbia Superior Court.
27. The form allows the landlord to check a box next to a statement that the defendant has defaulted in the payment of rent and to fill in the amount and the period of time over which that amount allegedly accrued. Another box is provided next to a space for the landlord to explain an alternative or additional reason for seeking possession. The landlord is also required to check whether notice to quit has been served or specifically waived in writing. Landlord-Tenant Form 1.
28. A landlord is permitted to combine these actions; however, he need not do so.
defendant-tenant to appear in court is printed on the bottom of the form. It is "issued" when the clerk stamps in the appropriate space the date on which the tenant is required to appear in court to answer the complaint.\footnote{29}

Service of process may be effected either by a United States marshal or a special process server.\footnote{30} Although the law specifies a defendant is to be served personally, there are exceptions authorizing substitute service on someone over sixteen years of age who is present on the premises sought to be recovered and permitting service by posting as a last resort.\footnote{31} The court rules require that a tenant who is sued both for possession and for back rent must be served personally.\footnote{32} Failure to effect personal service cannot be challenged, however, if the tenant asserts a counterclaim, recoupment, or set-off in his answer.\footnote{33}

When service is accomplished by a special process server, the latter is required to file a return of service verified under oath.\footnote{34} The court also

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29. The date on which the tenant is required to appear in court may not be set earlier than seven days after the complaint is served. D.C. Code § 16-1502 (1973). In practice, such dates are set with reference to the court's calendar and average more than the minimum seven-day interval.
30. D.C. Super. Ct. Rules, Landlord & Tenant Rule 4 allows for service by other than a marshal to be by "any competent person over the age of eighteen years who is neither a party to the action, nor otherwise interested in the suit." The rules also permit the landlord to recover the cost of such service if he obtains judgment. Id. Rule 15. One prominent landlord attorney employed his brother-in-law as process server for his clients' actions. Presumably, this was a full-time job until it was discovered that, according to the returns of service, the process server had been in at least two places on opposite sides of town at the same time.
31. If the defendant has left the District of Columbia, or cannot be found, the summons may be served by delivering a copy thereof to the tenant, or by leaving a copy with some person above the age of sixteen years residing on or in possession of the premises sought to be recovered, and if no one is in actual possession of the premises, or residing thereon, by posting a copy of the summons on the premises where it may be conveniently read.
D.C. Code § 16-1502 (1973). Courts have interpreted this law to permit service by posting only "as a last resort." Bell v. Tsintolas Realty Co., 430 F.2d 474, 477 (D.C. Cir. 1970). The compliance with this interpretation, however, is questionable. In a note to the Bell case, the court reported that "the overwhelming majority of summonses are served by posting." Included were the results of a Neighborhood Legal Services Program survey which showed that of the 6,340 summonses served by the U.S. Marshal's Office in 1969, all but 14 were served by posting. Id. at 477 n.7.
33. Id.
34. Id. Rule 4.
\end{verbatim}
makes available a printed form for this purpose. It requires the server to set forth "specific facts from which the court can determine that process was served . . . in compliance with D.C. Code Section 16-1502 . . . and SCR L & T [Rule] 4." Although both the language of the law enacted by Congress and its interpretation by the courts restrict the use of service by posting, the overwhelming majority of summons are served in this manner. In addition, a check of the returns of service filed by special process servers shows that the majority of them provide no information from which the court can determine where and how attempts were made to effect personal service prior to posting. Notwithstanding the dearth of information provided, under the present system these "compliance" efforts have been sufficient for the landlord to take a default judgment if the tenant does not appear on the return date.

The rules do specify that a default judgment may not be entered by the clerk when there is a question as to the validity of service upon the defendant. This provision is of little consequence in most cases, however, since a tenant who has not been notified of the action against him most likely will not appear in court to raise an appropriate challenge. Thus, notwithstanding the apparent failure of process servers to comply with the court rules, the number of challenges to the service of process or return of service is quite small. On the other hand, the most frequent manner of disposition of cases filed in the Landlord and Tenant Branch is by entry of a default judgment.

In contrast to the default rate, less than one percent of the cases filed during each of the past five years have gone to trial. In cases which do go to trial, the landlord's prima facie case is easily established. If the action is based upon expiration of a notice to quit, a copy of that notice and proof of its service are required. The latter can be established by testimony of

35. Landlord-Tenant Form 3 (Affidavit of Service by Special Process Server).
36. Most of the forms filed contain only the date, time, and place of posting.
38. Id. Rule 11.
39. The clerk's office does not differentiate in its records between the types of motions filed. In each of the five past years, however, the number of all motions filed has not exceeded three percent of the total number of cases initiated. Motions to dismiss based on a defective service of process or a challenge to some other aspect of the service would amount only to a small percentage of this three percent figure. (Statistics provided by the clerk's office). In cases in which the tenant or his lawyer is aware of a defect in service, however, the threat of dismissal can be used as leverage in formulating an acceptable settlement, thus eliminating the need to file a formal motion.
40. See Appendix, Table 1. All Tables are in the Appendix following this article.
41. This figure includes both bench and jury trials. See Table 7.
42. The statutory provision governing service of notice to quit is similar to that of service of process, although the latter is more stringent as to when substitute service and
either the person who served the notice or the tenant who received it. In all cases, introduction of the lease will evidence the terms of the tenancy and allow the court to verify the basis of the landlord's complaint for possession, such as whether the tenant has held over after expiration of the tenancy, failed to pay rent, or breached some other covenant of the lease agreement. If the action is based on nonpayment of rent, there must be evidence of the amount owed.

The tenant is not required to file a written answer unless he makes a jury demand or interposes a plea of title.\(^4\) If a trial by jury is desired, the tenant must file a verified written answer, setting out the facts upon which the defense is based, and pay a fee. Payment of this fee, which is greater than the landlord's filing fee, is waived if the court grants the tenant permission to proceed in forma pauperis.\(^4\) The tenant may also choose to file a written answer when he wishes to raise procedural or substantive defenses,\(^4\) or to assert a recoupment, set-off or counterclaim to the landlord's claim for back rent.\(^4\) The clerk's office, however, does not make any forms available to tenants for accomplishing the foregoing tasks. Thus, without legal assistance, many tenants are uninformed about potential defenses and remedies or are unable to prepare the necessary papers.

In addition, the defenses and counterclaims which may be asserted in response to a landlord's action are limited. When the suit for possession is not based upon nonpayment of rent or does not include a claim for rent in arrears, the tenant is not permitted to counterclaim for a money judgment.\(^4\)
Furthermore, a non-rent-related counterclaim, such as for damages based upon personal injuries sustained due to landlord's negligence or for breach of contract, is not cognizable in the Landlord and Tenant Branch.\footnote{Id. See Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976).}

Rules such as those described above evidence the fact that the mechanism appears to have been designed primarily to serve the landlord's legal and economic interests. For the most part, they provide little opportunity for the tenant to pursue his legal claims growing out of the landlord-tenant relationship. Thus, he is left to seek relief in other forums. Examination of the landlord and tenant court in operation confirms these observations.

2. The "Routine" in Landlord and Tenant Court

The trial court which must apply the appellate courts' decisions to the more than 100,000 cases filed each year in the Landlord and Tenant Branch is located in a "makeshift" courtroom on the third floor of an office building leased by the District government. This building is at least two blocks from any other courtroom (other than the Small Claims Court), the judges' chambers, or any other court administrative offices.

On any weekday between 9:00 and 10:00 a.m., a visitor to the courtroom or its corridors can discover why, notwithstanding the trend of the law towards balancing the needs and interests of the parties, this forum has not overcome its reputation as a collection agency. The majority of the cases on the day's calendar are disposed of during the chaos of this hour or so. Preliminary extrajudicial activities are such an integral part of the procedures of the present dispute settlement mechanism that they are themselves a target of reform efforts, and must, therefore, be included in any description of the present system.

The "first call" of cases set for the day is conducted by the courtroom clerk beginning at 9:00 a.m.\footnote{The court rule concerning the preliminary proceedings by the clerk prior to the time that the judge takes the bench specifies: At the beginning of each session of the court, the clerk shall advise all persons present that, except for corporations, no party is required to have an attorney represent him, but that any party is entitled to appear through counsel of his choice or may, if he qualifies for such an appointment, request the judge to appoint an attorney or third year law student to represent him. The clerk shall then make any other announcements ordered by the Board of Judges and shall call the cases assigned for that day in order to determine which, if any, parties are absent. If the plaintiff is present and (1) neither the defendant nor anyone purporting to represent him is present, (2) there is no question as to the validity of service upon the defendant, and (3) the plaintiff does not seek a money judgment or attorney's fees, the clerk shall enter judgment for the plaintiff as demanded in the complaint except that, upon request of the} If the defendant is present, he must answer, "here";

\[\text{\footnotesize 1977\} Landlord-Tenant Law 653}\]
if there is no immediate response, the landlord's attorney usually answers, "judgment." The latter statement, which is the most often heard response, indicates that without further action by either party, a default judgment against the tenant is entered. This judgment entitles the landlord to seek a writ of eviction any time within ninety days after entry of judgment. It has been reported that landlords' attorneys have taken default judgments in cases in which the tenant, having paid prior to the court return date, was told by the landlord that he need not appear. The advantage to the landlord of securing a judgment even though payment has been received is that if the tenant again defaults in paying rent within the next ninety days, the landlord may use the outstanding judgment to seek a writ of eviction and thus avoid filing another action. If neither party responds when the case is called, the clerk is supposed to dismiss the case without prejudice. The rules require that such cases, together with all cases remaining on the calendar after the first call (except continuances by consent of both parties), be presented to the judge for disposition.

After the first call, landlords' attorneys "stake out" areas of the courtroom or its corridors, where they hold conferences with those tenants who received summonses for nonpayment of rent. Those tenants who answered the call, or who arrived late and retrieved their court jacket from the clerk's office where a default judgment has been entered, line up to sign praecipes in which they confess judgment and agree to a payment schedule of monies owed. In

plaintiff, the clerk shall reduce the amount of rent claimed to be owing. If both parties fail to appear, the clerk shall dismiss the case without prejudice. The clerk shall present all other cases to the court for disposition except that the clerk may continue a case to a later date upon agreement of the parties.

D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 11.

50. Id. Rule 16(c). A writ may be executed three days after its issuance. The tenant is to be notified by mail prior to its execution. Id. Rule 16(a). The court rules do not provide for notifying a tenant of the entry of a default judgment.

51. Neighborhood Legal Services Program's Report and Recommendations to Chief Judge Greene Concerning Reform of Landlord-Tenant Court 5 (July 28, 1972) [hereinafter cited as NLSP Report]. This writer is aware of several requests for assistance received by the Urban Law Institute from tenant-defendants in this predicament.

52. This practice is of questionable legality, since the complaint upon which the judgment was based specified the period of nonpayment. Nevertheless, the threat of this ability to seek an immediate writ may coerce a tenant to pay rent which he might otherwise withhold in an effort to force the landlord to make repairs on the premises.


54. Id. If the plaintiff has not appeared by the time the judge takes the bench, the judge has the options of dismissing the case for want of prosecution, ordering a nonsuit, continuing the case, or returning it to the files for further proceedings on a later date. Id. RULE 12.
return, the landlord agrees to stay execution of judgment to allow the tenant to comply with the terms of the agreement.\textsuperscript{55} Court fees, late charges, and rent accrued subsequent to filing the complaint are often added to the sum.\textsuperscript{56}

Most landlord attorneys have preprinted form \textit{praecipes} which permit them to fill in the tenant's name and the dates on which the tenant agrees to pay the amounts owing. Such forms leave little space, if any, for the attorney to include language conditioning the tenant's payment upon the landlord's correcting specified deficiencies in the defendant's apartment. Even if a tenant claims to have made payment, the attorney often may request the tenant to consent to a judgment with a stay of execution to allow him to verify the fact of payment. As an inducement to agree, the tenant is told that he is free to leave after signing and thus need not spend any additional time in court. Although a confession of judgment requires judicial approval, the attorney "volunteers" to perform this task.

The crux of the exchange between a landlord's attorney and a tenant usually concerns the issue of when the defendant can pay, rather than why he has not done so. If the tenant resists payment of the full amount, he is told to wait and tell it to the judge. The spectre of further delay and subsequent court appearances, as well as having to speak to the judge in open court, are deterrents to the refusal to confess judgment with its assurance of a stay of execution. Landlords' attorneys generally do not explain, and most tenants are not otherwise aware, that even if they challenge the landlord's right to the rent sought and judgment is entered against them, they may avoid eviction by paying the amount of the judgment prior to issuance of the writ of restitution.\textsuperscript{57}

The case takes on a different dimension if the tenant informs the landlord's attorney that he does not have enough money to agree to a payment schedule of the rent in arrears. In this event, the landlord's attorney may refer the tenant to the Landlord-Tenant Consultant Service (LTCS), an administrative

\textsuperscript{55} In most cases the confession by the tenant includes a stay of execution, as shown by the following figures (data supplied by clerk's office, see note 64 infra):

<table>
<thead>
<tr>
<th>Year</th>
<th>Confessions</th>
<th>Stays</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>5,140</td>
<td>5,140</td>
</tr>
<tr>
<td>1973</td>
<td>5,223</td>
<td>5,158</td>
</tr>
<tr>
<td>1974</td>
<td>6,052</td>
<td>5,837</td>
</tr>
<tr>
<td>1975</td>
<td>7,425</td>
<td>7,342</td>
</tr>
<tr>
<td>1976</td>
<td>9,508</td>
<td>9,478</td>
</tr>
</tbody>
</table>

\textsuperscript{56} Technically, if the landlord wants to recover more than the amount stated in the complaint, because additional rent has accrued during pendency of the suit, he is supposed to seek an amendment of the complaint. Frequently this is not done unless the presiding judge, when approving the \textit{praecipe}, questions the discrepancy between the amount demanded in the complaint and the sum which the defendant has "agreed" to pay.

\textsuperscript{57} The basis for this practice is found in Trans-Lux Radio City Corp. v. Service Parking Corp., 54 A.2d 144 (D.C. 1947).
agency which provides emergency financial aid to qualified tenants and counsels them as to other sources of available assistance. In such cases the landlord's attorney will frequently still request that the tenant agree to a confession of judgment in exchange for a stay of execution to permit the tenant to seek assistance.

The lengthy waiting period between the first call by the clerk and the second call when the judge takes the bench, when combined with the settlement and collection activities conducted during the interim, create an atmosphere of confusion and anxiety for the tenant. Even to the casual observer it is evident that many defendants do not understand that they are entitled to the assistance of counsel and ultimately to a trial if they so request. In a study of the landlord and tenant court prepared for the Washington Planning and Housing Association and Yale Law School, it was reported that "[t]he initial encounter with this process is distressing, if not shocking. The small part played by the tenant in this automatic processing suggests that the tenant is being treated without elemental fairness, while the small part played by the judge suggests that the judicial system is completely irrelevant."

Although this study is almost ten years old, the majority of tenants who come to court each day still experience only the extrajudicial activities described above, few of which have changed since that report was written. Even after the appellate courts rendered decisions making major revisions in the substantive law governing the landlord-tenant relationship and Congress approved the proposed reorganization of the District of Columbia court system, the Washington Post reported that "[a]lthough it was established for

59. If the tenant in this situation does not agree to a confessed judgment and instead waits until the judge takes the bench, the judge will normally continue the case to allow LTCS time to investigate the tenant's situation and the landlord's claim.
62. The District of Columbia Court Reform and Criminal Procedure Act of 1970,
the swift legal settlement of disputes between rental housing owners and their tenants, D.C. Superior Court's Landlord and Tenant Branch has over the years become an inefficient, overloaded, slowmoving collection agency for landlords." Five years later, statistical data summarizing the disposition of cases filed in the landlord and tenant court indicate that it is still little more than a collection agency, and that although its daily operation has changed little over the years, it has become even less efficient.

Among the most revealing statistics bearing on the court's operation is that the majority of cases filed each year never go beyond the first call by the clerk of the cases set for the day's calendar. What is evident to the casual observer who sits through the first call is verified by the statistics; entry of default judgments has been and continues to be the most frequent manner of disposing of a case. Until very recently, the number of default judgments entered each year exceeded all other manners of disposition combined.

Despite the decline in the default rate, the majority of cases still end with the entry of judgment in favor of the landlord. In fact, the data shows that in recent years the increase in the number and incidence of confessed judgments has paralleled the decline in the default rate. Thus, although more tenants are appearing in court, the disposition of such a case has essentially

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64. Unless otherwise indicated, all statistical data presented in the body of this article and the tables were derived from the yearly "Landlord and Tenant Statistics" made available by the Landlord and Tenant Branch clerk's office.

65. See Tables 1 & 2.

66. See id.

67. As shown by Table 3, well over 90% of the cases filed each year end in default, confession, or dismissal. While it cannot be assumed that the landlord concurred with every dismissal, when the number of dismissals, Table 2, is compared with the number of cases which actually come before the judge, Table 4, it can be deduced that in only a very small fraction of the cases ending in dismissal could the presiding judge have entered such an order over the objection of the landlord. This conclusion is further supported by the fact that the total number of motions, including tenant motions to dismiss, did not amount to more than three percent of the total cases initiated in any given year, Table 4, while approximately 40% of the cases ended in dismissal with prejudice, Table 2. In addition, given the small percentage of tenants represented by counsel, it is unlikely that a landlord would be forced to accept a settlement which required him to dismiss the action.

68. See Tables 1 & 2. Although the entry of a confessed judgment requires the approval of the judge, the praecipe evidencing the agreement is usually summarily approved as the first order of business after the judge takes the bench. See pp. 659-60 infra.
the same effect as a default—the landlord secures a court order permitting him to seek an immediate writ of restitution unless the tenant pays the rent arrearage.  

The data also confirms the observation that while few of the hundreds of cases on the court's calendar on any given day remain on the calendar following the first call, even fewer actually receive the attention of the presiding judge. In fact, less than twenty percent of all cases filed each year come before the judge, and although this number has doubled in the last five years, a single judge still presides over the court session. The primary effect of this increase in the caseload of the individual decisionmaker has been to decrease efficiency without correspondingly improving the potential for achieving justice in individual cases.

Statistics indicate that if the majority of cases coming before the judge involved more than routine matters, the court would be incapable of func-

69. A confessed judgment with a payment schedule should have two advantages over a default. In reality, however, these advantages are speculative. First, the tenant receives assurance that he will not be evicted so long as he makes the required payments. Although a default judgment carries no such protection, indications are that in the majority of such cases the landlord would rather arrange to receive payment than to evict the tenant. This is evidenced by the low rate of writs of restitution sought in cases in which judgment has been entered, and the even smaller fraction of writs executed. This latter figure has been less than four percent annually over the past five years. Table 5. The second alleged advantage of the confessed judgment lies in the possibility that a tenant may be able to negotiate an agreement which would enable him to pay an amount which is less than the total dollar figure sought by the landlord. In the majority of cases this advantage is meaningless since most tenants are uninformed and incapable of negotiating such a compromise. Furthermore, in a case in which the landlord would rather have some of the rent from an indigent tenant rather than evict him and recover nothing, such an arrangement can be worked out privately between the two parties even after a default has been entered.

When a tenant is represented by an attorney, the chances are much higher that an abatement in the total amount of rent owed can be negotiated. This is particularly true in cases in which the tenant has withheld rent because of the landlord's failure to correct substandard conditions on the premises. This type of agreement, however, quite often will not take the form of a confessed judgment. Instead, the landlord is given the right to seek an immediate judgment enabling him to secure a writ of restitution in the event that the tenant fails to meet the schedule set forth in the agreement. On the other hand, when the tenant complies fully with the terms of the agreement, the case is then dismissed.

70. Table 1. Judges are assigned on a rotating basis to preside in the Landlord and Tenant Branch for no longer than a month at a time. Generally, they do not carry with them when they finish their tour of duty those cases which arose during their service on the bench.

71. The category of routine matters normally includes approving confessed judgments, certifying cases to the jury calendar, granting continuances, and ordering cases
tioning. For example, in 1976, the judge sitting in the Landlord and Tenant Branch presided over an average of seventy-seven cases daily.\textsuperscript{72} If each case required his individual attention and consideration, it would mean that a judge who sat from 10:00 a.m. to 4:00 p.m. with an hour's break for lunch would have had to hear 15.4 cases per hour, or one case approximately every four minutes.

As the system presently operates, however, only motions and bench trials actually require judicial expertise. Over the past five years these two activities accounted for less than twenty percent of the matters occupying the judge's attention.\textsuperscript{73} On the other hand, nearly fifty percent of the cases coming before the judge sought approval for the entry of a confessed judgment. When the courtroom clerk has been informed that the parties have reached an agreement requiring judicial approval, such cases will be placed at the beginning of the second call, which commences when the judge takes the bench.

Approving a \textit{praecipe} containing a confession of judgment is usually not a time-consuming process.\textsuperscript{74} The landlord and tenant rules impose no specific supervisory responsibilities upon a judge regarding approval of confessions of judgment.\textsuperscript{75} Thus, some judges will simply sign the stack of \textit{praecipices} handed them with but a cursory reading and will not require that the parties of each individual case be summoned before the bench, while others will require that each case be called separately and will read aloud the text of each agreement, inquiring whether the defendant understands its terms. Sometimes the judge will check to see that what the tenant has agreed to pay conforms to the sum demanded in the complaint and does not contain exorbitant court costs or attorney fees. An additional minute or two is required for a case in which the tenant arrived in court after the first call of the day's calendar. In such cases, the judge must first vacate the default...
judgment entered earlier by the clerk before approving the alternative form of judgment. In any event, approval of the confession of judgment usually ends up being a perfunctory affair.

The remainder of the morning session is occupied primarily with matters relating to cases which were not settled during the interim between the first call and the judge's entry into the courtroom. In the contested cases, the judge will make inquiries of the parties designed to elicit information concerning the nature of the dispute. Based upon the responses, he may choose to take one of four general actions:

(1) If the tenant indicates that he simply cannot afford to pay the rent owed, the judge may refer him to the Landlord-Tenant Consultant Service. The case is then continued to allow this social service agency to ex-

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76. Cases which have been continued from an earlier return date for purposes other than trial, such as to permit the filing of an answer, will generally also be called during the second call in the morning session. They are not a part, however, of the earlier call of the calendar by the clerk. Cases which have been set for bench trial during a previous court appearance will generally be assigned an afternoon time. This practice is contrary to the language of the summons and the court rule, both of which indicate that trial is set for 9:00 a.m. on the date specified on the summons. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 7(c); Landlord-Tenant Form 1.

77. The court rule governing these pre-trial proceedings reads as follows:

PROCEEDINGS BY THE COURT

(a) CALLING THE CALENDAR. After the judge takes the bench, the clerk will call the cases assigned to the court for disposition and the court will inquire in each instance as to the nature of the claims, the defenses, and any other matters which will serve the ends of justice. In the course of these inquiries the court shall make an earnest effort to help the parties settle their differences by conciliation. In cases involving unrepresented defendants alleged to be in arrears in the payment of rent, the court shall specifically ask the defendant (1) whether he has not in fact paid the rental amount alleged by the plaintiff to be due and (2) if he has not paid the rent, his reasons for not so paying. If in any case the plaintiff shall fail to appear without prior notice, the action may be dismissed for want of prosecution, or a nonsuit may be ordered, or the case may be continued or returned to the files for further proceedings on a later date, as the court may direct.

D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 12.

78. That the court does not anticipate many of these matters which come before the judge will require much time, is evidenced by the fact that contested motions are often set to be heard during the morning session after the second call is completed.

79. This option is not available, however, where the LTCS representative in attendance at the court session indicates the tenant would not qualify for assistance. Such a conclusion could be based either upon a previous encounter between the tenant and LTCS or on information provided in the tenant's responses to the judge's questions. For example, if the tenant is unemployed with no immediate job prospects or indicates the presence of housing code violations on his premises, the LTCS is not permitted to provide the tenant with money to meet his rent payments. Thus, some of those tenants most in need of monetary assistance may not qualify for LTCS assistance. See pp. 686-
plore the possibility of assisting the tenant. The judge will set a date on
which a representative of the LTCS must report back to the court.89

(2) If the tenant’s responses indicate that he has potentially meritorious
defenses to the landlord’s claim, or if the tenant requests legal assistance, the
judge may appoint an attorney to represent him.81 The case will then be
passed temporarily to allow the attorney to confer with the prospective client.
If the tenant appears to have a defense and qualifies under the income guide-
lines, the attorney will inform the court that he is accepting the case. He
will then usually be given additional time for preparation.82

(3) If the judge believes there is a potential for settling the parties’ dis-
pute, he may appoint an attorney to conciliate the case. The case will then
be passed to allow time for the mediator to confer with the disputing parties.
The attorney will report the results of his efforts to the court. If unsuccessful,
and the mediator recommends or a party so requests, the judge may then
appoint counsel for an unrepresented party who qualifies for free legal assis-
tance. In lieu of appointment, the judge may decide to set a date for trial
and recommend that the parties secure legal assistance.83

(4) If the judge chooses, he can either proceed with the trial immediately
or order the parties to return for trial during the afternoon session.84 In the

89 infra on the operation of LTCS. The judge would then be forced to choose between
compelling the tenant to defend against the landlord’s action or entering a judgment
which will allow the landlord to evict the tenant. In the latter case, and possibly even
in the first, if the tenant cannot come up with the necessary sum of money, his options
are to find other housing or wait to be evicted.

80. Even if the landlord or his attorney objects to the delay occasioned by the refer-
ral, the judge may choose to proceed in the absence of a showing of bad faith by the
tenant or irreparable harm to the landlord.

81. The court rules require that the clerk inform all persons present at the beginning
of the first call that any party is entitled to appear through counsel, and that if such
party qualifies for free legal assistance, he may request the judge to appoint an attorney
or a third year law student to represent him. D.C. Super. Ct. Rules, Landlord &
Tenant Rule 11. The rules authorize the appointment of law students certified under
Superior Court Rule 46A as counsel of record. Id. Rule 9(c).

82. If after conferring with the party, the appointed counsel discovers that this person
does not qualify for court appointed legal assistance, the case usually will be continued
to allow the party to retain counsel. Although the rule primarily benefits tenants, there
have been a few cases in which the landlord’s request for court-appointed counsel has
been granted.

83. Although the judge could order the parties to proceed immediately with the trial,
generally, if counsel is appointed, the case is continued to allow time for investigation
and formulation of strategy. See note 76 supra. See also D.C. Super. Ct. Rules,
Landlord & Tenant Rule 12(b).

84. The court rules sanction conducting the trial immediately if efforts to reach
agreement in a case are unsuccessful. The applicable section reads:

(b) TRIAL. Should the parties fail to settle the controversy, the court shall
proceed with a trial on the merits of the case. The parties shall be sworn and
rare case in which both the landlord and tenant are proceeding without counsel, and the dispute involves little more than conflicting accounts of factual circumstances which do not involve additional witnesses, the judge may conduct an informal trial by requiring each party to tell his story under oath. Usually, the judge will postpone hearing the case until all the cases remaining on the morning calendar have been called at least once. Although the rules require that the judge first make an initial inquiry and attempt conciliation, some judges have ordered the parties to proceed with the trial without having made such efforts.

The first potential for significant delay in the summary disposition of the landlord's claim arises when the tenant secures legal representation. When the attorney appears before the court after conferring with the party he has been appointed to represent, it is commonplace to request a continuance. The judge will usually grant a short extension to allow time for further investigation and formulation of a defense. Generally, this extension also permits the attorney to prepare a written answer.

The second potential delay occurs when the tenant's attorney appears in court after the first continuance to file an answer. If it is unaccompanied by a jury demand, the judge will then schedule a trial date, usually one to three weeks away, depending upon the court's calendar. In the interim be-

the court shall conduct the trial informally and in such manner as to fully elicit all matters of defense and all facts in the case which will enable the court to arrive at a just decision on the merits.

D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 12(b). As noted earlier, the summons informs the tenant to be prepared for trial on the return date. See note 76 supra. If a tenant has been present in the court on previous occasions, however, he probably will be aware that the trial is not likely to be held on the return date, even if a settlement cannot be reached.

85. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 12.

86. When the parties have secured legal assistance prior to the return date, opposing counsel may consent to continue the case to an agreed upon date before the judge takes the bench. This will expedite the case on the morning's calendar while still permitting tenant's counsel the additional time needed to prepare a defense. In a few cases, the tenant will have sought legal assistance far enough in advance of the return date to allow the attorney to file the answer at that time. This will avoid completely one potential delay.

87. The court rules do not require the defendant to file a written answer except in cases in which the tenant requests a jury trial, interposes a plea of title, or asserts a counterclaim, recoupment or set-off. See D.C. SUPER. CT. RULES, LANDLORD & TENANT RULES 5 & 6. In most contested cases in which the tenant has legal representation, however, the attorney is likely to file a written answer raising either affirmative defenses, a counterclaim, or both.

88. At least one judge has accelerated the process slightly by assigning a trial date when granting counsel's request for a continuance to file an answer. The judge will thus assign two dates, the deadline for filing an answer and any motions the parties may
between the return and trial dates, either party may file and be heard on any
motion cognizable in the Landlord and Tenant Branch. That the data shows
that in recent years between one-fourth and one-third of all cases coming be-
fore the judge on a given day have concerned the granting of a continuance.
In addition, given the small number of trials held each year, it can be inferred
that the majority of the cases initially contested are concluded prior to the
trial date. That the system is neither designed for, nor capable of allowing a judge
to review the wisdom or insure the fairness of a particular settlement, or to
attempt reconciliation personally, or to preside over an immediate trial in
contested cases, was demonstrated one month when the presiding judge at-
ttempted to accomplish the foregoing objectives. First, the judge read aloud
each praecipe containing a confession of judgment and inquired of the tenant
what his reasons were for not having paid rent, and whether he fully under-
stood the terms and consequences of the agreement. If the tenant indicated
that he had a potential defense or appeared not to understand the agreement,
the judge refused to approve the judgment and appointed an attorney to con-
ciliate the matter and advise the judge whether to accept the settlement. If
the attorney, after conferring with the parties, recommended that the
praecipe not be approved, and reported that he was unable to negotiate a
more acceptable agreement, that attorney or another would then be ap-
pointed to represent the tenant. The case would then be continued to allow
the attorney time to prepare a defense.

During that month, the matters which normally occupied the morning
calendar were not completed until 3:00 or 4:00 p.m. The afternoon calen-
dar, which usually includes bench trials, contested motions and miscellaneous
matters remaining from the morning session, often ran late into the evening
hours. The long delays frustrated everyone affected—tenants, landlords,
their attorneys, and the court personnel. The irony was that the judge ap-
peared merely to be attempting both to comply with the court rules and to
provide each defendant who came before him with a full opportunity to be
heard. The landlord and tenant court that month was a sad illustration

wish to bring, and the trial date. Assigning the trial date in this fashion allows it to
be set at an earlier date than would be available when the parties return to file the an-
swer. If a jury trial is later demanded, the scheduled trial will be removed from the
court's calendar.

90. See Table 4.
91. For the text of the applicable rule, see notes 77 & 84 supra. Generally, the rules
mandate that there should be a certain degree of flexibility in the proceedings to allow
the judge to assist an unrepresented defendant in presenting any defenses he might have
in order to reach a just result. See D.C. Super Ct. Rules, Landlord & Tenant Rule
12(a), (b).
of how ill-equipped the judicial dispute settlement mechanism is in the majority of cases to act in any role other than that of a collection agency.

Still another delay is occasioned by the tenant's request for a jury trial. When the demand is filed, together with a verified written answer, it is normally summarily granted by the presiding judge. The case is then certified to the Civil Assignment Office for placement on the expedited jury calendar. The average wait between certification and the trial date is presently between four and six weeks. When a case is certified for jury trial, the landlord may move for a protective order so that the tenant is required to pay into the registry of the court all future rent as it becomes due. Recently, it has become the practice of judges to issue the order summarily upon the oral motion of landlord's counsel.

The data shows that despite the Supreme Court's recognition of the right to a jury trial in a landlord's possessory action, in no more than five percent of the cases coming before the judge has such a request been made. While this small percentage represents hundreds of cases, not more than five jury trials in cases arising in landlord and tenant court have been held in any single year. Although the majority of cases certified to the jury calendar reach final disposition prior to the trial date, a substantial percentage remain unresolved at the end of the year. Thus, jury demands have proven to

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92. The court rules specify that jury demands must be filed not later than the date of appearance specified in the summons or such extended time as the court may permit for good cause shown. D.C. Super. Ct. Rules, Landlord & Tenant Rule 6.

93. Conversation with the Civil Assignment Office, D.C. Superior Court, April 15, 1975. The Clerk reported that an effort is made to schedule landlord-tenant trials within a month of certification, but when the calendar is backed up, the wait can run from four to six weeks. Furthermore, it is uncertain how many of these cases are actually assigned to a judge for trial on the first trial date assigned. If the case is not assigned on the scheduled date, it may be delayed another three to four weeks.

94. For a discussion of the developments in the law regarding protective orders see pp. 695-96 & n.212 infra.


96. In the two and one-half years subsequent to that ruling, the number of cases certified each year to the jury calendar and that number as a percentage of the total cases coming before the judge are as follows:

- 1974—485 cases (3.1%)
- 1975—876 cases (5.0%)
- 1976—710 cases (3.6%)

97. See Tables 6 & 7.

98. Id. This backlog has decreased somewhat. In 1975, 44% of the cases certified for jury trial were pending at the end of the year. In 1976 this figure had dropped to 35%. That year there were also 166 fewer cases certified to the jury calendar. While the percentage of cases pending at the end of a given year must be discounted slightly in order to account for the cases certified for jury trial in the final months of the year, since 1974 this figure has been approximately seven times greater than the number of
be a relatively effective means for the tenant to secure additional time either to find and move to new premises or to negotiate a settlement. Such a procedure is inefficient, however, both in maximizing the efficient use of the court's and the attorneys' time and in minimizing the costs of litigating a legitimate dispute.\textsuperscript{99} For example, many cases have required full trial preparation, only to be settled immediately prior to the schedule trial date.\textsuperscript{100}

Both observation of the daily operation of the court and examination of the data support the conclusion that the landlord and tenant court is incapable of functioning as a mechanism for the settlement of legitimate disputes between landlord and tenant. But the data also suggests that, in the majority of cases filed as actions seeking possession based on nonpayment of rent, landlords neither seek possession of the premises nor desire eviction of the tenant. On the contrary, the data indicates that the landlords' intentions are to use the court for the summary collection of rents in arrears. In less than half of the cases in which the landlord obtains judgment is a writ of restitution ever sought.\textsuperscript{101} Furthermore, in less than fifteen percent of these cases is an eviction scheduled, and in fewer than four percent is an eviction actually executed. In each of the past five years, the eviction of a tenant as the result of a case filed in the Landlord and Tenant Branch only occurred in approxi-
mately two percent of the total number of cases filed. This conclusion con-
cerning the objective of most actions initiated in landlord and tenant court
is further supported by a check of the defendants' index maintained in the
landlord and tenant court clerk's office. It reveals that many landlords
routinely file actions against the same tenant several times in a single year.
It is not an uncommon practice for the landlord to file an action each time
a tenant is overdue in paying a single month's rent. Then, if the landlord
recovers both the rent and the court costs before or on the return date, he
will either dismiss the action or take a default judgment. A less desirable,
but nonetheless acceptable, alternative for the landlord is to arrange a confes-
sion of judgment and payment schedule on the return date.

Thus, for most of those affected by the operation of the landlord and
tenant court, the routine continues undisturbed; the cases are substantially
the same and the results are predictable. Should either or both of the parties
to a dispute challenge this use of the system as an inefficient collection
agency, however, inefficiency will usually be compounded, and the search by
both parties for a measure of justice will be further frustrated.

B. Related Services Affecting Operation of the Mechanism

1. Legal Services: Tenant Representation

One aspect of the landlord and tenant court highlighted by the preceding
review of its operation is that an individual tenant who has obtained legal
representation has a greater potential for avoiding the entry of a judgment
against him. As a general proposition, however, this observation has two
qualifications. First, the availability of legal services has not significantly af-
ected the outcome of cases for the majority of tenant-defendants. This is
due in large part to the fact that half the number of cases filed each year
end in default. Furthermore, only thirty-three percent of the cases of
those tenants who came to court received judicial attention, and of those, only
slightly more than half were for other than summary approval of the tenant's
confession of judgment. Thus, in past years less than ten percent of the
cases filed each year were even nominally contested by tenant-defendants.

102. This writer served one client who had at least nine default judgments entered
against her in five years. When asked if she had ever been sued before, she answered
in the negative because she had always paid before the return date. When she finally
sought legal assistance for one summons, it was because she did not have enough money
to pay the rent in arrears.

103. See Table 1.

104. For example, in 1976, of the 59,089 tenants who did not default, only 19,491
cases came before the judge presiding in landlord and tenant court. Of the latter figure,
in 9,508 cases the parties sought approval of a confessed judgment. Table 1.
This pattern of summary disposition continues despite efforts to inform the tenant of the availability of free legal assistance at each step of the proceeding. At the outset, the summons part of the form used by the landlord to commence his lawsuit lists the telephone numbers of organizations which provide free legal services. In addition, at the start of proceedings each day the clerk is required to announce that any party who qualifies may request the judge to appoint an attorney or third-year law student to represent him. Legal services offices, many of which are located in the community, are accessible to tenants, and tenant attorneys are easily recognizable even by the first-time visitor to the courtroom. Tenants who approach these attorneys during the break between the first call and the time that the judge takes the bench and indicate a desire to contest the landlord’s claim are encouraged to request the judge to appoint counsel to represent them.

The second qualification on the value of legal representation for tenants is that the system must distinguish between the theory of making legal services universally available and the reality of providing representation in every

105. See p. 649 & note 26 supra. Landlord-Tenant Form 1 includes the telephone numbers of the Legal Aid Society, Neighborhood Legal Services, and the D.C. Law Students in Court Program.

106. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 11. Qualified third-year law students, who are certified by the Board of Judges of Superior Court, are permitted to engage in limited practice under the supervision of a licensed and certified attorney. D.C. SUPER. CT. RULE 46A. At present, the District of Columbia law schools of American University, Antioch (The Urban Law Institute), Georgetown University, George Washington University, Howard University, and The Catholic University of America have programs which allow students to “practice” in the Landlord and Tenant Branch. See id.; D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 9(c). See also AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE, § 3-101, at 73 (1969) which proposes that the court with jurisdiction over landlord and tenant matters be required to inform a tenant of his right to counsel and to appoint one if he is unable to afford his own.

The laws of the District of Columbia do not make any provision for the appointment and payment of private counsel to represent tenants in civil actions when the resources of the free legal assistance programs cannot accommodate the demand. (For example, Neighborhood Legal Services, on at least one occasion, has had to close down its intake of new housing cases and refer tenants elsewhere.) Compensation is provided only to private attorneys who are appointed by the court to render legal assistance without charge to indigent criminal defendants. District of Columbia Criminal Justice Act, D.C. Code § 11-2604 (Supp. I 1974). The right of an indigent defendant to counsel in a civil action, however, even where that defendant is a tenant threatened with eviction, has not been recognized as a constitutional guarantee. Cf. Sandoval v. Rattikin, 395 S.W.2d 889, 894 (Tex. Ct. App. 1965), cert. denied, 385 U.S. 901 (1966).

In Sandoval, the Supreme Court refused to review a state court finding that a provision authorizing judges to appoint attorneys to represent persons too poor to employ counsel was “not mandatory.” See also Note, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545 (1967).
case. Institutional resources are inadequate to accommodate the volume of litigation which would result from a large-scale increase in tenant representation. Even at the present time, limited involvement of attorneys has been said to distort significantly the operation of the dispute settlement mechanism. The Chief Judge of the Superior Court, Harold Greene, pointed to tenant legal assistance as an illustration of his concern that "the present system does not provide an effective method for a sound and fair determination of the relevant issues in L & T litigation."107 In a speech announcing his proposal for reforming the present court system, the Chief Judge stated:

As the system now operates, those tenants sufficiently affluent, lucky, or ingenious to secure the assistance of an effective lawyer or of a legal aid organization, such as Neighborhood Legal Services, will not only be adequately represented in Court, but the chances are that the landlord may be disadvantaged in the course of the litigation.108

It is submitted here that lawyers are permitted to carry the advantage referred to by the Chief Judge because their large-scale impact remains minimal. It is ironic that legal services should be cited for its potential injustice to landlords, because the majority of tenants choose not to use the legal system to achieve a just outcome in their individual case. This hypothesis receives support by examining the courts' behavior with respect to modification of rules which have impacted upon the dispute settlement mechanism and the private nature of the landlord-tenant relationship. When tenants' use of apparent legal benefits secured in the appellate courts threatened to become too disruptive of the status quo of the existing relationship, subsequent judicial decisions narrowed or avoided such an impact.109


108. Id.

109. For example, in Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968), the court declared that a lease entered into in violation of the Housing Regulations was void and unenforceable. The same court later modified the effect of its earlier decision that a tenant could not be evicted for failing to fulfill a rental obligation due under a void lease, by recognizing an exception to the rules of law governing a contractual transaction in which the contract had been declared void. Instead of prohibiting one who violates the law from profiting by his wrongdoing, the court permitted a landlord to recover an amount equivalent to the rental value of the premises during the period of occupancy even though the lease was void because it was entered into in violation of the Housing Regulations. Cf. William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970). Similarly, when the circuit court in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), recognized a warranty of habitability, the breach of which could entitle a tenant to abatement in rent, the District of Columbia Court of
The effect of this judicial retreat in the face of assaults on the more traditional legal concepts by tenants' lawyers is to deter tenants from obtaining legal representation to litigate a dispute when it appears to them that it would not be worthwhile to do so.

It must be admitted, however, that the courts' perceptions of the possible impact of widespread enforcement of the new rule changes are not necessarily incorrect. For instance, it cannot be denied that the few tenants who do retain counsel threaten the landlord with the prospects of increased time and expense in litigating a dispute. While this threat was not very prevalent before the availability of free legal assistance, the present situation is as much fostered by the unsettled state of the law as by attorneys who choose a litigation strategy which may result in delay. It is misleading to conclude, therefore, as the Chief Judge appears to do, that tenant lawyers are to blame for the disadvantage which a landlord may suffer in a case contested by a tenant who has obtained free legal assistance.

Accusations that tenants' lawyers unfairly disadvantage landlords tend to distract attention from the real problem posed by interjecting defense lawyers in the landlord-tenant dispute settlement process. The probability that their continued participation may permanently disrupt the ability of the present mechanism to function is overlooked in attempting to eliminate tenants' need for lawyers. Admittedly, this threat of disruption will remain somewhat distant so long as the disputants allow economics to take precedence over justice, and thus submit to compromises. While settlement may not be wholly satisfactory to either party, the high transactions costs associated with maximizing the benefits to be derived from litigation has so far deterred both parties from

Appeals limited the definition of this warranty to the provisions of the Housing Regulations. The effect of this decision was to bar the tenant from litigating in landlord and tenant court any other landlord breach of a lease provision which might have reduced the tenant's rental obligation. See Winchester Management Corp. v. Staten, 361 A.2d 187, 190 (D.C. 1976).

In addition, the D.C. Court of Appeals has since abandoned the circuit court's requirements for landlords who sought the extraordinary protection of a pretrial guarantee of the tenant's ability to pay a judgment. Compare Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970) with McNeal v. Habib, 346 A.2d 508 (D.C. 1975). Thus, to obtain a protective order a landlord is no longer required to submit a written motion outlining the need for this unusual judicial remedy upon which the court must hold a hearing. Cf. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970). It is also noteworthy that the D.C. courts have specifically refused to acquiesce in the circuit court's opinion in Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972). That decision would permit a tenant to remain in possession of a substandard dwelling without paying rent unless the landlord could demonstrate a bona fide business purpose for seeking eviction, or until the landlord brought the premises into conformance with the Regulations.
fully utilizing the judicial process to achieve the appropriate balance of their individual rights.\textsuperscript{110}

A growing body of literature has discussed the potential of legal services for vindicating the rights of and securing relief for the economically disadvantaged.\textsuperscript{111} The threshold issue underlying these writings centers on the value of imposing legal services on the present institutional framework of our legal system.\textsuperscript{112} Summary and analysis of the debate over the broad impact of advocates for previously unrepresented interests on the dispute resolution process are beyond the scope of this article. But the consensus of the writers on a few basic propositions provides a perspective from which to examine the potential for tenant representation.

First, making legal assistance available to individuals heretofore unable to

\textsuperscript{110} This situation is generally tolerated by the more powerful landlord so long as the number of tenants represented remains low enough to permit landlords to afford the losses involved in compromising. In addition, for the individual tenant who achieves unanticipated tangible benefits, considerations of justice are relatively unimportant. A survey of Detroit residents who were asked to identify serious law-related problems which they had experienced found that only a small proportion of respondents had sought justice or vindication of their rights rather than the most advantageous settlement. Of the 92 out of 1,302 respondents who identified landlord and tenant relations as a problem area, zero percent said that they sought justice or the recognition of their rights. Mayhew, \textit{Institutions of Representation: Civil Justice and the Public}, 9 L. & Soc'y REV. 401, 413 (1975).


\textsuperscript{112} Few writers suggest that providing access to legal services is not socially desirable. The debate focuses primarily upon how these services might best be used. For example, many of the authors argue in favor of an expanded concept of legal services in which the lawyer's role would not be limited to single client representation. Their conclusions stem, in part, from their perceptions that the present practice of concentrating legal energy on achieving a favorable outcome in an individual case does not maximize the opportunities for lawyers to achieve more significant results on behalf of tenants as a class. See Cahn & Cahn, \textit{supra} note 111; Hazard, \textit{Law Reforming in the Anti-Poverty Effort}, 37 U. Chi. L. Rev. 242 (1970); Wexler, \textit{supra} note 111. For purposes of this article, lawyering roles which may be alternative or supplemental to representation of individual clients in the resolution of a private legal dispute need not be considered.
retain counsel does not disadvantage the poor as a class. Each time an individual member of that class secures new benefits, the victory serves as precedent, notwithstanding its subsequent judicial history. Perhaps as important as these indirect benefits to the class is the likelihood that the failure to provide poor persons with access to legal services will have potentially disastrous consequences. The National Advisory Commission on Civil Disorders reported that conflicts between ghetto residents and those in a position of power over their daily lives, such as landlords or merchants, were among the most intense grievances underlying the riots of the summer of 1967. The Report suggested that, notwithstanding the considerable legal obstacles, "resourceful and imaginative use of available legal processes could contribute significantly to the alleviation of . . . tensions" resulting from these and other conflicts. In addition, studies show that attempts to design legal mechanisms which would eliminate the necessity of obtaining legal re-

113. This view, however, is not unanimous. One writer argues that the traditional model of legal practice for private clients is not what poor people need and may, in fact, be harmful. He notes that the whole notion of an adversarial proceeding is unsuited for dealing with social problems. In addition, he points out the negative effects experienced by poor persons who lose too often for reasons unrelated to the merits of the case. Wexler, supra note 111, at 1049. Along these lines, it is also possible to argue that securing the benefits of the law for one individual isolates him from the other members of the group and thus dilutes the strength of that group to effect change in some other manner.

Several writers have also expressed the view that the delivery of legal services within the single client/individual case framework provides little significant advantage for the poor as a class. The reasons given generally fall into two categories which have to do with the organizational and substantive capabilities of the institution of legal services. The most significant operational limitation is that the daily demands of the large case load do not permit time to focus upon long-range solutions. As one observer put it: "[R]eform that would affect the poor as a group and would deal with the depressed state of their day-to-day existence is neglected in the rush of small, individual matters the office must handle." Comment, supra note 111, at 1074. In addition, both observers and attorneys caution against expecting that legal services can accomplish too much. They point out that:

[L]egal services alone cannot further fundamental goals of the struggle to alleviate poverty. It does not contribute to substantial redistribution of the country's economic resources; it affects income redistribution for the class of poor people only by subsidizing the cost of legal services provided. It does not redistribute political power in the society. And it does not open new life possibilities for those who are born poor or black.

Id.


115. Id. at 152. The Report continues: "Through the adversary process which is at the heart of our judicial system, litigants are afforded a meaningful opportunity to influence events which affect them and their community. However, effective utilization of the courts requires legal assistance, a resource seldom available to the poor." Id. But see Wexler, supra note 111.
representation have not assured the unrepresented party a fair hearing.\textsuperscript{116} On the contrary, it was found that the pattern of litigation in these forums usually placed a business interest, appearing through counsel, in opposition to an individual litigant. When the latter was unrepresented, he was found to be at a significant disadvantage.\textsuperscript{117} In particular, the studies of those small claims courts which bar attorneys from representing an individual litigant concluded that such forums had become little more than collection agencies.\textsuperscript{118}

Secondly, there are limitations on what can be accomplished by providing legal services to the poor. Assigning a lawyer to every potential litigant in the traditional adversary-courtroom model will not enfranchise a disenfranchised class. Neither increasing the quantity nor upgrading the quality of legal services will, without more, result in the delivery of “legality” to those who have previously been denied the benefits which access to the law confers upon individuals and groups in society.\textsuperscript{119} Furthermore, access to the law cannot by itself achieve the redistribution of power and wealth which is

\textsuperscript{116} For a review of the literature on small claims courts, see Yngvesson & Hennessey, \textit{Small Claims, Complex Disputes: A Review of the Small Claims Literature}, 9 L. & Soc'y Rev. 219 (1975). The authors confirm the conclusions reached by many writers that although small claims courts were established to provide the poor citizen with access to the court system, he is more likely to have this legal process used against him than for him. The titles of some of the studies reveal their content and conclusions; see, e.g., \textit{Small Claims Court Study Group, Little Injustices: Small Claims Courts and the American Consumer} (1972); \textit{Note, The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California}, 21 Stan. L. Rev. 1657 (1969). See also Leff, \textit{Injury, Ignorance and Spite—The Dynamics of Coercive Collection}, 80 Yale L.J. 1 (1970).

\textsuperscript{117} In the design of these mechanisms, neither the role of the decisionmaker nor decisionmaking procedures were significantly modified to adjust for the imbalance in the bargaining positions of represented and unrepresented parties. See, e.g., \textit{Note, The Ohio Small Claims Court: An Empirical Study}, 42 U. Cin. L. Rev. 469 (1973). The authors admit that the presence of attorneys in some cases “may frustrate the goal of maintaining informal proceedings” in small claims courts, but conclude that “in general their presence is advisable.” \textit{Id.} at 501.

\textsuperscript{118} See, e.g., \textit{Note, supra} note 116.

\textsuperscript{119} See Galanter, 11 L. & Soc'y Rev., \textit{supra} note 111, at 225. Professor Galanter uses the term “legality” to refer to the collection of “distributive benefits . . . which access to law . . . bestows upon actors, individuals or groups, within the society.” \textit{Id.} Included among such benefits are protection and security, remedies for grievances and claims, securing accountability of officials, participation in decisionmaking, feelings of justice and fairness, employment of facilitative rules to accomplish specific purposes, and provision of a framework for reliance. Although he recognizes that such goals will vary both with the perceiver and the actors, he rejects the assumption underlying many of the discussions of legal services that we can specify “the instances in which these benefits are not realized and thus compile a list of unmet legal needs.” \textit{Id.} at 226. For discussion of the reasons underlying this conclusion, see notes 122 & 124 infra.
necessary to equalize the political and economic disparity between classes.

From the present courtroom perspective, providing poor litigants with legal representation, even in theory, does not guarantee that the parties will obtain equal access to legality, even in the isolated example. For instance, if all factors extrinsic to the immediate outcome, such as the future precedential value of a decision or its political or economic impact on others, could be removed from consideration in deciding the particular controversy, the dispute would remain an adversarial proceeding between the legal advocates of the disputants' interests. In rendering a decision, the decisionmaker's choice among conflicting facts and law would be as likely to be influenced by the advocacy skills of the attorney as it would by the decisionmaker's own perceptions of the particular equities posed by the parties. External factors would, therefore, impact upon the decision, since such human qualities as intelligence and competency in lawyering skills, and more objective considerations such as the economic resources of both the lawyer and the client, would reflect upon the ability of each lawyer to represent his client. Thus, even in the theoretical construct of the isolated case, the delivery of legality is likely to be biased by economic considerations.

When the case is viewed in the context of the legal system, it becomes even more apparent that the inequality in the positions of the parties is more than a simple function of income differential. Among the most fundamental reasons for the disparity in the access to legality is the capability of members of different socio-economic classes to utilize legal services effectively. If

120. ABA Code of Professional Responsibility, Canon 7 (1974).
121. Carlin & Howard, supra note 111, argue that the inequality of legal representation between those who can and cannot afford to retain counsel will not be remedied effectively by legal aid organizations. They point out that "[l]awyers representing lower-class persons tend to be the least competent members of the bar, and those least likely to employ a high level or wide range of technical skills." Id. at 384.
122. The most articulate proponent of this thesis is Professor Marc Galanter, whose initial explanation appeared in a very thoughtful article entitled Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974). He divides litigants into two general categories based upon the frequency of their involvement in legal controversies—the "one-shotters" (OS) and "repeat players" (RP). According to Galanter, litigation typically involves combinations of "one-shotters" and "repeat players," with the most frequent configuration taking the form of the repeat player versus the one-shooter. In this paradigm, he states that "[t]he law is used for routine processing of claims by parties for whom the making of such claims is a regular business activity." Id. at 108. Based upon the typology of the parties developed, Galanter identifies the strategic advantages which accrue to the repeated user and which are accentuated by the use of lawyers:

We might assume that RPs (tending to be larger units) who can buy legal services more steadily, in larger quantities, in bulk (by retainer) and at higher rates, would get services of better quality. They would have better informa-
the adversarial process pits an organized interest, which is a repeated user of the legal system, against a less wealthy individual, who is at best an infrequent participant in legal proceedings, the outcome is likely to be affected by a variety of factors which do not appear in the records of those proceedings. These factors provide the organized interest with a strategic advantage over the individual, either in securing a favorable outcome or in minimizing the impact of an unfavorable result.

Notwithstanding the aforementioned limitations, it is submitted that providing legal services to individual litigants who cannot afford to retain counsel is socially desirable and cost-effective. From the institutional perspective, the judiciary is the most accessible branch of government for the poor person who has been educated to use the legal system to seek redress. It is also the

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123. When used in this context, the term "organized interest" includes the individual commercially-oriented litigant who, if not formally part of an organization, is capable of organizing when it is in his best interest to do so. Thus, while the landlord or merchant may sue an individual plaintiff for relatively modest relief, each is "organizable" for purposes of sharing resources, achieving more effective representation of common interests, or exerting power to achieve a more broad-based result.

124. These factors can be divided into three general categories, which include the general characteristics of the "repeat players," their position vis-à-vis the legal institution, and their potential, based upon available resources, for maximizing their advantages. Among the characteristics attributable to the "repeat player" are intelligence, expertise, credibility and relative wealth. These characteristics place him in a position to utilize economies of scale to minimize the costs of utilizing the legal system, to play the odds in choosing to negotiate or litigate, and to develop useful relationships with institutional personnel. Thus, he acquires a potential for influencing the development of rules and for manipulating the operation of the mechanism in which such rules are applied. While he can tolerate the isolated compromise and absorb the occasional loss, he can also, if necessary, marshal the resources to challenge such results. Thus, an organized effort in the judicial forum or in another lawmaking body may reverse unfavorable precedent and replace it with more favorable rules. Cf. Galanter, supra note 122, at 98-103.

125. The foregoing factors do not always accrue advantageously to the organized interest, nor is the individual powerless to neutralize some of these advantages. This will vary according to the circumstances of the case, including the particular characteristics of the parties.
least susceptible to the political pressures which organized interests can bring to bear on public officials. Appellate judges in particular are receptive to arguments based upon principles which may include rules of general application and unique concepts.\(^{126}\) In addition, the presence of lawyers in the trial court helps insure that appellate decisions and legislative enactments are implemented and enforced so as to affect their intended beneficiaries.

From their position of insulation, judges at both the appellate and trial levels may effect change which could not be achieved by the more politically oriented lawmaking bodies. Furthermore, lawyers from subsidized legal assistance programs, operating free of market constraints, carry some advantages when it comes to pressing for reform. Although voluminous caseloads and other factors\(^{127}\) generally inhibit the ability of legal services attorneys to undertake law reform activities, significant and far-reaching decisions have been won on behalf of clients who could not afford to pay their attorneys' fees.\(^{128}\)

Finally, even minimal success achieved on behalf of a new participant in the legal system carries intangible benefits. The experience can foster a new awareness of legal rights, promote a renewed sense of self-dignity, and inform participants of potential benefits to be derived from using the legal system. It may thus provide the incentive to undertake organizational efforts for achieving new power, both in the judicial forum and elsewhere in the political system.

Examination of these general propositions in the context of the landlord-tenant dispute settlement mechanism in the District of Columbia defines a threefold potential for tenant defense lawyers.\(^{129}\) First, they can assist in dep-

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127. See note 121 supra.
128. Among legal services programs which have achieved significant law reform in the courts is California Rural Legal Assistance (CRLA). In the early days of its existence as an O.E.O.-funded legal services project, CRLA achieved notable success in its suits against government agencies on behalf of clients who rely on government entitlements. Although 70% of its time was spent on day-to-day service cases, some time was devoted to law reform and group representation. The Director of CRLA reported:

Our work has impact when the client groups which we represent are perceived as having some political power, when the cases which we handle for our clients succeed in arousing public sympathy for those clients and indignation against our opponents, and when the cases are supported by middle class groups, such as the trade unions which do have political power.

Comment, supra note 111, at 1085. For more specific examples of the achievements of legal services attorneys, see discussion on the potential of lawyers as representatives of tenants' interests at pp. 670-86.

129. It should be remembered that the tenant's initial encounter with the landlord and tenant court is as a defendant since only a landlord may initiate an action in that forum. Although the tenant has the right to counterclaim, the nature of the issues
delivering legality to individual tenants. Second, their presence in the courtroom is both an incentive to law enforcement and a deterrent against lawlessness. Third, they can use the appellate process to achieve selective judicial law reform.

In assisting the delivery of legality to individual tenants, lawyers can perform three functions: (1) insuring that each tenant receives whatever procedural protections are afforded him by the landlord-oriented dispute settlement mechanism, (2) seeking to secure the benefits of the substantive law warranted by the facts of the tenant's situation, and (3) manipulating the procedural complexities within the mechanism to maximize the tenant's bargaining position.

As to the first of these functions, it is submitted that an attorney is essential for insuring that the tenant is guaranteed the benefits of procedural due process. The operational design of the present mechanism in accordance with considerations of efficiency and landlords' convenience provides little protection for the unrepresented tenant. The court furnishes forms for the landlord to use in initiating his lawsuit, but provides no formal assistance for tenants wishing to answer the complaint. The courtroom clerk is authorized to enter a default judgment if the tenant fails to answer during the first call of the roll, but may not dismiss the case if the landlord fails to appear before the judge takes the bench. The court rules require minimal proof of compliance with the provisions governing service of process, but the failure to comply is overlooked if no challenge is raised, and the burden of proof rests with the tenant who must show why he should not be evicted once the landlord presents a minimal prima facie case.\textsuperscript{130} Without legal assistance, most tenants would not know what procedural requirements are imposed upon the landlord, much less how to object to his noncompliance.

The unrepresented tenant is also generally unable to take the appropriate action to neutralize the advantages which the system accords to the landlord. Thus, he is unlikely to get the court to focus on the merits of the case.\textsuperscript{131}

\textsuperscript{130} See note 12 supra.

\textsuperscript{131} One is reminded of the image from Alice in Wonderland in which the Red Queen is explaining to Alice that she must run twice as fast to stay in the same place. See L. Carroll, Alice's Adventures in Wonderland (1885). In the first instance, the tenant is required to seek assistance merely to overcome the barriers which stand in his way of a hearing on the merits of his action. Only after he takes this initial action will he stand on an equal footing with the landlord, since then each can present evidence to support his contentions. The major burden of proof, however, continues to rest with the tenant to show why judgment should not be entered against him.

which may be litigated are restricted both by the issues raised in the landlord's complaint and by court rule. For discussion of the limitations on tenant's action for relief, see pp. 652-53 supra.
On the other hand, a lawyer can have an immediate and significant effect on the tenant's posture as a litigant. Even seemingly minor deviations from the rules can be grounds for a dismissal of the landlord's action. Dismissal has been granted when a notice to quit gave the tenant only twenty-eight days to vacate instead of the required thirty days, or when a summons was served by sliding it under the door instead of posting it in a prominent place.

Furthermore, the participation of a lawyer is likely to improve the procedural manner in which contested cases are resolved. A study of the Detroit Landlord-Tenant Court revealed that tenant lawyers pursued a variety of procedural strategies not utilized by unrepresented tenants. For example, the study found that jury demands and jury trials were characteristics virtually unique to the cases of represented tenants. Jury demands were filed in sixty-three percent of the cases in which the tenant had an attorney, while less than one percent of the unrepresented tenants made such a demand. Of interest, however, is the fact that in only 3.1% of these cases was a jury trial actually conducted; the remainder were either settled or tried before a judge without a jury. The disparity of the statistics on pretrial settlements indicates that the procedural development of a case often affects its outcome. Of the cases in which the tenant had a lawyer, 17.4% were settled out of court before trial, while this result was obtained in only 0.1% of the cases of unrepresented tenants.

The second function the lawyer can perform in delivering legality to the tenant-client is to secure for him the benefits of the substantive law. This can be accomplished both by raising defenses which may defeat a possessory action and by seeking affirmative relief to which the tenant may be entitled. Empirical data gathered in the Detroit study, which was conducted two years after Michigan legislatively recognized substantive tenant defenses to a landlord's eviction action, show the potential impact of tenant representation.

135. id. at 47.
136. Id. This 63% figure, however, represents only 189 out of 4,116 contested cases which formed the basis of the study. Id. at 46.
137. Id. at 47.
138. Id.
139. Among the tenant rights recognized by the Michigan legislature were the warranty of habitability, a covenant to repair, and protection against retaliatory eviction. The tenant's covenant to pay rent was made mutually dependent upon the landlord's
Working from in-court observation of 797 contested cases, in which 58 tenants were represented and 739 were not, the researchers found that tenants with attorneys were seldom without a defense. In contrast, "over two-thirds of the unrepresented tenants who appeared in court to 'contest' their cases raised no legal defenses." In addition, tenants with attorneys raised the new defenses more than twice as often as unrepresented tenants.

The study also found that tenants with attorneys were much less likely to lose their challenge completely. The data base was a study of 4,116 contested cases, which represented approximately twenty percent of all nonpayment and termination cases filed that year. In these cases, almost half of the landlords were represented by attorneys, while less than ten percent of the tenants were defended by legal counsel. The data showed that the landlord received immediate judgment for all he claimed in 87.7% of the cases in which the tenant was not represented. This figure was only 46.2% in cases in which the tenant received legal assistance. In addition, tenants

compliance with these obligations. Thus, the new law permitted a landlord's breach to be raised as a defense in a summary eviction proceeding based upon nonpayment. Id. at 16. In addition, the defense of retaliation could be raised in a landlord's termination action based upon service of a notice to quit. Id. at 19-20. The methodology of the study had two parts: a review of all cases filed in a one-year period, and an in-court observation during two selected portions of that year. These parts were complementary. The in-court study provided data on tenant defenses raised, while the case-file study disclosed information such as the default rate and extent of tenant representation. Id. at 23-25.

140. Id. at 44. This data was gathered through in-court observation.

141. Id. at 44-45. It should be remembered, however, that the percentage figures translate into 10 tenants' attorneys who raised the defense of the landlord breach, out of 41 nonpayment cases in which tenants were represented by counsel. Four tenants' attorneys raised the retaliation defense out of 17 termination cases in which tenants were represented. Id. at 44.

142. Id. at 37-41.

143. Id. at 25. In addition, 57.6% of the cases filed during the year studied ended in default, while the remaining 22.3% were voluntarily dismissed before the return date. Id. at 26.

144. Id. at 35. Representation of landlords in the District of Columbia is probably higher than 50% since a substantial number of cases are brought in the name of the management company hired by owners to undertake such responsibilities as leasing apartment units and collecting rent. These companies are required to appear through counsel. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 11. In addition, the D.C. landlord and tenant court is attended by a number of lawyers with a predominantly landlord practice. These attorneys can handle a large volume of "routine" possessory actions for a relatively modest fee, which is affordable by most non-corporate landlords.

145. Mosier & Soble, supra note 134, at 35. The comparable statistics from the in-court observation revealed that landlords were awarded immediate and complete judgment in 81.9% of the cases against unrepresented tenants, while they achieved this
with attorneys secured significantly more favorable outcomes. They achieved a rate of dismissal almost ten times higher than tenants without a lawyer (31.2% compared to 3.7%).\textsuperscript{146} Although numerically less, the rate of favorable judgments obtained by represented tenants was also nearly nine times greater than for unrepresented tenants (5.2% compared to 0.6%).\textsuperscript{147}

Even in losing, represented tenants fared better than unrepresented tenants. Although the percentage of their cases resulting in judgment for partial rent was only slightly higher (9.4% compared to 8.1%),\textsuperscript{148} they were more frequently given additional time to comply with the judgment before issuance of a writ of eviction (41.8% compared to 10.4%).\textsuperscript{149}

While it should be emphasized that the number of tenants in the Detroit study who actually received the benefits of legal representation was quite small, the dramatic discrepancy between the results achieved by represented tenants as compared with unrepresented tenants illustrates the potential to be achieved by tenants with lawyers. The data also provide evidence of the aforementioned limitations upon the potential accomplishments of lawyers.\textsuperscript{150} Thus, it must be realized that securing for tenants the benefits of the law requires not only an adequate supply of lawyers, but the ability of the tenant to utilize such legal service effectively.

The third function which the lawyer can perform in delivering legality to the tenant, while not exclusive of the first two, is distinguished from them by the purpose for which it is undertaken. The lawyer is in a position to exploit various procedural maneuvers to obtain relief for his client which is not necessarily related to the purpose for which the procedure was designed. Thus, a jury demand might provide the tenant with additional time to find alternative housing, or a motion to dismiss an action because the landlord has failed to comply with a procedural requirement in initiating his action, may improve the tenant's position for negotiating a settlement. Procedures in the landlord and tenant court in the District of Columbia are particularly

\textsuperscript{146} Id. at 37.\textsuperscript{147} Id. at 35 n.71.\textsuperscript{148} Id. at 37.\textsuperscript{149} Id. at 38.\textsuperscript{150} See pp. 662-66 supra.
vulnerable to manipulation since they afford so many opportunities for delay.\textsuperscript{151}

The use of these litigation techniques to secure new advantages for tenants has been much criticized, and the professional responsibility of lawyers who engage in such practices has been questioned.\textsuperscript{152} It is submitted, however, that the use of legitimate procedures for improper purposes has not been particularly widespread or employed as frequently as the amount of criticism would seem to indicate.\textsuperscript{153} On the contrary, it is not the use of questionable

\begin{itemize}
\item \textsuperscript{151} See discussion pp. 662-65 supra.
\item \textsuperscript{152} Among the ethical considerations which tenant lawyers have been accused of violating are: EC 7-4 which states "a lawyer is not justified in asserting a position in litigation that is frivolous"; EC 7-10 which cautions lawyers against "infliction of needless harm" upon persons not his client who are involved in the legal process; EC 7-38 which calls upon the lawyer to "be courteous to opposing counsel and . . . [to] accede to reasonable requests regarding court proceedings, setting continuances, waiver of procedural formalities . . . ". Failure of the lawyer to agree to the latter when it does not prejudice the rights of his client is a violation of Disciplinary Rule DR 7-101(A)(1). It has also been argued that the lawyer who engages in deliberate delaying tactics is violating DR 7-102(A)(1) which states:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.


The answer to these accusations is twofold. First, the overwhelming majority of lawyers who choose a course of action which may force upon the landlord an involuntary delay do so only when the choice is justified by the merits of the case. Second, the language of the Code is ambiguous. Although the legitimate purpose for which the procedure was designed may be subordinate to the primary objective of the lawyer in utilizing it, the lawyer has not violated the Code, since to do otherwise would arguably be an abdication of his responsibility to represent his client zealously." See Canon 7.

\item \textsuperscript{153} For example, the data gathered by the Mosier and Soble study, supra note 134, shows that in all cases not dismissed before the return date the landlord received judgment for all that he sought 96\% of the time. The rate of favorable judgment achieved by the landlord in all contested cases was 84.8\%. Id. at 33. Thus, the results were labeled "miniscule," since the few gains achieved by tenants appeared to have relatively little impact.

A study of the New Haven Legal Assistance Association's (LAA) attorneys in landlord-tenant litigation conducted for the Yale Law Review disclosed that the participation of attorneys tended to increase the amount of time required for disposition of the action. It also found that when a tenant was represented by an LAA attorney, the disposition time was four times longer than when representation was provided by a private attorney. The author points out "the primary factor leading to this differential appears to be LAA's use of the procedural complexities available in summary process litigation. However, despite such efforts, the landlord almost inevitably obtains judgment of possession." (citations omitted). Note, Legal Services and Landlord-Tenant Litigation: A Critical Analysis, 82 Yale L.J. 1495, 1496-98 (1973). The New Haven study found that the vast majority of the tenants there, similar to those in Detroit and the District of Colum-
practices which contributes to the disruption of the settlement mechanism or the distortion of the rules governing the landlord-tenant relationship, but the legitimate employment of procedures to obtain those benefits to which the law has recognized tenants are entitled.154

While it cannot be denied that the opportunity for misuse is present, providing tenants with the same opportunities to exploit the settlement processes available to the more powerful landlord interests achieves a measure of distributive procedural justice. Although the result in a particular case might work a hardship upon an individual landlord, considering the vast resources available to landlords as an organized class of litigants, the impact can be effectively minimized.155 Furthermore, it is arguable that landlords who file possessory actions solely to compel payment of outstanding rent have themselves subverted the present landlord and tenant dispute settlement mechanism by converting the court into a collection agency.

It is, in fact, neither revolutionary nor novel to view a legal dispute settlement mechanism as a process of compromising, whereby "deserving" parties may choose to settle for less than their full entitlement for reasons not entirely related to the merits of their individual case. One can speculate that the conduct of tenants' lawyers has aroused such controversy, despite its relatively minor impact, because both their participation in the adversarial process and their use of traditional litigation techniques on behalf of a previously unrepresented interest are relatively recent phenomena for which effective countermeasures have not yet been developed by their critic-opponents.

Although the preceding discussion on the delivery of legality minimizes the impact of these isolated efforts, the potential consequences of widespread participation of lawyers in the resolution process, including their use of procedures to secure advantages not necessarily related to legal entitlements, should not be ignored. It is indisputable that the ability of the present mechanism to function could be permanently impaired if tenant representation or misuse of procedural maneuvers increased substantially. Thus, the tenant's use of lawyers fosters a climate which encourages reform of the

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154. See pp. 663-64 supra.
155. Theoretically, the advantages of being free from certain market constraints are enjoyed by two types of litigants: those too poor to pay for legal assistance and those with "unlimited" resources for engaging in litigation. In the former case, however, institutional resources cannot adequately operate free from the constraints of economics and efficiency. Alternatively, even though the wealthy litigant is not completely free from economic considerations, when he believes the expense of achieving a favorable decision or avoiding an unfavorable result is justified, available resources can be relatively limitless.
traditional dispute settlement mechanism that could significantly improve the delivery of legality to the individual tenant in the long run.

The potential benefits to be derived from participation of lawyers as representatives of tenants in the trial court on a regular basis also can be shared by more than the immediate defendant-client. The lawyer's presence in the courtroom provides both an incentive for law enforcement and a deterrent against the victimizing of tenants by the court officials and landlords. Changes in the rules effected at the appellate level do not penetrate automatically or costlessly to the courts which can confer the benefits of the new rules on the largest numbers of intended beneficiaries. In their second potential role, lawyers are therefore, an essential part of the price for achieving implementation of the rules. This is not an insignificant task since, as noted earlier, judges sitting in landlord and tenant court often appear unwilling or unable to enforce new rules which they perceive to be particularly disruptive of the status quo. Thus, tenants' lawyers are in the unique position of being, simultaneously, both the cause of and the solution to the problems posed by judicial hostility to change.

Furthermore, the court's manifestation of its intent to enforce the new rule changes provides the incentive for landlord-plaintiffs to comply with these legal requirements. For instance, re-examination of the costs and benefits of noncompliance may influence the landlord's decision to make the repairs necessary for uninterrupted collection of rent, or deter him from filing an action which is retaliatorily motivated, or convince him to comply with the procedural requirements for commencing his action. The benefits which result from enforcement and observation of the law by judges and plaintiffs are likely to be shared by a class of potential defendants which includes both those who appear without legal representation and those who will be saved from ever having to come to court.

On the other hand, the potential effect of legal services on the present courtroom model should not be overstated. Even if a decisionmaker in-

156. See Galanter, supra note 122, at 137-39.
157. See Stumpf & Janowitz, Judges and the Poor: Bench Responses to Federally Financed Legal Services, 21 STAN. L. REV. 1058 (1969). The authors found that judges in a California community were openly hostile to the law reform efforts of new legal services attorneys. This situation, the authors reported, prevented legal services from having an observable impact on the policies and procedures of the local courts, and may have adversely affected the operation of local legal services programs.

It is reasonable to expect that a new program will engender some opposition and distrust. The setbacks suffered by legal services attorneys at the trial level do not detract from the potential of legal services to achieve certain law enforcement and reform objectives on behalf of the poor.
Landlord-Tenant Law

indicates a willingness to enforce rule changes, the nature of a landlord-tenant dispute requires individualized consideration and customized remedies. The condition of a tenant's premises or the pattern of a landlord's behavior are unique to each controversy. As would be the case with attempting the delivery of legality to individual tenants on a large scale, the present institutional framework is not equipped to insure law enforcement in every case.

The danger lies in continuing to tolerate the view of the landlord-tenant dispute as a "species of mass transaction," and thus ignoring the changes required by the appellate decisions according new rights to tenants. The argument raised against customizing the settlement of disputes arising out of debt collection is equally applicable to landlord-tenant disputes. One expert observes that, "[t]here does come a point where the additional costs of having personalized transactions may be too great; a little injustice may be a social good." Thus, it must be acknowledged that tenants' attorneys at the trial level can achieve little more within the present framework than selective law enforcement. Still, it is arguable that they can demonstrate the need to re-examine the mechanism with a view towards correcting the inadequacies of its enforcement capabilities.

A third potential role for tenants' attorneys is as an advocate for judicial law reform. The appellate courts in the District of Columbia have been particularly receptive to arguments favoring modification of historical legal doctrines which are no longer appropriate to the modern landlord-tenant relationship. Utilizing the appellate process, lawyers representing previously unrepresented interests have been a significant force in securing favorable decisional responses. These results were achieved through innovative use of

158. This is the term used by Professor Arthur Leff to describe modern debt collection methods. Leff, supra note 116, at 38. Professor Leff observes that:

"It is too expensive, given the current institutional framework, for collection transactions as currently designed to be handled individually on the basis of the peculiar needs of particular parties in particular instances. That is what the litigation system attempts to do; its failures illustrate the fact that one cannot easily customize dispute resolution any more than one can customize manufacture or distribution for a mass market."

159. Id. at 42 (citation omitted). This observation, however, does not deter Professor Leff from speculating upon changes which might correct present injustices. His concentration focuses upon changing the legal institutions rather than the legal rules. He concludes that "Of greater moment is so reshaping the institutional framework as to get for the merchant-consumer collection imbroglio some of the apparent advantages of the current merchant-merchant system." Id. at 43.

160. The advantages and disadvantages of judicial lawmaking are explored in a well-reasoned article by Hazard, supra note 112.

161. For an analysis of the judicial development of the substantive landlord and tenant law in the District of Columbia, see Gerwin, supra note 4.
precedent and public policy, such as analogizing the residential tenant's situation to that of a party in a commercial transaction, and invoking existing laws, such as housing codes, in a new and creative fashion. By focusing their advocacy on the courts, lawyers achieved for tenants the benefits of rule changes for which courts in other jurisdictions deferred to the legislatures.

Despite the character of the judicial rulemaking, it is submitted that the potential gains to be secured are significant. In addition, the ramifications of these accomplishments extend beyond the present landlord and tenant forum. Tenants who have experienced or observed positive results from the legal system are encouraged to seek additional affirmative benefits, both in other courts and in the legislature. In addition to its other advantages, this activity creates a climate for change, not only of the rules, but of the institution in which the rules operate.

As the foregoing analysis illustrates, the potential impact of providing tenants with access to legal representation is part of the larger issues which arise out of the discussion concerning the delivery of legal services to consumers in the legal system. In this discussion, however, the qualitative impact of providing legal advocates for previously unrepresented interests re-


163. This fact is noted critically by one recent writer. While crediting "highly motivated advocates for the low income tenant" with having achieved judicial rule changes in an effort to advance tenant interests, he notes that "[t]he force of their advocacy has been directed into the courts and against landlords, rather than into legislatures and against local governments. The consequence has been increased regulation rather than increased subsidies." Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. REV. 1, 138 (1976).

164. Hazard points out some disadvantages of judicial lawmaking: it has ephemeral legitimacy; it is episodic in form; it yields an unfinished product framed by the parties over which the court has no continuing jurisdiction and no ability to deliver results to the intended beneficiary; and it operates in “molecular dimensions rather than molar ones.” Hazard, supra note 112, at 24.

165. See the discussion of the court's role in law reform in Gerwin, supra note 4, at 500-11.

166. Despite his belief that the law reform efforts of legal advocates for low income tenants presently are misdirected, Abbott argues that “fundamental revision of the antiquated landlord-tenant law is needed. It will take ingenuity, legal skill, time, perseverance, and freedom from retaliatory pressures. Slum dwellers will need qualified counsel at every step.” Abbott, supra note 163, at 4.
Landlord-Tenant Law

remains the subject of speculation since little verification data has been collected or analyzed.167

Since the landlord and tenant court only permits the entry of tenants as defendants in a legal action, examination of the lawyer's role as the legal representative of tenants' interests narrows the inquiry to the impact of defense counsel.168 When viewed from this limited context, it is possible to identify certain recent changes effected by tenants' lawyers, and to speculate upon their impact. The short-term effects have included securing both procedural and substantive changes affecting tenants' rights at both the trial and appellate court level, posing operational problems for the dispute settlement mechanism, and altering to some extent the behavioral assumptions underlying the landlord-tenant relationship.169

These changes, however, are not the end result of imposing lawyers upon the dispute resolution process of landlord and tenant court. They are rather the beginning of the modernization of the law and the forum for its implementation required by the dictates of justice in twentieth-century urban America. Such changes are a warning that the current situation in landlord and tenant court cannot long continue in the face of increased tenant access to and utilization of legal services. This institution, in both design and operation, offers little likelihood that tenants will be fairly treated without the presence of an attorney to represent their interests. On the other hand, the participation of lawyers and the changes they effect cannot be accommodated within the existing dispute settlement mechanism.

Therefore, a significant long-range potential of the tenant lawyer lies in fostering conditions which will compel changes in both the design and the operation of the mechanism. Operating within the framework of the individual dispute, lawyers can help achieve those benefits which are likely to promote change.170 In addition to the tangible benefits previously noted, their


168. Once sued, the tenant can seek limited affirmative relief by filing a counter-claim. See D.C. Super. Ct. Rules, Landlord & Tenant Rule 5(b).

169. In addition, the effect of these changes upon the housing market in terms of supply, cost, and quality remains the subject of speculation and beyond the scope of this article. Compare Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093 (1971) with Komesar, Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor, 82 Yale L.J. 1175 (1973).

170. It is undeniable that legal services can include lawyers acting in significant
participation carries with it certain intangible rewards: it begins the educational process of informing tenants of their rights; it engenders confidence in the fairness of the legal system which has heretofore been unknown by a class of litigants; and it provides incentives to tenants to organize for more effective promotion of their interests. Without these achievements, merely providing tenants with access to legal services will have little impact.

Admittedly, legal services hold neither the panacea for poverty nor the solution to the housing crisis facing low income tenants. What it does hold is a key to unlocking the Pandora's Box which, by threatening to render the present mechanism inoperative, will compel fundamental change. The lawyers' expertise can then be employed to insure that the change will do justice to the interests they represent.

As a starting point, it is worthwhile to note that the observation of former Attorney General Robert F. Kennedy is nowhere more applicable than to the present landlord and tenant court: "The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away."171 Legal services will have made a significant contribution if they can convince tenants that this observation need not be true.

2. Social Services: Landlord-Tenant Consultant Service

The Landlord-Tenant Consultant Service (LTCS) occupies a special place in the landlord and tenant court in two respects. First, a representative of this District of Columbia government agency attends each court session, sitting in an assigned place at the front of the courtroom. This non-judicial official assumes a unique role in assisting litigants to achieve a satisfactory settlement and in providing the court with non-legal information which might help it to resolve the dispute.172

"non-courtroom-oriented" roles, such as organizers, educators and lobbyists. Operating in these capacities is also likely to affect if, when, and how reform efforts are undertaken on behalf of tenants. It is submitted, however, that the groundwork for these external efforts must take place within the mechanism targeted for reform. The tasks include convincing officials of the need for change and tenants of the potential benefits to be derived from reform.

172. The LTCS describes this activity as follows:

Recommendations are offered for consideration to the Court or the landlord so that the hardships to both parties to the dispute may be lessened. Through the aid of this Service, landlords are assisted in collecting overdue rents and tenants are saved from being evicted during the time they are making efforts to pay the rent.

"Landlord-Tenant Consultant Service," material accompanying statement of Anna R.
Second, the existence of the agency and the deference accorded to it by the court is, at a minimum, a symbolic commitment by the District government to assist in the resolution of landlord-tenant disputes. Among the most significant services provided by LTCS is the money given to qualified tenants which will enable them to avoid eviction by paying the amount of overdue rent. In addition, the agency assists in such functions as mediating and conciliating differences between landlord and tenant, working out payment plans if the tenant is not eligible for financial referral, notifying landlords of tenant complaints and seeking their voluntary compliance, and referring tenants who appear to have a legal defense to nonpayment to an attorney. The Landlord-Tenant Consultant Service was set up in 1941 as part of the Department of Human Resources in the executive branch of the District government. The agency describes its purpose as "assist[ing] tenants in overcoming the difficulties which arise between them and landlords" by "working in the Courts, for the Court and for the public." Its offices are located one floor above the landlord and tenant courtroom, thus separating it physically from the other agencies in the Department of Human Resources.

While the concept of having a court accommodate and encourage the operation of a government-sponsored social services agency is admirable, several problems inhibit the effectiveness of the LTCS in operation. First, the criteria used for granting tenants emergency financial assistance are either unknown, ambiguous, or ineffective. The agency itself admits that it has no formal regulations or rules of operation. Thus, it is difficult for tenants who must go through the application process, for landlords who must agree to delay prosecution of their case, and for the parties' attorneys to understand whether the referral offers a possible means of resolving the dispute. Moreover, it is known that to receive assistance, the tenant must be steadily employed and may not be living in a dwelling in which there are violations of the Housing Regulations. These requirements have the effect of disqualifying poorer tenants who tend to live in the worst housing and against whom many of the actions are filed. Furthermore, the verification standards

Greer, Chief, LTCS, to the D.C. Superior Court Committee on Reorganization of Landlord-Tenant Branch 2 [hereinafter cited as "Accompanying Material" and "Statement," respectively].
173. Statement, supra note 172, at 3-4.
174. Accompanying Material, supra note 172, at 1; Statement, supra note 172, at 2.
175. Id.
176. An argument can be made that these requirements are necessary to limit the likelihood that the emergency assistance will be ineffective because the tenant will be unable to pay the rent the next time it falls due and thus will end up back in court. In addition, it is understandable that the LTCS would not wish to pay money which will go to landlords who fail to maintain their premises in compliance with the Housing
require a tenant to produce a variety of documentary proof without any assurances that his application will be granted because of the inadequate criteria used to determine who is eligible. The process is degrading and the wait for certification is frustrating to the tenant who faces eviction if he does not come up with money to pay the rent.\textsuperscript{177}

The second problem inhibiting its effectiveness stems from the absence of attorneys on its staff, although LTCS claims to serve several quasi-legal functions, including determining when a tenant has a legal defense.\textsuperscript{178} In addition, while the agency admits that it was organized as a "non-legal" entity, it has requested authority to negotiate praecipes in "non-contested" suits. In support of this request, LTCS contends that it has "the contacts, the expertise, and the know-how to immediately remove from the courtroom all of the non-contested cases in L & T actions."\textsuperscript{179} Removing a case from the courtroom without assuring the tenant that the legal aspects of his case, including possible defenses, have been adequately evaluated will not insure that justice is done. Furthermore, several of the functions which LTCS ascribes to itself, together with the additional authority it requests, carry the potential for compromising the court by sanctioning the unauthorized practice of law.\textsuperscript{180}

Finally, LTCS would have to increase its resources and capabilities significantly to provide landlords and tenants with a meaningful alternative to litigation. In the thirty-one years of its existence, LTCS reported that it assisted over 14,715 persons.\textsuperscript{181} When it is remembered that more than 100,000 cases are filed against tenants each year, this figure is relatively insignificant. It can be hypothesized from these figures that LTCS can handle only about two percent of the cases filed each year, although the non-default rate in the past few years has been close to fifty percent.\textsuperscript{182}

Notwithstanding its shortcomings, however, the concept behind LTCS has merit. LTCS has had a reputation for objectivity, fairness and credibility.
in those cases in which it has been of service. The symbol appears to be worth preserving, and the possibility of expanding services may be worth consideration.

3. Investigative Services: Housing Inspectors

Housing inspectors are the employees of the District government responsible for enforcing the Housing Regulations. Their principal duty is to conduct inspections of residential premises and to report any deficiencies to the owner, the landlord, and/or the tenant. Their power to enforce correction of violations rests primarily with criminal prosecutions, which as a regulatory scheme has failed dismally. In recent years, however, the government has begun to exercise its statutory authority to make repairs, recovering its expenditures through tax liens.

The services of housing inspectors are required in a civil action arising in landlord and tenant court when the condition of the premises is raised as an issue bearing upon the tenant's nonpayment of rent. A tenant who seeks a partial or total rent abatement by claiming that the lease is void or that the landlord breached the warranty of habitability must bear the burden of proof in the trial proceeding. Meeting the burdens of production and persuasion generally requires presentation of expert testimony and supporting documentary evidence of violations. Thus, the housing inspector and his reports are an indispensable element of the tenant's case.

The Department of Economic Development and the Office of Housing and Community Development to which the inspectors are assigned will honor a request for an inspection made by or on behalf of a tenant. Both case law and the Regulations protect the tenant from retaliatory acts by a landlord displeased with a tenant's having made such a request. Inspectors will also respond to a subpoena to testify at a trial or motion hearing. While conduct-

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183. For an analysis of public enforcement of the Housing Regulations, see Gerwin, supra note 4, at 465-71. When a landlord is served with a deficiency notice, he is given thirty days to correct the violations before a reinspection is scheduled. If the landlord fails to act, he is subject to criminal prosecution. D.C. Code §§ 5-308, 313, 320 (1973). In addition, if the inspection was conducted as a part of a landlord's application for a Housing Business License or Occupancy Permit, issuance of the license should be withheld so long as the deficiencies remain uncorrected. Ultimately, the enforcement of the licensing requirements depends upon the outcome of the criminal prosecution. See D.C. Code § 5-313 (1973).


185. See D.C. Housing Regulations § 2901, providing for civil enforcement of the Regulations.

ing an inspection is a part of the District’s enforcement program, and thus the tenant is not charged, a subpoena must be accompanied by witness fees and roundtrip bus fare. When the tenant is proceeding in forma pauperis, the general practice has been to waive the witness fees. It is uncertain, however, whether the court’s granting of a motion to waive prepayment of trial costs legally includes a waiver of witness fees. An inspector’s qualifications as an expert witness, what weight to accord his testimony, and whether his report is admissible as evidence, are unsettled questions in the law. For example, one judge recently refused to admit an inspector’s report when the request for inspection had been made following the landlord’s commencement of the suit. The judge concluded that it was inadmissible on the grounds that it was a document prepared for litigation.\textsuperscript{187}

The burden upon the tenant who must rely upon the services of housing inspectors to present his case to the court is compounded when there have been several inspections conducted by different inspectors.\textsuperscript{188} In such a case, it may be necessary for the tenant to subpoena each inspector in order to introduce the various reports into evidence. Furthermore, testimony of an inspector may be required at more than one hearing during the pendency of the litigation. For example, if a landlord seeks a pretrial protective order, and the tenant’s defense is based on the landlord’s lack of entitlement to part or all of the rent because of the condition of the premises, the testimony of an inspector may be required to defeat the landlord’s motion.\textsuperscript{189} For a tenant who is denied permission to proceed in forma pauperis, or who is only marginally solvent, litigating his case could be quite costly.

Needless to say, when the tenant fails to summon a housing inspector or fails to introduce an inspection report without good cause, the tenant’s burden of proof concerning the condition of the premises will be difficult to satisfy. Under present law and the operative rules of the court, there is no formal relationship between the court and the inspectors which might ease either the financial or evidentiary burden carried by the tenant.\textsuperscript{190}

\begin{enumerate}
\item \textsuperscript{187} This incident was related to the author by Mr. Jack Schuermann, Director of the Law Students in Court Program, who was an attorney of record on the case. The oral ruling was made by Judge Hannon during the course of a trial being conducted by a certified law student.
\item \textsuperscript{188} Such a situation is not unlikely to arise since inspection functions are compartmentalized and different persons may be assigned to inspect different aspects of the housing unit, such as the electrical or plumbing systems, or the structure itself.
\item \textsuperscript{189} See Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970); McNeal v. Habib, 346 A.2d 508 (D.C. 1975).
\item \textsuperscript{190} For example, the legislation creating the Boston Housing Court provided that an inspector’s report shall be admissible as prima facie evidence of the facts stated therein. \textit{Mass. Gen. Laws Ann.} ch. 185A, § 23 (West 1977). It has also been proposed
II. Proposed Alternatives to the Present Judicial Mechanism

A. Introduction


The landlord-tenant dispute settlement mechanism in the District of Columbia court system, described in the preceding section, attracted little public attention prior to 1970. In that year, Congress enacted the District of Columbia Court Reorganization Act establishing the unified D.C. Superior Court, the United States Court of Appeals for the District of Columbia Circuit handed down its decision in Javins recognizing the implied warranty of habitability, and the District of Columbia City Council amended the Housing Regulations to create a civil enforcement remedy for tenants. Since that time the inability of the present Landlord and Tenant Branch to handle the responsibility which these events have created has been recognized. The interposition of new tenants' rights and remedies has even curtailed the ability that the court once had in functioning as a rather efficient collection operation.

The basic system has survived the past seven years substantially unchanged, not because reforms were not proposed, but because no reform proposal could be implemented. In essence, the principal reform efforts amounted to little more than a three-year discussion of proposals, counterproposals, and amended proposals. All were highly critical of the present system, but that a number of housing inspectors be assigned to the judiciary to conduct inspections and serve as impartial witnesses in cases where conditions of the premises are at issue. See discussion at pp. 698, 703, 705 infra.

191. The most recent predecessors of the Superior Court of the District of Columbia were the District of Columbia Court of General Sessions (established by the Act of July 8, 1963, 77 Stat. 77 (1963)) and the Municipal Court for the District of Columbia (established by the Act of April 1, 1942, 56 Stat. 190 (1942)). Prior to 1942, the civil court was also known as the Municipal Court.


196. See generally McNamara, The District of Columbia Landlord and Tenant Court: An Obsolete Structure in Need of Reform, 23 Cath. U.L. Rev. 275 (1973). Although each interest group had its own suggestions, the major proposals that emerged were those of Chief Judge Harold H. Greene; the Advisory Commission on Landlord and Tenant Affairs appointed by the District of Columbia City Council [hereinafter Advisory Commission]; the Real Property Law Committee of the Bar Association of the District of Columbia [hereinafter D.C. Bar Committee]; and the Special Committee of
most presented alternatives which were incomplete in terms of analysis or potential for ameliorating existing problems. In the end, there emerged from the discussion a request to Congress for an appropriation to set up a limited pilot program employing hearing examiners in the Landlord and Tenant Branch. The request was denied.

The discussion for reforming the mechanism for settling landlord and tenant disputes was first initiated in December of 1970 by the Chief Judge of the newly established Superior Court of the District of Columbia, Harold H. Greene. Among his stated reasons for doing so was the prediction that there would be a formidable problem "when the gap between the promise of the law as laid down by the appellate courts and the reality as it is compelled by the present framework becomes fully apparent." At an address before the Young Lawyers Section of the District of Columbia Bar Association, Judge Green proposed a radical overhaul in the handling of landlord-tenant disputes. His proposal called for the removal of the whole area from the jurisdiction of the court with responsibility placed in a landlord-tenant agency attached to the executive branch. At the core of his proposal was the replacement of judges with hearing examiners aided by a corps of housing inspectors. In announcing his proposal the Chief Judge declared:

There is an urgent need to re-examine the present system of resolving disputes between landlords and tenants in the District of Columbia.

Until 1967, landlord-tenant litigation in the District, like everywhere else, had been not much more than a bookkeeping operation—involving basically only the question of how much . . . was still owed. Since that time, L&T lawsuits in the District have become a great deal more complicated. Typically, they now necessitate searching inquiries into the physical condition of particular premises as well as the allocation of responsibility for any deterioration or deficiency. Much of this litigation has acquired economic,
The proposal to create an administrative agency was first referred to the City Council which appointed an Advisory Commission on Landlord and Tenant Affairs. This body met over a period of several months and submitted its report to the Council in October, 1971. The Commission did not endorse an administrative agency, although it did see a role for hearing examiners in its Housing Court proposal. In November 1971, the City Council held a public hearing on the Advisory Commission's report, which proposed that the present system be replaced by a new court with expanded jurisdiction over all rental housing matters. The following month, the Council endorsed the report and forwarded it to Chief Judge Greene.

That year Chief Judge Greene also solicited and received the recommendations of the Real Property Law Committee of the District of Columbia Bar Association. This committee proposed that a screening procedure be imposed between the filing of a complaint and the hearing in the present Landlord and Tenant Branch. As envisioned by the Bar Committee, the screening panel would be empowered to refer cases to hearing examiners for factfinding.

It was not until the fall of 1972 that Chief Judge Greene appointed a committee of five judges, chaired by Judge Margaret Haywood, to consider his proposal for establishment of an administrative agency. At about the same time, the Chief Judge submitted a budget request which proposed a pilot use of hearing examiners within the present court structure. In his memorandum appointing this Special Committee, Chief Judge Greene instructed its members to consult with the City Council's Advisory Commission.

199. While the practices and statistics discussed in the preceding section belie the conclusion that this is often the case, there is no question that it has the potential to be such.

200. Greene Address, supra note 197, at 25.

201. The proposals of the Advisory Commission described in this article were contained in the Statement of Harold Davis, Chairman of the D.C. City Council Advisory Commission on Landlord and Tenant Affairs, to the D.C. Superior Court Committee on Reorganization of the Landlord and Tenant Branch (Dec. 2, 1972), and in the Advisory Commission's Findings and Recommendations Relating to Resolution of Landlord-Tenant Disputes, which was submitted with the Chairman's Statement of Dec. 2, 1972. See pp. 702-04 infra.

202. The proposal was submitted in a letter from Godfrey L. Munter, Chairman of the Real Property Law Committee to Herbert Miller, Jr., President of the Bar Association of the District of Columbia (Mar. 11, 1971). See p. 708 infra.

203. The Special Committee of Superior Court Judges on the Reorganization of the Landlord and Tenant Branch, composed of Associate Superior Court Judges Block, Doyle, Haywood, Moultrie and Taylor, was to have reported to the Chief Judge and Board of Judges within 60 days of the Sept. 26 memorandum announcing the Committee's appointment.
He also made available to it the Bar Association's proposal, together with other written comments he had received.

The Special Committee held a series of meetings in November and December of 1972. During these meetings and hearings, representatives of many interests advanced a variety of proposals. The Special Committee submitted its report to the Chief Judge in February, 1973. They unanimously opposed the concept of an administrative agency with the majority disapproving the hearing examiner concept. Two judges suggested a modified and limited role for hearing officers.

In a strongly worded response which ran longer than the Special Committee report itself, Chief Judge Greene refused to endorse the report. He agreed, however, that both the Advisory Committee report and the Special Committee report should be submitted to the full Board of Judges, which included every judge sitting on the Superior Court bench. The latter body approved the idea of hearing examiners, who would be under the auspices of the judicial rather than the executive branch. Prior to the meeting of the full Board, Chief Judge Greene had indicated his willingness to accept such an amendment.

In March, the Chief Judge submitted a request for $117,343 to the Mayor and City Council for two hearing examiners and a supporting staff of ten employees, including housing inspectors. Although the Mayor and City Council approved this request, Congress did not. Discussions for reforming the landlord-tenant system ended abruptly in December, 1973, when Chief Judge Greene announced he was abandoning the proposal.

2. Background of the Reform Discussion

Although the consensus of those who participated in the discussions for reform was that something should be done, the general reaction to the Chief Judge's efforts was described as "vague and apathetic." A review of the proposals and suggestions will be mentioned in connection with the discussion of the principal reform proposals advanced so far. See p. 710 infra.

204. Some of the proposals and suggestions will be mentioned in connection with the discussion of the principal reform proposals advanced so far. See p. 710 infra.

205. Report to the Chief Judge by the Special Committee, signed by Judge Margaret Haywood, chairman, on behalf of Judges Taylor, Block and Moultrie (Feb. 21, 1973). See pp. 709-11 infra.

206. Memorandum from Chief Judge Harold H. Greene to Judges Haywood, Doyle, Taylor, Block, and Moultrie, at 1 (Mar. 5, 1973) [hereinafter cited as the Greene Response].

207. Id. at 6-7.


209. See Landlord-Tenant Court Reorganization memorandum II from Robert Mc-
proposals, suggestions and comments reveals that the feasibility of implementation and the possibility of efficient operation received considerably more attention than the issues of probable impact on landlords and tenants and the potential for balancing the interests of the parties to achieve a measure of justice. The discussion, when set in its proper perspective—subsequent to the major appellate court decisions and prior to the resolution of the question of a tenant's right to a jury trial in a summary proceeding—highlighted the conflicting interests which pervaded the system that was the focus of reform proposals.

In the name of judicial economy there was, on one side, the proposal to establish an administrative agency which would avoid the possibility of allowing disputes to be settled by jury trials. This suggestion was in conflict with the idea of creating a judicial settlement mechanism with an expanded jurisdiction over all landlord and tenant disputes which, given the nature of the disputes that would arise, would have to provide the right to trial by jury. Inherent in this conflict is the tension between a system with procedures specifically designed for swift disposition of cases, and the new body of substantive law, which presented the potential for significant delays in the course of litigation.

That the major proposals did not offer a complete resolution to these conflicts is best illustrated by the treatment given to the issue of landlord protective orders. These proposals, which called for creating a new settlement mechanism, either in a new system or in the present forum, conceded the right of a landlord to obtain a protective order as a matter of course. None of the proposals acknowledged the earlier decision by the United States Court of Appeals which stated that ordering tenants, who were contesting the landlord's entitlement to rent, to prepay the amount of that rent into the registry of the court was "not favored." While the court had upheld the trial

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Namara, Jr., to Nancy Wynstra, Director, Division of Planning and Research, Superior Court of the District of Columbia, at 5 (undated).

210. A history and analysis of the major landlord and tenant decisions in the District of Columbia can be found in Part One of this article. Gerwin, supra note 4.


212. Bell v. Tsintolas Realty Co., 430 F.2d 474, 479 (D.C. Cir. 1970). In addition, the Supreme Court has held unconstitutional certain prejudgment protective measures.
court's exercise of its equitable power to issue such an order, it noted that
the procedure is contrary to the ordinary processes of civil litigation, since
a plaintiff normally does not receive advance assurances of the defendant's
solvent. The provisions in the reform proposals for protective orders did
not condition the granting of an order upon a showing by the landlord of a
need for this special arrangement, nor did they limit their availability to cases
in which the payment of rent was at issue, thereby excluding cases based
solely upon expiration of a notice to quit. Furthermore, none of the discus-
sions raised the possibility that one effect of conditioning his ability to raise
certain defenses upon the prepayment of rent would be to restrict the tenant's
access to, or participation in the judicial system. The need to balance these
concerns led the circuit court to conclude that the protective measure should
be employed "only in limited circumstances, only on motion of the landlord
and only after notice and opportunity for a hearing on such a motion."²¹¹⁴

Another source of potential conflict pervading the reform discussion con-
cerned the nature of the substantive law which the proposed decisionmaking
forum would be required to implement. Consideration of reform proposals
began as the United States Court of Appeals for the District of Columbia
Circuit was being eliminated from the appellate route of civil non-federal trial
court decisions.²¹⁵ The District of Columbia Court of Appeals, whose land-

See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin of household furniture); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages). The Court held that the due process clause requires a substantive hearing on the merits prior to taking such action. But see McNeal v. Habib, 346 A.2d 508 (D.C. 1975), an opinion handed down after the Court Reorganization Act removed the circuit court from the route of trial court appeal, in which the District of Columbia Court of Appeals substantially liberalized the conditions for granting landlord motions for protective orders. Disregarding any consideration of the potential burdens on the tenant, the court upheld the granting of a protective order by a judge upon the oral motion of the landlord's attorney. The court also extended the landlord's opportunity to obtain such an order to cases based solely upon expiration of a notice to quit, in which the landlord did not join a claim for rent. In addition, the court refused to follow that part of the decision in Bell v. Tsintolas Realty, which stated that monies paid into the registry of the court should be refunded to the tenant if he voluntarily vacates the premises prior to trial. Id. at 514 n.15. The McNeal decision raises two procedural considerations. First, notwithstanding the fact that the tenant has moved, the possessory action will not be concluded because the court may be required to hold an evidentiary hearing to distribute the funds in its registry. Furthermore, were the landlord to be awarded part or all of such funds in a case in which he only sought possession, he would be receiving relief not sought in his complaint. An additional question is whether the issues involved in disbursement of the funds must be tried to a jury if either party so requests.

²¹³ Bell v. Tsintolas Realty Co., 430 F.2d at 479 & n.10.
²¹⁴ Id. at 479.
lord-tenant decisions had so often been reversed by the circuit court in opinions which modified or abandoned outdated common law doctrines, became the highest court of local jurisdiction.\textsuperscript{216} The position of the D.C. Court of Appeals was further reinforced in the midst of the discussion when the Supreme Court in \textit{Lindsey v. Normet} indicated that not many landlord-tenant issues would attract its attention.\textsuperscript{217} The Supreme Court concluded that "[A]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions."\textsuperscript{218}

The timing of the reform discussion was a final consideration because it began almost immediately after Congress approved reorganization of the District of Columbia court system in the Court Reorganization Act of 1970.\textsuperscript{219} It was not likely, therefore, that the legislators would again devote their attention to judicial matters in the District prior to testing the initial legislative package.

Against a background of existing and potential conflicts between the substantive and procedural law, and in the context of recent and continuing changes in the law and dispute settlement mechanism, discussion of reform of the Landlord and Tenant Branch of the Superior Court of the District of Columbia was undertaken.

\textbf{B. Proposal of the Chief Judge: The Landlord-Tenant Agency}

1. \textit{Summary of the Proposal}

The proposal unveiled by Chief Judge Greene in December of 1970 called for the creation of an independent agency as part of the executive branch of the District of Columbia government. This administrative body was to be known as the District of Columbia Landlord-Tenant Agency. In outlining the proposal, Judge Greene stated: "Such an agency or department would pass on evictions for non-payment of rent (except where title to realty was involved), but without the necessity for cumbersome, technical court

\begin{itemize}
    \item \textsuperscript{216} See id. § 102.
    \item \textsuperscript{217} 405 U.S. 56 (1972).
    \item \textsuperscript{218} Id. at 74. Significantly, the Supreme Court upheld Oregon's summary proceeding which precluded the tenant from raising a defense to nonpayment of rent based upon the landlord's breach of duty to maintain the premises in a habitable condition. In so doing, the Court specifically declined to disturb the state's decision to treat lease covenants as independent. Id. at 68. That this common law doctrine was one which the District of Columbia Court of Appeals had been reluctant to modify was evidenced by its many landlord and tenant decisions which were subsequently reversed by the circuit court. See generally Gerwin, supra note 4, at 482-97.
\end{itemize}
procedures, including jury trials." Chief Judge Greene suggested that the agency be given additional responsibilities to "help to perpetuate an orderly Housing Code program and a sound and healthy real estate rental industry." Functions which he recommended that the new agency perform included: conciliation of housing disputes through citizen panels, broad study of housing and code enforcement problems and recommendations, review of the Housing Code "with a view to the elimination of those prohibitions which are relatively minor and have no significant health or safety purpose, but serve primarily to harass owners of real estate and to dilute the effectiveness of the Code as a whole," and consideration of "grading the remaining regulatory prohibitions according to their real importance to the people occupying housing, as a guide both to criminal enforcement and to determinations of habitability in connection with eviction matters."

Under the Chief Judge's plan, the agency would have had a staff of full-time hearing examiners and its own investigators who would constantly be aware of code violations. He anticipated that investigators would be able to submit first-hand reports on the condition of rental premises as soon as a petition for eviction was filed. Review of the hearing examiner's decision would lie with the court; however, Chief Judge Greene emphasized that such review would be narrowly confined to errors of law and clearly erroneous factual conclusions. To discourage the "routine filing" of review petitions, he proposed that costs be assessed against the losing party. Chief Judge Greene added that "provisions for the preservation, pending review, of the rent-payment status quo determined by the Landlord-Tenant Agency," were also needed "to discourage routine appeals filed solely for the purpose of increasing or decreasing rent payments during the review period."

The Chief Judge did not elaborate on the potential nature of the hearing examiners' decisions. In a later description of this proposal, however, the alternatives were explained as follows: (1) if a tenant had no legal defense, no code violations or extenuating circumstances to explain nonpayment, the examiner could order payment or eviction, or he could approve an agreement reached between the parties; (2) if there were extenuating circumstances, he could refer the tenant to the Landlord-Tenant Consultant Service; (3) if the possibility of housing regulation deficiencies was apparent, the examiner could continue the case to permit an inspector to make a report on the

220. Greene Address, supra note 197, at 30.
221. Id. at 30-31.
222. Id. at 31.
223. Id. at 32.
condition of the premises; (4) if there were defenses to the eviction action, the examiner could set the case for hearing.\textsuperscript{224}

2. \textit{Analysis of Chief Judge Greene's Proposals}

Chief Judge Greene's proposal was admittedly incomplete. He disclaimed the purpose of proposing "definitive solutions," explaining instead that he sought to "stimulate discussion."\textsuperscript{225} The primary focus of his concern, however, was not disguised. While Chief Judge Greene spoke in terms of the administration of justice, he identified the problems as "technical court procedures" which "slow down the adjudicatory process," "Housing Code . . . prohibitions . . . [which] serve primarily to harass owners of real estate," "routine filing" of appeals, "preservation of rent-payment status quo," and tenants' attorneys who may disadvantage landlords.

It was clear that the establishment of a Landlord-Tenant Agency would remove a substantial number of cases from the docket of the Superior Court while promising a potentially more efficient mechanism for handling landlord possessory actions. It was also quite probable that the tenant would not be in any better position before the new agency than he had been before the court.

The agency idea, however, did have several positive features. It was viewed as providing expertise both in the nature of the decisionmakers and in the decisionmaking process. There would be convenient access to housing inspectors and their reports would be a regular part of the adjudication. The informal hearing process would eliminate some of the burdens of proof and production faced primarily by tenants in the course of formal judicial litigation. Chief Judge Greene acknowledged the seriousness of this latter situation when he stated that "[l]itigants who lose out for reasons unrelated to the merits of their claims or defenses . . . are likely to spread their disillusionment and their anger to the citizenry at large."\textsuperscript{226}

The negative aspects of the proposal arose primarily from what was not contemplated as part of the new agency. Principally, the failure to assign to it jurisdiction over all rental housing matters meant that the present double standard between the adjudication of landlord possessory actions and tenant affirmative claims would continue. Thus, when the Chief Judge spoke of

\textsuperscript{224} See Preliminary Evaluation of L&T Court Reorganization Proposals, memorandum I from Robert McNamara, Jr., to Nancy Wynstra, at 3 (undated). When the proposal was amended to include hearing examiners within the judiciary, the latter provision was revised to permit the examiner to certify the case for trial by the court.

\textsuperscript{225} Greene Address, supra note 197, at 32.

\textsuperscript{226} Id.
eliminating "technical court procedures" which distract attention from the merits of the case, one was left to wonder whether the landlord's abuse of such technical procedures requiring proper notice, valid service, and timely filing would be sanctioned. Also omitted from discussion was any mention of those limited affirmative remedies presently available to the tenant in the form of counterclaim, recoupment or set-off.

A fair evaluation of the Chief Judge's proposal from the tenant's perspective can not be undertaken without knowing whether and to what extent procedures which were protective of tenant interests would be included in the final design of the new mechanism. This consideration became particularly important after the Supreme Court decided *Lindsey v. Normet* approving a procedure which restricted the tenant's ability to defend against a landlord's possessory action. The Court held that local jurisdictions need not adjudicate tenant affirmative claims in a landlord's possessory action. In fact, the Court held that "it was permissible under the Due Process Clause to 'exclude all claims of ultimate right from possessory actions.'"

Similarly, the Chief Judge did not address the issue of whether the tenant would be entitled to representation in an agency proceeding, and whether, if he could not afford a lawyer, one would be appointed. Without such a provision, it is likely that most hearings would take place between one party appearing through counsel and the other proceeding *pro se*. Any system which relies solely upon the impartiality of the trier of fact, without insuring the parties a relatively equal bargaining position before that decisionmaker, may not succeed in correcting the abuses which characterize the present system.

Included in the announcement of the agency proposal, was strong emphasis on the need to revise the Housing Regulations to eliminate provisions which "serve primarily to harass owners of real estate . . ." While it is undeniable that this might have been a worthwhile undertaking, at the time the proposal was made, there was little, if any, evidence that the present regulations had been a significant obstacle to landlords' obtaining relief. The language of both the applicable legislation and case law required that violations of the Housing Regulations be substantial before a tenant would be entitled to rent abatement. The question of "substantiality" was one for resolution by the trier of fact. The mere existence of a violation was not then, and is not now, by itself, sufficient to defeat a plaintiff's claim for rent or posses-

227. 405 U.S. 56 (1972); discussed pp. 696-97 & note 218 supra.
sion based on nonpayment of rent.\textsuperscript{230} The empirical data available from the years preceding and during discussion of the proposal also raise doubts about the Chief Judge's conclusion regarding the effect of the Housing Regulations on landlords. In the years 1972 through 1976, over ninety percent of the possessory actions filed by landlords ended in default, dismissal, or confession of judgment.\textsuperscript{231}

An additional problem raised by the plan as contemplated by the Chief Judge was the proposed court review procedures. It was his expressed purpose to discourage a party from exercising his right to a day in court by assessing costs to the losing party. Such a requirement raises a question of fundamental fairness, however, as it is obvious that the greatest hardship falls on the party least able to pay—the tenant. Further, the Chief Judge maintained it would be necessary to preserve the rent payment status quo pending court review. This provision potentially conflicts with the stringent standards mandated by the circuit court in order for the landlord to obtain a protective order.\textsuperscript{232}

Finally, the most serious potential problem with Chief Judge Greene's proposal arose from the absence of safeguards against one of the most common and undesirable characteristics of an administrative body: who would control the new agency. It is well known that a regulatory agency can become controlled by or subservient to the interests it is supposed to regulate. Thus, without appropriate safeguards, the fairness of the decisionmaking process in the new agency would be subject to question.

On balance, the orientation and defined provisions of the Chief Judge's proposal appeared to be potentially more beneficial to landlords than tenants. While it is significant that the suggestion for removing settlement of landlord and tenant disputes from the court met with almost unanimous opposition from those who participated in the reform discussion, the hearing examiner concept as essentially contemplated by the proposal was received favorably, particularly by representatives of non-tenant oriented interests.\textsuperscript{233} It is not


\textsuperscript{231} See Table 3.

\textsuperscript{232} See pp. 695-96 & note 212 supra.

\textsuperscript{233} Almost all groups which submitted comments or suggestions, with the notable exceptions of the Neighborhood Legal Services Program and the Special Committee, approved of the concept of nonjudicial court personnel vested with some authority in the dispute settlement process. Among the interest groups which commented on the Chief Judge's proposal were the Building Owners and Managers Association, the Washington Board of Realtors, the Metropolitan Board of Trade, the Bar Association of the District
possible to conclude, however, that the mechanism, if implemented, would, in fact, represent an unfair balance of landlord and tenant interests. Those provisions most necessary to protect tenant interests were not addressed in the initial proposal and did not receive significant attention in subsequent discussion. In the final analysis, it is perhaps best to view the Chief Judge's proposal as a valuable stimulus for the discussion of reforms and the proposal of alternatives which followed.

C. Proposal of the City Council Advisory Commission on Landlord-Tenant Affairs: Housing Court

1. Summary of the Proposal

The Advisory Commission was comprised of an equal number of landlord and tenant representatives appointed by the City Council to consider Chief Judge Greene's proposal. It unanimously agreed that the resolution of landlord and tenant disputes should remain with the courts, although the Commission did not reject all of the Chief Judge's proposals.\textsuperscript{294}

The Commission identified three primary areas of needed reform: (1) greater speed in the resolution of contested cases, (2) wider jurisdiction of the court to allow for actions by tenants, and for city prosecutions of Housing Regulation violations, and (3) arbitration as an alternative to trial in complex cases such as rent strikes.\textsuperscript{295} Rather than create an administrative agency as Chief Judge Greene had suggested, the Commission concluded that the present Landlord and Tenant Branch should be replaced by a Housing Court.\textsuperscript{296} It advocated that this judicial institution should be either a branch or division of the Superior Court or an independent court system.\textsuperscript{297} It proposed that the Housing Court have jurisdiction over actions involving possession or condition of rental property, and over criminal prosecutions.\textsuperscript{298}

The Advisory Commission envisioned that potential plaintiffs in the new court system would include landlords, tenants, and District government offi-
cials. It also suggested that judges be assigned exclusively to the Housing Court and that they serve for an extended period of time in order to develop an expertise in this area of law. New powers to be given the judges were to include the power both to appoint receivers for properties undergoing owner abandonment and to order a landlord to abate violations of the Housing Regulations.

Although they unanimously rejected the Chief Judge’s proposal to establish an administrative agency, the members of the Commission included a recommendation concerning the use of hearing examiners. It defined their role in such a way, however, so as not to deprive a judge of jurisdiction, but rather to provide assistance in uncontested cases. Duties of the examiners, as envisioned by the Commission, would include granting stays for payment, referring consenting parties to an arbitration or mediation service or a social services branch, conducting pretrial conferences (including ordering an official inspection of the premises), and entering protective orders on the return date which would be reviewable by the judge assigned to hear the case.

According to the Commission’s proposal, the Housing Court would have three related services attached to it: arbitration and mediation, social services and counselling, and property investigation. If both parties consent, or provisions were included in the lease, the hearing examiner could refer the dispute to an arbitration service for resolution. When a defense to nonpayment of rent raised a question about the condition of the premises, the examiner would be required to order an inspection by a member of the property investigation staff attached to the court. The inspector would then serve as an impartial expert witness, which either party could rebut by introducing its own expert evidence at trial.

The Commission also recommended that the Housing Court have a social services branch along the lines of an expanded version of the Landlord-Tenant Consultant Service. It would provide financial, employment, and other related counselling assistance, as well as emergency aid. The proposal called for staffing this branch under contract with the Social Services Administration of the District’s Department of Human Resources. It suggested that there be a five-day deadline within which the social services branch would be required to report on the status of cases assigned to it.

The members of the Advisory Commission envisioned the new Housing

239. Id.
240. Id. at 6.
241. Advisory Commission Chairman’s Statement, supra note 201, at 4-5.
242. Id.; Advisory Commission Proposal, supra note 201, at 5.
243. Id. at 4.
244. Id.
Court as providing tenants with a forum, where, as a matter of right, they could initiate legal actions. Specifically, the Commission recognized the right of a tenant to seek injunctive relief, request escrow receivership of rent monies, and file a formal complaint against a landlord for violation of the Housing Regulations. The tenant would retain the right to file a counterclaim in an action brought by the landlord. In addition, under the new system, the landlord could bring a civil action, other than one for possession, against a tenant for breach of a lease covenant. The Advisory Commission suggested that the court be empowered to order civil penalties, such as fines, probation, or "housekeeping school."²⁴⁵

2 Analysis of the Advisory Commission's Proposals

Unfortunately, the meager attention paid to this proposal centered on the procedural requirements for its implementation rather than its merits. The Advisory Commission made an impressive effort to examine the whole landlord-tenant relationship and to develop a judicial mechanism which would serve the interests and protect the rights of all the parties appearing before it.

In addition, many of the Commission's specific proposals afford the same advantages held out by Chief Judge Greene's administrative agency concept. For example, the Commission recommended assignment of judges to the Housing Court for a substantial period of time (three years was suggested). This would accommodate those who argue for informed decisionmakers on the theory that their expertise improves the quality of the decisions. Further, the Commission's proposal matches the Chief Judge's recommendation that there be a corps of housing inspectors to assist the decisionmakers, by including within the Housing Court system a property investigation service. The Commission recommended, however, that the present method of inspecting for purposes of licensing and criminal enforcement and for answering tenants' complaints remain within the appropriate division of the executive branch.²⁴⁶ Presumably this would avoid a conflict of interests problem which might arise from placing a single inspector in the position of exercising discretionary judgment on matters of licensing and prosecution and also of testifying as an impartial court witness. The Commission acknowledged the need for revising

²⁴⁵ Id. at 5-6.
²⁴⁶ Although the Advisory Commission's report specifically referred to the Department of Economic Development as retaining the responsibility, this body has since been replaced by the Department of Housing and Community Development, which has responsibility for housing inspection functions. District of Columbia Reorganization Plan #2 of 1975.
the Housing Regulations. It did not place as much emphasis on this aspect as did the Chief Judge, however, and it did not suggest that the revision be undertaken by the same body which would be called upon to interpret it in the context of a landlord-tenant dispute.

The Commission strongly emphasized the role of a social services branch. The expanded role envisioned for this branch implied a recognition of the need to consider social and economic factors in reaching a just resolution of a dispute. In this regard, it appears from the Commission report that it considered options to the permanent entry of a judgment against a tenant who requires additional time to make payment of the rent due. While the Commission contemplated that the case be continued when it was referred to the social services branch, it recommended that the latter be required to report back to the court within five days of the date of referral. This alternative would provide a means of guaranteeing payment to a landlord within a reasonable time when the landlord was entitled to immediate payment. At the same time it would go far towards eliminating the unfairness of entering judgment by confession against an indigent tenant whose premises may require some major repairs, but ones which are not significant enough to warrant total abatement. Abuse of the practice of entering confessed judgments has potentially more serious consequences than the tenant may contemplate at the time of the agreement. A judgment may have an adverse effect on an individual's credit rating, thus stigmatizing future applications for housing and employment.

The Commission's proposal approved the use of hearing examiners, although it did not specify the nature of authority such examiners would be given. It did suggest that such personnel might assist judges in uncontested cases and conduct the first call of the day's calendar, but it was unclear whether these were functions beyond the capability of a clerk to perform. Thus, the potential for using examiners to end the practice of summarily approving confessed judgments by tenants, or of entering default judgments without minimal assurances that proper service of process has been effected and that the amount claimed is in fact unpaid and owing, remains unexplored.247

The Commission's proposal, while presenting a good beginning for revising the present system within the judicial branch, omitted discussion of some important operational aspects. For example, it did not specify how the proce-

247. For a discussion of present court practices and procedures, see pp. 653-66 supra. See also D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 12(a), for court proceedings concerning the calling of the calendar. For a proposal addressing these problems see pp. 733-43 infra.
dures of the Housing Court might eliminate the excessive delays which plague the present system. Furthermore, the Advisory Commission did not address the problems raised by its suggestion that a landlord and tenant be required to submit their dispute to arbitration or mediation if the lease so specified. At the outset, the Commission should have considered whether such a provision might operate as an implied waiver of the tenant's right to trial. Theoretically, this potential constitutional infirmity could be cured by including in the lease an express waiver of the right to a jury trial together with the arbitration requirement. To sanction this type of "voluntary agreement," however, ignores the reality that a tenant normally has very little power to effect a change in lease provisions. A proper balancing of the interests of both parties requires that the Commission provide assurances that the advantage accruing to the landlord by being able to dictate the terms of the lease would not operate to deprive the tenant of important rights.

Another weakness in the Commission's proposal was its vagueness on the proposed structure of the Housing Court. This shortcoming may have accounted in part for the lack of attention which the proposal received. In suggesting merely that the new court be either a branch or division of the Superior Court or an independent court system, the Commission ignored an important distinction. Had the Commission been more specific, attention might have focused on the merits of the proposal rather than on speculative technicalities of implementation. Thus, while the Court Reorganization Act had named the divisions into which the Superior Court was to be divided, it allowed such divisions to be subdivided into "such branches as the Superior Court may by rule prescribe." Further, the Superior Court was empowe-

248. The Commission did not include any discussion of the right to a jury trial. While this question had not yet been decided by the Supreme Court in Pernell, see note 95 & accompanying text supra, the Commission did not indicate how the Housing Court might handle jury trials in the event the tenant was recognized as having such a right.

249. Since the Supreme Court has consistently held that the seventh amendment right to jury trial does not apply in state courts, Pearson v. Yewdall, 95 U.S. 294 (1878), lease clauses which contain a waiver of a tenant's right to request a jury trial in a landlord's action to recover possession of the leased premises have generally been upheld. See, e.g., Goelet Realty Co. v. Robin Redbreast Hosiery Co., 14 N.Y.S.2d 68 (App. Div. 1939) (per curiam). In the District of Columbia, however, the argument in favor of the right to trial by jury in possessory actions is grounded in the fact that the courts were established by Congress, and thus the seventh amendment guarantee should be applicable. The Supreme Court adopted this reasoning when it recognized the tenant's right to jury trial in actions by landlords to recover real property in Pernell v. Southall Realty Co., 416 U.S. 363 (1974). Generally, contractual waivers of constitutional rights are not favored by the courts. See D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972), in which the Court applied the standard governing the waiver of constitutional rights in a criminal case to determine the validity of a contractual waiver of due
ered to adopt and enforce rules it deemed necessary, without the approval of the court of appeals, if the rules did not conflict with the federal rules. The possibility of avoiding legislative action and appellate court approval by designating the new court as a branch rather than a division of the Superior Court might have been explored further, particularly in light of the receptiveness of the Chief Judge of the Superior Court to the idea of change. It is significant that the enactment of "home rule" does not allow for direct implementation of the proposal, if it is determined that legislation is required. The City Council is expressly prohibited from enacting any "act, resolution, or rule with respect to any provision of Title II of the District of Columbia Code" (relating to organization and jurisdiction of the District of Columbia Courts). Thus, the District of Columbia remains dependent on Congress for major changes in its court structure.

The proposal of the Advisory Commission merits more consideration than it received. It was and remains a good starting point for discussing reform of the present system, while looking at the full picture—the affirmative claims and defenses of both landlords and tenants, their legal rights and liabilities, and the need to provide both parties with equal access to and protection of their interests in a judicial dispute settlement mechanism. Its failure to address fully the aspect of judicial efficiency which was the focus of the Chief Judge's proposal, however, left the task of investigating and substantiating its feasibility incomplete. Unfortunately, the Special Committee appears to

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221. The pertinent provision is as follows:

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure . . . unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

223. During the time that this proposal was being formulated, several major urban cities were likewise developing or implementing Housing Court proposals, including New York, Boston and Baltimore.
have ignored it; Judge Greene distorted it by citing it only for purpose of claiming support for the hearing examiner concept; and few others have commented on any aspect of it other than the question of whether legislation, regulation, or rule changes would be required for its implementation.

D. Proposal of the D.C. Bar Association's Real Property Law Committee Review Section

1. Summary of the Proposal

The Real Property Committee of the Bar Association of the District of Columbia met to consider Chief Judge Greene's original proposal and unanimously resolved that litigation of landlord-tenant disputes should remain within the judicial system. Along with its resolution, however, the D.C. Bar Committee proposed creation of a "Review Section" which would include the use of hearing examiners in its procedures.254

As the Committee envisioned the new procedures, the Review Section would summon all parties involved in a dispute to a preliminary hearing. Examiners, housing inspectors, and other necessary personnel for conducting a factual investigation would then be available. It was reported to be the consensus of the Committee that the proposed examiners be given "full powers to determine facts, but that all matters of law pertaining thereto should be decided by a Judge of the Superior Court."255 Under this procedure, the Committee believed cases involving only money would be separated from those involving the condition of premises and other issues.

2. Analysis of the D.C. Bar Committee's Proposal

The Review Section proposal was vague and incomplete. Its significance was primarily its opposition to the creation of an administrative agency as proposed by Chief Judge Greene. In retrospect, it appears that the Committee had sought a consensus for suggesting procedures which would use hearing examiners within the court system.

The Real Property Law Committee's submission to the Chief Judge and to the President of the Bar Association took the form of a flow chart which contained very little explanation. The system depicted a Review Section which referred cases to an examiner or to the court, and received cases referred back to it from the examiners after investigation. The letter accompanying the proposed chart did not elaborate on the substantive nature of the proposed procedures. Thus, many elements of this proposal remain un-


255. Id. at 2.
clear, including such questions as who would comprise the Review Section, and what would be the criteria of review or the standards of decisionmaking.

To one not familiar with anything other than what was written or depicted, the Committee’s proposal appeared to do little more than impose one more bureaucratic layer between the tenant and his “day in court.” This position is corroborated by two aspects of the proposal. First, the proposal was silent on the subject of other reforms of the present system. Apparently, the intent was to include the Review Section in the present system without removing many of the most obsolete and abusive procedures. In addition, the proposed Review Section is premised in part on the assumption that there is a distinction between contested cases involving only money and those involving the condition of the premises. Until these two issues are viewed as the norm, rather than as the exception, meaningful reform by which the tenant can use his legal remedies as a tool for improving and maintaining the condition of his housing cannot take place.256

E. Recommendations of the Special Committee of Judges: Procedural Changes Within the Present System

1. Summary of the Recommendations

The Special Committee of Judges unanimously opposed the removal of landlord-tenant affairs from the jurisdiction of the Superior Court. The majority also disapproved of the use of hearing examiners. The Special Committee did recommend alternatives, the motivation for which included considerations of justice as well as those of efficiency. “The concern is not for lessening the time and effort required by the Judge,” the Special Committee Report stated, “but rather for making possible the same speedy and just disposition of cases there that is available in most other divisions of the court, and to lessen even further the amount of time on the trial date itself which parties must spend waiting for the actual hearing.”257

The principal recommendation, in the words of the Special Committee’s

256. The D.C. Bar Committee admitted considering a suggestion in which a landlord and tenant, prior to entering into a rental agreement, would prepare and sign a checklist of the condition of the premises, which would be certified by an inspector. Although the idea of allowing indigent tenants to contract freely for substandard, inexpensive housing offers attractions to free market economists and others philosophically opposed to governmental interference with private relationships, the proposal contains no provision for correcting the imbalance in the landlord and tenant bargaining positions. In addition, it is likely to allow the further deterioration of housing to go unchecked.

257. Special Committee Report, supra note 205, at 1.
Report, was "one which would dispose of a greater number of cases on the return date." This would be accomplished by expanding the Landlord-Tenant Consultant Service. The Special Committee adopted the position, advocated in the testimony of representatives of the Landlord-Tenant Consultant Service, that if a tenant was informed by the summons and complaint forms of the availability of this service, the LTCS could ready the case for immediate disposition on the return date. According to the Special Committee, this could be accomplished in two ways. First, although the LTCS has no attorneys on its staff, its personnel would refer the tenant to an attorney if in the course of the interview, violations of the Housing Regulations or other legal defenses surfaced. Thus, it reasoned that a defendant with a potentially meritorious defense could secure legal assistance before the return date instead of waiting for the judge to appoint counsel. Second, in the words of the report, "Where no defense is being raised there seems no reason why the recommendation of the Chief [sic], LTCS, could not be implemented almost immediately." Although it was not stated in the report, these suggestions assume that the tenant would not merely be informed of the LTCS, but would somehow be encouraged to consult this agency.

As the Chief Judge and the Advisory Commission had done, the Special Committee recommended that the court acquire its own staff of housing inspectors to inspect as soon as a tenant claims the existence of housing code violations. In a footnote to the report, the Special Committee expressed the hope that such a report could be available on the return date.

The Special Committee generally did not comment on specific proposals advanced by representatives of the organizations which appeared before it. It did, however, respond to a suggestion of representatives of property management companies that tenants be required to file an answer to a plaintiff's complaint so that the landlord would be informed of the defenses. At the same time, management representatives were also urging, in the name of efficiency, that a defendant not be allowed a continuance on the return date in order to file such an answer. In the opinion of the Special Committee, it was not "deemed feasible to require tenants to answer." Instead, the Special Committee suggested that the court make available suitable forms "setting forth in the simplest but least suggestive language the various pos-

258. For a discussion of the Landlord-Tenant Consultant Service, see pp. 686-89 supra.
259. Special Committee Report, supra note 205, at 2.
260. Id.
261. Id.
sible defenses." It also suggested there be increased staffing for the Landlord and Tenant Branch Clerk's Office to enable the "office's important work to remain current."

In passing, the Special Committee noted the problem of service of process and the need for reform of practices which "border on fraud." It also mentioned the need to look into the advisability of holding night sessions and of having the judge conduct the first call of the day's calendar. In making these recommendations, the Special Committee expressed the belief that the fair administration of justice required the court to be cognizant of social as well as legal issues. In its final paragraph, the Special Committee suggested that the court might require a landlord on his complaint to certify as to the nonexistence of code violations as of a certain specified date prior to filing.

2. Analysis of the Special Committee's Recommendations

The Special Committee had before it a variety of proposals, comments, and recommendations for changes. These varied from total repression of tenant's rights and civil liberties to radical adjustment of the parties' positions relative to one another in a legal controversy. It chose instead to make recommendations of an essentially procedural nature designed to effect changes within the existing framework of the landlord and tenant court. Its report, however, did not substantiate the articulated expectation that implementation of its suggested changes would eliminate the congested calendar and result in an improved system for the delivery of justice. In fact, it was not apparent from the report whether the recommendations would have any significant impact on the present practices conducted in and related to the operation of that court.

Only in the closing paragraphs of its report did the Special Committee consider two of the major problems of the present system. Implied in the suggestion that a judge supervise the first call of the day's calendar was the intent to curtail the practice of landlords' attorneys coercing tenants into "settlements" requiring the tenant to confess judgment. In addition, the Special Committee mentions the idea of making a landlord certify the nonexistence of Housing Regulation violations at the time he files suit for posses-

262. Id.; see Boston Housing Court Summary Process Form 2A (Answer to Complaint).
263. Special Committee Report, supra note 205, at 3.
264. Id. at 4. The Special Committee did not elaborate further because it noted that this problem was being addressed by another committee of judges. Id.
265. Id. The Report suggested the possibility of a period of three months prior to the filing of a complaint. Id.
266. See pp. 654-55 supra.
sion based upon non-payment of rent. Such a requirement should act as a deterrent to the maintenance of substandard housing. These suggestions, however, were little more than procedural stopgaps. They did not affirmatively address the real issues.

The Special Committee's major recommendation was to increase the frequency and manner of using the Landlord-Tenant Consultant Service. This agency, by its own admission, has no regulations or guidelines and it appears doubtful that it could fulfill the role the Special Committee envisioned for it. Furthermore, the Special Committee did not make any recommendations designed to clarify LTCS procedures or to make it more accountable to the court. A related problem is posed by the Service's admitting to practices and arguing for additional powers which look very much like the unauthorized practice of law. In initiating an expanded role for LTCS, the Special Committee does not explain the basis for its assumption that if the LTCS were listed on the summons, more cases could be disposed of on the return date. Admittedly, it is not known whether the listing of the telephone numbers for Neighborhood Legal Services and the Legal Aid Society has significantly increased the retention of lawyers by tenants prior to the return date; but observation of a court session on any given day will confirm that there are still many tenants who request legal assistance after appearing in court, and still others who do not understand their entitlement to counsel.

In fairness to the Special Committee, it is to be commended for its independent consideration of the Chief Judge's proposal. It had much to consider in a very short period of time. The lack of an understanding of landlord-tenant practices exhibited in the recommendations can, in part, be explained by the fact that three of the five judges assigned to the Special Committee had been on the bench only three months prior to their appointment and had

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267. See discussion of LTCS, pp. 686-89 supra. The Special Committee Report did not include any provision similar to the Advisory Commission proposal that the Social Services Branch be given a specified time within which to process and report back on a case referred to it.

268. For example, the Landlord-Tenant Consultant Service requested that it be allowed to negotiate praecipes, notify a landlord of complaints and obtain his voluntary compliance, and determine whether and when to recommend that a tenant obtain legal assistance. See J.H. Marshall & Assocs. v. Burleson, 313 A.2d 587 (D.C. 1973); see also ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3, EC 3-3, 3-4, 3-5, 3-6 & n.3. (1974).

269. In his memorandum appointing the Special Committee, Chief Judge Greene requested that it submit a report within 60 days. It is reported that Judge Haywood did not receive a copy of the memorandum for approximately one month after its issuance, and was thus unaware of her appointment as chairperson. Memorandum from Judge Haywood to Judges Doyle, Taylor, Block, and Moultrie (Oct. 25, 1972).
not presided in the Landlord and Tenant Branch.\textsuperscript{270} Interestingly, one member, known to be among the most conservative of the judges, had been a hearing examiner prior to his appointment to the bench. The Special Committee Report, however, did serve a very important purpose. It provided an official opposition to the Chief Judge's proposal. Further, in offering alternatives, however unsatisfactory or unworkable, the Special Committee at least provided a judicial response showing that reforms could be accomplished in a manner other than that recommended by the Chief Judge.\textsuperscript{271}

3. \textit{Separate Report of Two Special Committee Members}

In a separate report by Judge Taylor, subscribed to by Judge Doyle, these two Special Committee members registered their disagreement with certain aspects of the Committee's Report. In contrast to the Committee's suggestion that the judge take the bench during the first call, Judge Taylor maintained that the judge should not handle any of the matters that take up the morning session. He suggested that a lawyer holding a high civil service grade classification, with a title other than hearing examiner, could handle such assignments as:

- explaining to tenants what is meant by the terms of a proposed praecipe and the entry of judgment in accordance with the praecipe.

\textsuperscript{270} One consultant to the Chief Judge's reform project later wrote of the Special Committee's Report: "[T]he final report demonstrated either a disinterest on the part of the committee or a lack of understanding of the operation of the proposed system." McNamara, \textit{supra} note 196, at 295. In the author's opinion such criticism is unfair. It was surmised by one person involved in the hearings that such a committee was appointed because the Chief Judge believed that he would be assured of approval for his proposal.

\textsuperscript{271} Another organization which concentrated upon recommending changes within the present mechanism was the Neighborhood Legal Services Program. Its major contribution to the reform discussion took the form of extensive analysis and commentary upon proposals and suggestions submitted by other interest groups. See Neighborhood Legal Services Program's Report and Recommendations to Chief Judge Greene Concerning Reform of Landlord-Tenant Court (July 28, 1972). The principal recommendation of the report, which was not contained in the other proposals, was that procedures be established for tenants who appear in court to be interviewed and apprised of their rights by "trained personnel" who could then refer them to the appropriate legal or social services agencies prior to the judge taking the bench. Although it did not elaborate, the report suggested that existing legal and social agencies could provide such personnel so that it "would not necessarily require additional expense by the Court, as would the hiring of hearing examiners." \textit{Id.} at 21. This recommendation is sufficiently similar to the Special Committee's proposal for increased use of the Landlord-Tenant Consultant Service, and that of the D.C. Bar Committee for a screening panel, to suffer from the same weaknesses. See discussion pp. 708-09 \textit{supra}. The NLSP's first recommendation was to upgrade the physical facilities and judicial attitudes of Landlord and Tenant Court by elevating it to equal status with the Criminal, Family, and Civil Divisions.
cipe; referrals to the Landlord and Tenant Consultant Service; entry of default judgment when a defendant is not present; dismissal for want of prosecution when plaintiff is not present; if housing violations are alleged, referral to housing inspectors as provided for in the proposed [Special Committee] report; acting upon motions and any other matters where counsel consent; and any other matters which we can place in the jurisdiction of the Hearing Commissioner by a change in the rules and without legislation, but not including at this time, the trial of the case.272

In his disagreement with the Special Committee, Judge Taylor appears to recognize that some of the present abusive practices should come under “official” scrutiny, albeit by someone other than the presiding judge.

4. The Chief Judge's Response to the Special Committee's Recommendations

The Chief Judge did not attempt to veil his displeasure with the Special Committee’s report. The opening paragraph of his memorandum to the Committee members set the tone:

As you know, it is my general practice to support committee recommendations to the Board of Judges even if I have some disagreements with them. However, in this case, inasmuch as the subject matter was originally proposed in a public speech I made after long and careful consideration—a speech that was based not only on my own observations but also on those of a number of other judges—and inasmuch as the committee report departs radically from the goals I had in mind, it will not be possible for me to support the committee’s conclusions.273

In his response, which runs longer than the Special Committee report itself, the Chief Judge’s conclusions do not appear to follow from the report which he is criticizing. Rather his attack on the report more closely resembles an attempt to make orange juice from applesauce than a disagreement over different means to reach the same objective. For example, Judge Greene states that the basic difference between the Special Committee’s conclusions and his own is that he regards “the central problem in the Landlord-Tenant Branch as one which would rectify serious problems of unfairness in that Branch arising from the imbalance created when one side has legal representation and the other does not.”274 He attributes to the Special Committee

274. Id.
the position of recognizing the primary problem as one of "various social factors." He responds that the court lacks the capacity to provide solutions to such problems.

There are at least two basic discrepancies in the Chief Judge's characterization of the primary problem as one resulting from the imbalance created by legal representation of only one party to the proceeding. First, while the party most often unrepresented is the tenant, Chief Judge Greene already cited the unfairness to landlords when tenants manage to secure representation as a principal reason for reform. Second, in his proposal, Chief Judge Greene excluded any mention of whether attorneys would have a role in the hearing examiner system. Thus, Chief Judge Greene's response criticizes the Special Committee for failing to address a problem for which he does not offer a satisfactory solution in his own proposal.

Further, while the confidence in the Landlord-Tenant Consultant Service exhibited by the Special Committee in its report is admittedly subject to question, Chief Judge Greene takes this recommendation to mean that the Committee was suggesting that most tenants "probably have no defense anyway." He responds that "such referrals [to LTCS] seem to me to smack of an affront to the dignity and equal standing of tenants before the law." Considering the difference in emphasis between Chief Judge Greene's proposal which primarily addresses efficiency considerations, and the Special Committee's Report, which identifies its concern as equalizing the delivery of justice to landlords and tenants, it is ironic that the Chief Judge should be accusing the Committee of disregarding the tenant's rights.

It is significant that neither in his initial proposal nor in his response does the Chief Judge explain how the hearing examiner concept would "dramatically lessen" the impact of the mere fact of legal representation on the outcome. On the contrary, several unanswered questions remain. Is it to be assumed that hearing examiners would be more objective than judges? Even if the examiners acquire a knowledge of the poorer housing accommodations and have before them inspection reports, a legal advocate for a landlord and a pro se tenant are not in an equal position before the decisionmaker. Is the practice of attorneys compelling "confessed" judgments from tenants to be curtailed? Will the practice of entering large numbers of default judg-

275. See the discussion of the Chief Judge's proposals p. 699 supra.
276. Id.
278. In a newspaper article announcing the Chief Judge's abandonment of the reform effort, the following was reported: "Judge Greene yesterday defended his plan again as the best way to achieve justice. 'Most of the time,' in suits against tenants in arrears for rent, 'there is no defense,' Greene said." Wash. Post, Dec. 4, 1973, § C, at 4, col. 4.
ments at the landlord's request continue to go unsupervised by the decision-making authority? Will the examiner inquire whether or not the tenant has available such defenses as retaliatory eviction, breach of the covenant of quiet enjoyment, or breach of the implied warranty of habitability? Will he seek to determine whether the premises have had long-standing housing code violations, which were only recently corrected in time for the landlord to initiate the action, and thus which should entitle the tenant to rent abatement or restitution?

In his response, Chief Judge Greene does acquiesce in the Special Committee's suggestion that the examining and inspecting functions be invested in an adjunct of the court rather than in an administrative agency attached to the executive branch. The Chief Judge reads this suggestion, however, as support for his idea of employing hearing examiners, and he cites the recommendation of the City Council's Advisory Commission to that effect. This support appears misplaced for two reasons. First, the Special Committee expressly rejected the hearing examiner concept. Second, the Advisory Commission, while approving the use of hearing examiners, proposed a role for such personnel which would be considerably more limited than that envisioned by the Chief Judge. Furthermore, Chief Judge Greene's response fails to consider the recommendation of the Advisory Commission in the context of its other proposed reforms. Instead, the Chief Judge goes on to chastise the Special Committee: "It has been my hope and expectation that the Court's special Landlord-Tenant Committee would similarly perfect and improve the proposal I had made, rather than to address itself to completely different purposes and objectives."\[279\]

While the report of the Special Committee is subject to criticism for holding too closely to the present system and failing to recognize certain necessary basic reforms, Chief Judge Greene's response rejected outright several of the Special Committee's reform recommendations. These included having the judge take the bench during the first call, expanding night sessions,\[280\] and increasing the budget of the Landlord and Tenant Clerk's Office. Although the Chief Judge stated that he had no strong objection to providing answer forms for tenant-defendants, he expressed doubt in its benefit.

It is significant that both the proposal of Chief Judge Greene and that of the Special Committee were consistent in their silence regarding the issue of

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280. Chief Judge Greene's opposition to the expanded sessions suggestion was based on the results of a three-month experiment in 1967. He claimed that judges sitting on weeknights were unoccupied 75% of the time. Id. at 5. This, of course, was prior to the decisions in Brown and Javins recognizing new lines of tenant defenses.
a tenant's right to initiate a suit for affirmative relief in a new or improved settlement mechanism. In this respect, both proposals were equally incomplete and inadequate for insuring that the tenant is provided an equal opportunity to seek justice.

F. Conclusion of the Reform Discussion

In a memorandum dated one month after his initial response to the Special Committee, Chief Judge Greene concluded that the court has the inherent power to appoint "subordinate judicial officers." He pointed out that when Congress created the job of Auditor-Master in the District of Columbia Court Reform Act of 1970, it included language that the Master shall "perform such other functions as may be assigned by the Superior Court." Chief Judge Greene argued that such language provided authority for the Master to undertake duties of a quasi-judicial nature. Thus, the Chief Judge concluded the Master could assume the role of hearing examiner in a court-supervised system.

The Chief Judge's memorandum also noted that the Landlord-Tenant Consultant Service had reported that it should not be assigned to handle an additional percentage of cases unless it was also given the authority to require landlords and tenants to accept the solutions LTCS developed. The memorandum is ambiguous as to whether this was the recommendation of the Chief Judge or was merely being noted for the record.

Finally, the memorandum mentions the concern of some judges that housing inspectors attached to the court may present a conflict of interest. Chief Judge Greene indicated his willingness to have the inspectors be employees of the executive branch. He agreed to make the appropriate adjustment in the budget request upon the condition that the inspectors would be assigned to court-related investigations full time.

The Board of Judges, the Mayor and the City Council approved the Chief Judge's proposal in theory. In addition, they adopted his budget request of $117,343 for twelve additional court employees, including two examiners, and an unspecified number of investigators and supporting personnel. Congress rejected the request, and Chief Judge Greene subsequently announced pub-

281. Memorandum of Chief Judge Greene (Apr. 5, 1973) [hereinafter cited as the April Memorandum].
283. April Memorandum, supra note 281, at 2.
284. Id. at 4.
285. Id.
licly that he was abandoning the proposal. Since that announcement in December, 1973, no official efforts to reform the present system have been undertaken.

G. The Effect of Rent Control

The same year that Chief Judge Greene abandoned his efforts, the basic structure of the District of Columbia's rent control program was instituted. Following the example of a provision in the World War I rent control legislation (the Ball Act), the regulations promulgated pursuant to the initial rent control act included a section restricting the instances in which a landlord could evict a tenant who had not defaulted in the payment of rent. While the original legislation had not specifically authorized such eviction restrictions, substantially similar provisions were later included in the language of the Act itself.

The Act, following the example of the original regulations, enumerates six grounds upon which a rent paying tenant can be evicted, thus implying that if the landlord's reasons do not fall within one of those categories, a rent-paying tenant cannot be evicted. As a means of enforcing these provi-

287. In that year, Congress passed the District of Columbia Rent Control Act of 1973, Pub. L. 93-157, 87 Stat. 623 (1973). The first set of regulations was promulgated and implemented by the District government prior to the election of members of the City Council pursuant to the Home Rule Act, supra note 40. Rent Control Regulations, Regulation 74-20, 21 D.C. Reg. 289 (Aug. 1, 1974). Following implementation of Home Rule, the newly elected City Council passed rent control legislation which reenacted, with amendments, the original regulations. Rental Accommodations Act of 1975, D.C. Code § 45-1631 (Cum. Supp. IV 1977). Under the latter act, the original Housing Rent Commission was replaced by the Rental Accommodations Commission, whose procedural and administrative functions would be handled by the Rent Administrator.
289. Rent Control Regulations, supra note 287, at § 10.
291. Id. at §§ 45-1653(b)(1)-(6). These categories included situations in which:
(1) tenant has violated an obligation of his tenancy and has failed to correct it after notice;
(2) tenant was convicted of performing an illegal act on the rented premises;
(3) landlord seeks to recover premises for his personal use and occupancy;
(4) landlord has contracted to sell the property to a buyer who desires the premises for his own immediate use and occupancy;
(5) landlord intends renovations which cannot be performed while the premises are occupied or seeks to demolish the housing accommodation; or
(6) landlord intends to discontinue the use of his structure as housing accommodations.
Id. at § 45-1653(a).
sions a landlord is required to file a copy of his notice to quit with the Rent Administrator at the time of serving it upon the tenant.292

Under the new regulations promulgated pursuant to the 1975 Act, the Housing Accommodations Commission can issue a temporary restraining order directing the landlord not to enforce a notice to quit which is not in compliance with the provisions of the Act.293 Either the Rent Administrator or the tenant can raise objections to the notice which can set in motion the chain of events leading to issuance of the restraining order.294 If the landlord fails to contest the temporary order, or, if after a hearing, the notice is found not to comply, a permanent order restraining enforcement of such notice will be issued.

As interpreted by the courts, the similar provision in the Ball Act regulating evictions had been read to mean that when the jurisdiction of the commission set up to administer the act was invoked, the court would refrain from acting on a landlord's complaint for possession until the commission had ruled upon the validity of the landlord's notice. The commission's decision was considered by the court to be conclusive evidence in determining whether to grant the relief sought by the landlord.295 In effect then, the controversy was adjudicated before the administrative tribunal, and appeal from its decision was taken to the appellate courts.296 When the Supreme Court upheld the District of Columbia Rent Control Act in 1921, Justice Holmes, writing for the Court, found that:

While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent.297

292. At one point subsequent to passage of the 1975 Act, the City Council amended the eviction control section to require that a notice to quit also be served upon any tenant who had defaulted in rent prior to instituting court proceedings, whether or not the lease contained a clause waiving such notice. This requirement was deleted in subsequent amendment of the act.
293. 22 D.C. Reg. 3488 (1976).
294. Id. at 3493-94. If the Rent Administrator determines that the notice is not in compliance he may cause the temporary restraining order to be issued immediately. The landlord is given time in which to contest the finding by requesting a hearing. The tenant's objection takes the form of a request for a hearing on the nonconforming notice. The Rent Administrator will notify the landlord of the objection and the date set for the hearing.
296. Id.
It is not certain whether the almost identical provision in the present Rent Control Act will be interpreted in a similar manner. If it is, the Housing Accommodations Commission would have the power, notwithstanding the practical problems posed, to resolve landlord-tenant disputes in certain cases. Thus there has been created, albeit de facto, a procedure whereby an administrative forum has been vested with authority giving it jurisdiction over at least one type of dispute which frequently arises in the Landlord and Tenant Branch. It is ironic to note this implied change in present court procedures, particularly in light of the controversy and political maneuvering which accompanied proposals to reform the present system and the opposition to the creation of an administrative agency utilizing hearing examiners. Although it is doubtful that the Housing Accommodations Commission as it is presently operating could ever fully assume a significant role in the adjudication of individual landlord-tenant eviction disputes, change has a foot in the door—even though it may be the back door.

H. Final Observations on Prior Reform Proposals

The discussion of reforms between 1970 and 1973 highlighted the issues which require consideration when change of the legal mechanism for resolving landlord-tenant disputes is proposed. It raised many questions concerning the most just and equitable forum from the standpoint of

298. Unlike the earlier act, the present regulations provide that a landlord who has exhausted his administrative appeals must appeal to the trial court rather than directly to the court of appeals. Thus, the determination of the commission may not carry the same weight as it did under the earlier version. This difference, however, does not change the fact that an administrative agency has been created with powers to adjudicate one type of landlord and tenant dispute.

299. This article must necessarily exclude examination of the present practical problems of rent control, and thus this observation is limited to theoretical considerations.

300. In theory, the jurisdiction of the Housing Accommodations Commission can also be invoked to settle disputes arising out of the obligation to pay rent for premises which are not in substantial compliance with the Housing Regulations. This could be achieved by a tenant who filed a petition or complaint alleging that he was overcharged based upon the condition of the premises. This procedure has the advantage of providing the tenant with a means of bringing economic pressure to bear upon the landlord which is potentially less drastic and costly than withholding rent and waiting to be sued.

301. The sections of the Act and regulations restricting evictions are arguably subject to challenge on the ground that the City Council interfered with the jurisdiction of the recently enacted Home Rule legislation. This characterization of the role of the Housing Accommodations Commission however is not supported by the earlier precedent. In a challenge to the Ball Act a similar argument was rejected. Instead, the court found that the trial court and the Act were in pari materia. Hayden v. Filippone, 278 F. 329 (D.C. Cir. 1922). See also Smith v. Pyne, 274 F. 142 (D.C. Cir. 1921).
all the parties in a landlord-tenant controversy. Unfortunately, however, it could propose few definitive answers or final conclusions. There remain too many unresolved variables.

It is significant that almost all the interests which had an input into the reform discussion preferred the judicial forum to that of an administrative agency. Among the most credible expressions of this preference was that of the Neighborhood Legal Services Program:

> With all of its imperfections, the judicial process remains the potential repository of tenant's hopes for just adjudication of their rights. The judiciary's sense of justice and fair play, proper demeanor, and full awareness of interrelated legal rights and issues is to be preferred to a hearing examiner whatever his expertise might be. For, indeed, the only experts ordinarily needed in landlord-tenant disputes are housing inspectors and appraisers. The Court, however, provides the forum for fact-finding.\textsuperscript{302}

Notwithstanding a rent control program, therefore, it is likely that a dispute settlement mechanism outside the judiciary will not offer a complete solution to the problems which plague the present judicial system. It should also be noted that while the major reform proposals opposed the administrative agency, each fashioned some role for a hearing examiner. Analysis of the proposals, however, leads one to question how many of the proposers actually believed in the hearing examiner concept or just wished to show deference to the Chief Judge's "germ of an idea."

Another conclusion which emerged from the discussion merits particular emphasis. Just resolution of landlord-tenant legal disputes is inhibited when one of the parties has legal representation and the other does not. Any system which relies solely upon the impartiality of the trier of fact without insuring that both parties come before that decision-maker in a relatively equal bargaining position will not succeed in substantially improving the present system. At the same time it is obvious that merely providing legal representation to both sides will not substantially improve the delivery of justice and insure the availability of habitable housing.

If the purpose of the law is to insure the maintenance, availability and improvement of habitable and safe housing, the interests of the landlord in making a profit from his ownership, which is his business, and that of the tenant in living peacefully in decent and affordable housing must be reconciled to this goal. It can be concluded, therefore, that any forum which has the responsibility of resolving disputes arising from the conflicting interests

\textsuperscript{302}. Neighborhood Legal Services Program Report, \textit{supra} note 51, at 15-16.
of the parties must take account of the social, economic, and psychological factors, as well as the legal issues. Thus, it is obvious that reform of the present court system will require changes both in the forum and in the concept of the services to be delivered there. It is significant that the Supreme Court has recognized that more is at stake than just the interests of the individual disputants:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. 303

III. "BUT IN JUSTICE SHALL YOU JUDGE": AN EVALUATION AND PROPOSAL

A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Justice Thurgood Marshall in Pernell v. Southall Realty304

A. Introduction: Scope of the Proposal

The history of efforts to reform the mechanism for settling landlord and tenant disputes has been marked by many proposals, but very little action. As the discussion in the previous section has detailed, there is virtual agreement that change is needed, but little agreement over the form it should take. The most significant proposals which have been advanced to date can be divided into two categories both of which highlight the past inability to effect reform. In the first category are the proposals advanced by representatives of special interest groups. Their suggestions have reflected an implied or express agenda which tends to be either politically or legally unrealistic. In the second category, which is not mutually exclusive of the first, are proposals whose primary weakness is incompleteness. Implementation of these

suggestions would fail to correct the underlying problems which presently inhibit the delivery of justice to parties who seek to resolve their disputes in a legal forum. What has been missing from the reform discussion is compromise. Reformers have yet to examine openly the question of reform from the perspective of the current evolutionary development of the substantive law and its effect on the interests of all concerned.

The analysis in this final section is intended to identify and examine the organizational and procedural considerations involved in the mechanism for the settlement of landlord and tenant disputes. This examination is based upon two premises. First, the settlement mechanism should remain within the judicial system. Despite the disadvantages inherent in a judicial proceeding, the courts remain the most appropriate forum for the settlement of legal disputes. The court system is best able to bring to the decisionmaking process a sense of justice with the concomitant understanding that precedents are not dictates, and statutes do not require stagnation. The court can continually evaluate and reappraise legal doctrines in light of contemporary social values in an atmosphere which is least subject to the direct political pressures which bear upon the other two branches of government. Furthermore, and of equal importance, is the fact that the establishment of an administrative agency which would remove the majority of cases from the court system is a politically unacceptable idea at the present time.

Second, proposed changes in the organization and procedures of a judicial dispute settlement mechanism must allow for implementation of the substantive law. The court must not continue to be the vehicle for inhibiting application of precedent deemed undesirable by litigants or judges. The present case and statutory law must be given the opportunity to accomplish the objectives which it embodies. In the end, if the objectives prove unattainable or incompatible with desirable social and economic conditions, the law should be changed, and the mechanism reformed again to reflect this change. The impetus for change must not be generated by a situation characterized by

305. A possible exception to this recommendation would be a rent control program administered by an agency in the executive branch. The discussion in this section excludes consideration of the effect which a rent control mechanism might have on the proposed judicial modifications. This is done for two reasons. First, a rent control program is generally considered to be a temporary procedure necessitated by an emergency situation. Second, rent control statutes theoretically do not interfere with the jurisdiction of the court over landlord-tenant matters. According to the interpretation of the appellate courts, the actions of a rent control commission merely effect a change in the character of the evidence upon which the trial court can act. Hayden v. Filippone, 278 F. 329 (D.C. Cir. 1922). Thus, notwithstanding a rent control program, the responsibility for the ultimate resolution of a landlord and tenant dispute remains in the trial court. See discussion on rent control pp. 718-20 supra.
its failure to develop a mechanism which would allow the law to be tested fairly. In this respect, reform must not be allowed to occur piecemeal. A partial reform is doomed to fail if all parties to a dispute are not provided with an opportunity to experience its effects. Merely amending an obsolete mechanism designed for societal conditions which have long since passed is inadequate. A new mechanism for the settlement of landlord and tenant disputes is needed—a court motivated by legal and equitable concerns which will give all parties an equal opportunity to seek justice; a mechanism that is without the burden of a past history of inequality.

B. Proposed Organization and Subject Matter Jurisdiction

The Superior Court of the District of Columbia should establish a Housing Division or Branch within the Superior Court organization. The new forum should be vested with exclusive jurisdiction over all suits arising out of a residential rental relationship and all actions to enforce or penalize violations of public laws relating to residential rental housing. Ideally this should include both civil and criminal penalties. Transfer of jurisdiction over the latter may have to be postponed initially, as the City Council is barred from taking any action with respect to the criminal provisions of the District of Columbia Code (Titles 22 and 23) for a period of four years after its election. District of Columbia Self Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(a)(9), 87 Stat. 813 (1973) as amended by Pub. L. No. 94-402, 90 Stat. 1220 (1976) (Home Rule Act).

It should be unnecessary for jurisdictional purposes to create or to continue any distinctions between equitable and monetary actions initiated by either landlords or tenants. Instead, it is in the interests of judicial economy and efficiency to permit landlords and tenants to sue and be sued in the same forum and, where appropriate, in the same action. These distinctions have been eliminated for procedural purposes by the Superior Court Rules of Civil Procedure, and the Landlord and Tenant Rules which permit the landlord to join claims for possession and back rent and permit the tenant to counterclaim, or seek set-off, or recoupment. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULES 3, 5(b); cf. Pernell v. Southall Realty Co., 416 U.S. 363 (1974). For a discussion and analysis of these restrictions, see Gerwin, supra note 4, at 488-97.
C. Jurisdiction over the Person and Types of Actions\(^\text{310}\)

The new Housing Division or Branch should have jurisdiction over actions brought by or against landlords, tenants, and the appropriate government authorities, their agents or representatives. The types of actions authorized should include: suits for injunctive relief, both mandatory and prohibitory,\(^\text{311}\) damages arising out of tort or breach of contract, imposition of sanctions, both criminal and civil,\(^\text{312}\) for violation of the housing, building, or licensing statutes and regulations, and possessory actions in the nature of unlawful detainer\(^\text{313}\) or ejectment which may be brought as a summary proceeding.\(^\text{314}\)

In addition, permissible actions should include special proceedings such as tenant actions to establish an escrow account for rents;\(^\text{315}\) landlord motions for protective orders during the pendency of lengthy litigation;\(^\text{316}\) government

\(^{310}\) While the City Council is prohibited from interfering with the Superior Court's organization or jurisdictional provisions of Title 11, it is not restricted with respect to Title 16 relating to Particular Actions, Proceedings, and Matters, and Title 45 concerning Real Property. Some of the actions and proceedings suggested in this section can be achieved within this legislative authorization.

\(^{311}\) Enforcement of an injunction would carry with it the threat of a contempt of court citation if the order was not obeyed. Such proceedings would also be brought in the Housing Branch. Ironically, while the criminal prosecutions in New York City had produced dismal results in terms of convictions and penalties for housing code violations, after implementation of civil remedies, the amount of fines collected and the number of landlords sent to jail increased significantly. Interview with Anthony Gleidman, General Counsel, Housing Development Administration, in New York City (Mar. 13, 1975).

\(^{312}\) The imposition of civil fines on landlords may already be covered by D.C. Code §§ 5-408, 504-6 (1973) concerning violations declared to be a nuisance. In addition, the City Council has recently enacted the Nuisance Elimination Act of 1976, Council Bill 1-303, which would allow the District government to assess a landlord an amount equivalent to double the cost of its undertaking correction of Code violations. The extra assessment would be the practical equivalent of imposing a fine. See Gerwin, *supra* note 4, at pp. 497-99 & notes therein.


\(^{314}\) D.C. Code § 16-1124 (1973) and D.C. Code § 45-910 (1973). It may be unnecessary to retain separate codification of the types of possessory actions as these distinctions are essentially historical. The landlord's right to seek eviction in a summary proceeding, however, should be preserved.

\(^{315}\) A tenant's right to initiate an escrow of rents may require legislation. The Rent Control Regulations provide that it is unlawful for a tenant to withhold rent unless it is deposited in "an escrow account established for that purpose." Rent Control Regulations, *supra* note 287, at § 13(f). However, the meaning of escrow is not defined in the regulations. Establishing a true escrow account, in which neither the landlord nor the tenant has control of the funds, may require judicial supervision.

\(^{316}\) Although the United States Court of Appeals for the District of Columbia Circuit held that the entry of a protective order should be carefully circumscribed because it is contrary to normal civil litigation procedures, Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970), the District of Columbia Court of Appeals has substantially
or tenant petitions to appoint a receiver for receipt of rents, issues, and profits of substandard residential property and for use of such funds to make repairs or correct Housing Regulation violations. Its jurisdiction should extend to government proceedings relating to buildings undergoing abandonment, including the appointment of receivers and the vesting of title in the District of Columbia. It should also include government actions to re-

liberalized the conditions under which a landlord may obtain such an order. McNeal v. Habib, 346 A.2d 508 (D.C. 1975). Thus, the procedures for granting a protective order have gone from requiring a separate hearing on the merits of a written motion demonstrating need (which could be held only after the tenant had been given written notice) to requiring only that the landlord make an oral motion on the return date (this motion is usually summarily granted). In addition, the District of Columbia Court of Appeals has sanctioned entry of a protective order in cases in which the tenant has requested a jury trial even though the landlord has not sought by his complaint to collect back rent. Id. See also pp. 695-96 supra for a discussion of the problems raised by these changes.

A new judicial mechanism, however, could provide an opportunity to balance more carefully the needs of both landlords and tenants in cases in which a protective order is sought. For example, it is possible to preserve the landlord's right to seek a protective order on the return date while still providing the tenant with an opportunity to raise an informed challenge to this request. This could be accomplished if the court were to make available forms upon which the landlord could submit the information necessary to demonstrate his need to be guaranteed in advance that a judgment in his favor would be collectable. If possible, the form should be made sufficiently simple in both its procedural and substantive requirements so that it may be served together with or shortly after the complaint for possession based upon nonpayment. In addition, when the landlord has not joined a claim for collection of rent in his complaint for possession, the new mechanism should be able to accommodate requests for expedited trials of those cases whether or not a request for jury trial is made. This would obviate the need for a protective order and thus eliminate the potential inconsistencies and delay involved in requiring a separate trial on the issue of disposition of the funds or in providing a landlord relief which was not sought.

317. Authority to appoint receivers for unabandoned property most likely will require legislation, particularly in light of the district court's pronouncement in Masszonia v. Washington, 315 F. Supp. 529 (D.D.C. 1970), that "[t]he city has no authority to take over structures by way of receivership and operate them at city expense for the public good." Id. at 532. A receiver should also be authorized to expend monies collected as rents and profits from the building. See note 319 infra.

The filing of petitions to appoint receivers need not be limited to the District government. Tenants should also be permitted to initiate such proceedings. Upon the proper showing by the petitioner, the court should be able to appoint any suitable person, including a tenant, as a receiver. This latter provision was enacted in New York City when it was discovered that qualified persons willing to serve as receivers were hard to find. See administrator provisions of N.Y. REAL PROP. ACT. LAW § 778 (49½ McKinney Supp. 1976); see also Model Residential Landlord-Tenant Code, art. III, part 3 (relating to Apartment Building Tenants' Receivership) (1969).

318. Legislative clarification regarding appointment of receivers for abandoned property may be needed. See D.C. Code § 20-2301 et seq. (1973). To be effective, government activity with respect to abandoned property should include the authority to act prior to the actual abandonment.
cover costs from, or to levy fines or taxes upon a landlord whose residential property was repaired at District expense, or to establish, enforce, or collect a lien in favor of the District, on property and its rents where public funds were expended for the abatement of a nuisance or the correction of Housing Regulation violations.\textsuperscript{319}

In short, the new Housing Branch should provide the forum for all public, private, and declaratory actions regarding possession and maintenance of rental housing, and for settlement of other legal disputes which arise from the landlord-tenant relationship. In addition to those types of actions presently authorized by case law or statute, the Housing Branch could accommodate new forms of legislatively created actions and should be given the means to fashion more appropriate remedies. Finally, each party should be permitted to raise both legal and equitable affirmative defenses including set-offs, recoupments, and counterclaims. The present restriction on tenant counterclaims contained in the Landlord and Tenant Superior Court Rules should be removed and replaced by a provision similar to the rules used by the Civil Division.\textsuperscript{320}

1. \textit{Litigation Strategy: The Tenant as Plaintiff}

Reform of the landlord-tenant dispute settlement mechanism to make its procedures conform with the realities of modern urban society is required to provide for affirmative actions initiated by tenants.\textsuperscript{321} More than one

\textsuperscript{319} Authorization for city repairs and recoupment of costs is found in D.C. Code §§ 5-313, 622 (1973). In addition, the court in Masszonia v. Washington noted that a municipality has an inherent power to abate nuisances. 315 F. Supp. at 532. While there is no statute regarding establishment of a lien for city expenditures, either directly or through a receiver, such a statutory scheme has been upheld. See \textit{In re Department of Buildings of the City of New York}, 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964) in which the court upheld the Multiple Dwelling Law § 309, under which the city could apply to the court for appointment of a receiver for substandard dwellings. The receiver would be empowered to use rents and other profits from the building to effect repairs. If such funds were insufficient, the receiver could use monies from a special fund set up for that purpose. Use of this money would create a lien in favor of the receiver to which all other liens were subordinated if the lienors were given prior notice and opportunity to take appropriate actions. New York City also has a similar provision concerning emergency repairs undertaken at city expense. Emergency Repair Act, N.Y. MULT. DWELL. LAW § 309 (35A McKinney 1974).

\textsuperscript{320} Compare D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 5(b) \textit{with} D.C. SUPER. CT. RULE 13.

\textsuperscript{321} At the present time such suits may only be brought as regular civil actions in the Civil Division (unless a recovery less than $750 is sought in which case the Small Claims Court can be used), and are subject to the Rules of Civil Procedure. The time required to litigate a civil action in the District of Columbia can be anywhere from six months to a year, or longer.
commentator and tenant lawyer has observed that "[t]he archaic state of the law is attributable, at least in part, to a shortage of tenant-plaintiffs." In Javins, the court explicitly recognized the right of the tenant to sue when it stated: "In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability." Furthermore, an underpinning of the Housing Regulations is the recognition that their enforcement depends in part upon civil actions to compel abatement of violations.

The posture of a case with the tenant as a plaintiff has several important implications. When the particular equities compel judgment for the plaintiff, the tenant's right to receive the relief granted is not likely to be challenged further. There are two reasons for this: landlords rarely appeal, and appellate courts are reluctant to reverse trial court decisions. In addition, the ability of the tenant to bring suit may provide an incentive for self-help and self-reliance. Since it is undeniable that conditions in slum housing are at times attributable to tenant activities, a tenant with the authority to seek judicial relief from conditions created by landlord action or inaction may refrain from activity which would bar or reduce his claim.

Finally, the tenant, particularly the slum dweller, must be persuaded that the judicial system can deliver solutions to some of his housing problems. He should not be forced to withhold rent or seek to be sued in order to benefit from the simplified rules of the Landlord and Tenant Branch. In the end, rent withholding or a rent strike does little to upgrade or maintain the quality of housing. A recognition that something more than economic considerations are at stake in a tenant-initiated action is needed in addressing this issue. As Julian Levi, reporter for the committee which drafted the Model Landlord Tenant Code, observed:

The enforcement of housing codes, or the failure to enforce them, and the imposition of penalties on landlords who refuse to maintain their properties in adequate condition, or the failure to penalize—this is what instructs the poor about the American legal system, its doctrine and its operation. The rent strike illustrates that a society

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324. See D.C. Housing Regulations § 2901.5.
325. See, e.g., Sax & Hiestand, Slumlordism as a Tort, 65 MICH. L. REV. 869, 891 (1967). The authors advance this argument in favor of judicial recognition of a tenant's right to recover in tort where the landlord has continued to capitalize on the social ills of slum housing to earn his livelihood.
of justice and equality, governed by the rule of law, is a fiction to the slum dweller, who has been imposed upon and defrauded.\textsuperscript{326}

2. Litigation Strategy: Potential Defendants in a Tenant Action

In creating a tenant's right of action, identification of potential defendants is required to fashion appropriate remedies. In this regard, three potential classes of defendants should be considered:

(1) the District of Columbia in an action for injunctive relief when it fails, after reasonable notice, to enforce the Housing Regulations, or when it refuses to exercise the other powers provided it by law for maintaining and improving housing conditions;
(2) the lessor with whom the tenant has contracted to rent a dwelling, including the principal or owner when the lessor is the managing agent;
(3) the "money interests" behind the owner, in particular the mortgagee.

The role of this latter class, the "money interests," as defendants deserves particular attention when assessing the potential value of using the judiciary to influence private behavior which impacts upon housing quality. One of the leading advocates of reforming landlord-tenant law has observed:

The maintenance and profitable operation of slum housing is, in the first place, rendered possible by the cooperation of many elements within the business community: the mortgagee who seeks high interest rates and commissions and who does not choose to enforce covenants against waste; the insurance underwriter who often assumes an unsound risk; the trustee of a land trust who, in some states, by holding title conceals the identification of beneficiaries; the real estate manager who collects rents and operates the property.\textsuperscript{327}

Bringing suit against such business interests could have a significant impact upon each of the parties involved, as well as on the development of landlord-tenant law. From the tenant's perspective, joinder of the mortgagee offers increased assurance that a judgment awarding him money will be satisfied, even if the landlord became insolvent or lacked sufficient resources. The latter situation is not an unlikely occurrence when the building is owned or operated by a corporation or the landlord's assets have been invested in a tax shelter. For the landlord, the potential involvement of the mortgagee would operate as an incentive, as well as a deterrent, to the maintenance of mortgaged housing in violation of the housing and building regulations. At

\textsuperscript{326} Levi, supra note 322, at 285.
\textsuperscript{327} Id. at 276-77.
a minimum, in order to qualify for a loan or to avoid foreclosure, a landlord would be responsible for insuring that the premises were in safe and reasonably sanitary condition.

Furthermore, the potential class of business defendants would be obligated to take an interest in the condition of the housing it is subsidizing or protecting. For example, if the mortgagee is convinced that the maintenance of the mortgaged property in substandard condition presents a significant financial risk, a powerful, though unwilling supporter of the tenant's search for decent housing may emerge.\footnote{Id. at 280. Sax and Hiestand, \textit{supra} note 325, take a contrary position. Imposing liability on the mortgagee, they contend, will make the financial community the involuntary ally of the slum landlord. They argue:

Since a basic impediment to effective code reform has always been reached at the point where the landlord's economic interest was truly jeopardized, it is difficult to understand how enforcement is going to be aided by enlarging the investor class thus threatened. The more likely result is an increase of political pressure against code enforcement. Perhaps the financial community has a hidden altruism yet to be revealed, but one can hardly be blamed for having his doubts.

Sax & Hiestand, \textit{supra} note 325, at 917. This argument, however, appears to conflict with one of the authors' overall goals in suggesting tort liability for "slumlordism," namely, to create pressure on the legislature to pass measures designed to improve housing conditions. Certainly, financial institutions carry a good deal of political clout which, it should not be assumed, will be directed solely against public and private law enforcement efforts. In a 1964 study of housing code enforcement conducted before the recognition of methods for civil enforcement of housing codes, the authors addressed the question of criminally prosecuting the mortgagee and determined that it would be unwise. After examining other options, they proposed a different alternative:

Violation of housing codes might be made a breach accelerating the due date of principal payments, but this would only force the mortgagee to foreclose. For most violations, foreclosure is too cumbersome and expensive a procedure to be desirable. The prosecution of mortgagees might be made practical by a statutory requirement that all mortgages contain a covenant allowing the mortgagee to repair violations and providing for a prior assignment of rents to cover such investment.

\textit{Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 848-49 (1965).}}\footnote{329. Consideration of the potential economic and political consequences of holding a mortgagee liable under these circumstances is beyond the scope of this article.}

While in the end such a strategy may prove unwise,\footnote{330. Forcing the mortgagee to take an interest in the condition of the mortgaged property could be achieved indirectly by according a priority lien to the municipality or a court-appointed receiver who was authorized to expend funds to correct substandard conditions on the mortgaged property. Under such a program, the rights of all creditors, including the mortgagee, who had received notice of the intent to undertake the improvements, would be subordinated to the lien in the amount of the costs of work performed.} its potential is such that tenants and government officials might choose to test its value by bringing such an action if the proper forum was available.\footnote{One court has
recently held that a mortgagee may be liable for damages suffered by new home buyers who brought an action alleging negligent construction of their residences. The reasoning set forth in that 1968 decision written by Chief Justice Roger Traynor of the California Supreme Court is significant and holds the potential for analogizing it to a situation involving leased residential property. Justice Traynor articulated the criteria for determining liability in a real estate context:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

He then concluded that the mortgagee had a duty to exercise reasonable care to protect the plaintiff-buyers from seriously defective construction. Par-

If the mortgagee wanted to avoid this result, its options would be to cause the repairs to be undertaken or to foreclose on the mortgage. Tenants would have the power to set this chain in motion if their rights to sue the city to undertake repairs or to petition the court for appointment of a receiver were recognized. See Masszonia v. Washington, 315 F. Supp. 529 (D.D.C. 1970), in which the court recognized a form of injunctive action against the District government. See also N.Y. REAL PROP. ACT LAW § 778 (491/2 McKinney Supp. 1976); UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 3; note 319 supra, on tenant-initiated receivership proceedings. The District government already has the authority to undertake repairs or demolition of substandard housing and to assess the costs against the landlord as a tax. See note 319 supra.

Recently, District officials who had been unsuccessful in their attempts to force a landlord to correct violations on his premises or to recoup the costs of government-authorized repairs, turned to the landlord's mortgage holders. While it was reported that after learning of the District's concern, most of the banks sent letters of "mild warnings" to the landlord, one bank, after sending a more sharply-worded letter, foreclosed on a multi-unit apartment building. (Although a lawyer for the bank later asserted that the sale resulted from the landlord's nonpayment of the notes on his mortgage, it was left to speculation whether the default was prompted by the warning letter.) See Bonner, "Landlord Views Self Victim of Social Ills," Wash. Post, Mar. 23, 1976, § C, at 1, col. 1.

331. Connor v. Great Western Savings & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (The court reversed the lower court's entry of a nonsuit which had the effect of dismissing the plaintiff's suit against the mortgagee).

332. Id. at 865, 447 P.2d at 617, 73 Cal. Rptr. at 377. Justice Traynor was quoting from Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958) (privity of contract not necessary for intended beneficiary under void will to sue the drafter).

333. The court rejected the mortgagee's defense that there had been a superseding cause of the harm by pointing to the "settled rule that two separate acts of negligence may be the concurring proximate causes of an injury." 61 Cal. 2d at 870, 447 P.2d at 620, 73 Cal. Rptr. at 380 (citations omitted).
particularly applicable to landlord-tenant law was his reasoning that: "The admonitory policy of the law of torts calls for the imposition of liability on [the mortgagee] for its conduct in this case. Rules that tend to discourage misconduct are particularly appropriate when applied to an established industry."\(^3\)

In particular, that case offers support for the argument which stresses the importance of allowing tenants access to the courts in order to identify defendants who may be in a position to provide them with a measure of relief from seriously inadequate housing conditions. The courts are less subject to the immediate political pressures which raise formidable barriers to legislatively imposing liability directly on mortgagees and others similarly situated in the financial community. The courts are thus in the best position, both in terms of opportunity and flexibility, to safeguard and vindicate the legitimate rights of minorities.

**D. Powers and Procedures of the Proposed Housing Branch**

The new Housing Division or Branch should have all the powers of a civil trial court in the Superior Court system. Civil actions should be litigated in accordance with the Superior Court Rules of Civil Procedure. In addition, the new court should maintain a separate calendar in order to expedite more informal-type summary actions, including possessory and small claims proceedings, and equitable matters. The revision of the rules required to accommodate the new court proceedings would be relatively minor. Similarly, the present criminal rules should govern proceedings of that nature.

One particular rule change, more in the nature of a policy statement than a procedural requirement, should be emphasized. To insure the potential of this new forum to achieve results which reflect an appropriate balance of the litigants' conflicting interests, it will be necessary to allow the decisionmaker a certain degree of flexibility. The legislation establishing the Housing Part of New York City's Civil Court included such an enabling provision. It bears quoting here as an example of the philosophy which decisionmakers, presiding in a similar District of Columbia court, would do well to emulate:

Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest . . . . The court may retain continuing jurisdiction of any action or proceeding

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334. *Id.* at 867, 447 P.2d at 618, 73 Cal. Rptr. at 378.
relating to a building until all violations of law have been re-
moved.335

Articulation of such a standard in the rules of the new court would not
be out of keeping with the civil rules of procedure since the latter liberally
permit amendment for purposes of conforming the pleadings with the proof.
In accordance with this philosophic orientation, determination of the ap-
propriate procedures for the new court will require that the interests of effi-
ciency and speed be balanced against provisions which will maximize proce-
dural protections for the disputing parties. In this regard the new rules
should seek to equalize, to the extent possible, the present procedural double
standard existing between actions brought by landlords and those brought by
tenants. The essence of this distinction is that the landlord may use a sum-
mary proceeding to seek his objectives, while the tenant is required to await
relief until the slow litigative process has run its full course. The new rules
should reflect the recognition that tenants, as well as landlords, have need,
in certain situations, for the prompt resolution of their complaints.

It does not necessarily follow, however, that the summary proceeding
should be eliminated. The solution lies in simplifying procedural require-
ments whenever possible and in adopting procedures which place the burdens
of pleading and proof on the party in the best position to present the neces-
sary evidence. These measures hold the potential for prompt resolution of
both landlord and tenant claims.

1. Summary Proceedings in a Possessory Action

a. Procedural Reform

This vital [property] interest that is at stake may, of course, be
tested in so-called summary proceedings. But the requirements of
due process apply and due process entails the right "to sue and de-

335. N.Y. CITY CIV. CT. ACT, § 110(c) (29A McKinney 1972). The legislative
findings establishing the Housing Part articulate the policy behind this provision. They
state in part:
The legislature finds that the effective enforcement of proper housing standards
in the city of New York will be greatly advanced by the creation of a housing part . . . with jurisdiction of sufficient scope . . . to recommend or employ
any and all of the remedies, programs, procedures and sanctions authorized
by federal, state, or local laws for the enforcement of housing standards, re-
gardless of the relief originally sought by the plaintiff, if it believes that such
other or additional remedies, programs, procedures or sanctions will be more
effective to accomplish and protect and promote the public interest and com-
pliance . . .

Id. § 1-(b) 1972 N.Y. Laws, ch. 982, eff. Apr. 1, 1973.
fend in the courts,” a right we have described as “the alternative of force” in an organized society.\textsuperscript{336}

Although the original purpose behind the development of the summary proceeding as an alternative to self-help and its underlying doctrine of independent covenants is no longer applicable, there remains a need to expedite the litigation process in a landlord’s action to recover possession of his leased property. The summary proceeding presently conducted in the District of Columbia’s Landlord and Tenant Branch, however, would require significant revision before its implementation in a new Housing Court. As discussed earlier,\textsuperscript{337} the basic design of the present summary proceeding is premised upon legal doctrines which reflect policies no longer relevant. This conflict between procedure and policy has been further aggravated in recent years by the imposition of new rules to account for the changes in the substantive law without making adequate procedural provisions for accommodating these changes. Thus, in fashioning the new procedures, the landlord’s interests must be balanced against that of the tenant’s, who, as a contracting party of equal status with the landlord, should be entitled to a full adjudication of the merits of an action before being deprived of the property he considers “home.”

In view of the short time span between commencement of an eviction action and its final disposition, there is a particular need to improve the defendant’s opportunities to receive notice and to defend against the plaintiff’s claim. As the process currently operates, the first point of potential conflict between efficient disposition of cases and protection of the tenant’s interests is the service of process.\textsuperscript{338} The present court rule governing service of process\textsuperscript{339} is designed for two purposes. The first is to relieve landlords, court administrators, and the United States Marshal’s office of the burden of having to arrange and effect marshal service in the more than 100,000 actions filed each year, by authorizing special process service in lieu of marshal service. In addition, the rule allows compliance with the statutory service requirements to be achieved at a minimal cost, while in theory providing the tenant with a reasonable opportunity to receive notice, by authorizing posting as a service method of last resort.\textsuperscript{340}

As discussed earlier, however, in practice there is little evidence of efforts to comply with even this minimal burden. If the tenant does not challenge

\begin{itemize}
\item \textsuperscript{336} Lindsey v. Normet, 405 U.S. 56, 84 (1972).
\item \textsuperscript{337} See discussion pp. 653–66 supra.
\item \textsuperscript{338} For discussion of the present problems with respect to service of process, see pp. 650–51 supra.
\item \textsuperscript{339} D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 4.
\item \textsuperscript{340} D.C. Code § 16-1502 (1973).
\end{itemize}
the method of service, or does not appear on the return date, there is no independent review of the service to determine compliance. As a first step towards correction of the abuse of the service requirements, there is a need to enforce the present court rules. Review by court personnel of the return of process to determine whether efforts were made in good faith to effect personal or substitute service before entering a default judgment in cases in which service was effected by posting should not impose too great a burden upon the operation of the present system.

In addition, if the present practice of allowing the service of process requirement for entry of default judgment to be satisfied by the filing of an affidavit is retained, additional precautions to insure receipt of such notice may be advisable. One possibility, which would not unduly delay court proceedings would be to require that a summons be sent by registered mail in all cases in which service was first achieved by posting. Consideration should also be given to still more stringent requirements imposed in other jurisdictions when a default is sought on the basis of posted service. For example, in Detroit, when a tenant does not appear on the return date, the case is continued for one week and a second "alias" summons is issued. In Boston, there is a period of six work days after the entry of the default judgment within which the tenant can appeal from it. To insure that the tenant knows about the judgment, the court clerk is required to notify him of it by mail.

Other procedures in need of standardization would be those governing the return date and the defendant's responsive pleading. The present court rules specify that trial is to be held at 9:00 a.m. on the appearance date specified in the summons. In practice this procedure is not observed by the court. In fact, the trial may be at least two subsequent appearances later, as some judges set an answer date and then assign a trial date after the answer is

341. See pp. 650-51 supra. The majority of affidavits provide no information other than the time, place and method of service, and thus do not comply with the directive that the return of service state "specific facts from which the court can determine that process . . . was served . . . in compliance with D.C. Code Section 16-1502 (1973 ed.) and SCR L&T 4." Landlord-Tenant Form 3.

342. The most common method of effecting service is by posting, while the most prevalent manner of disposition of cases is by entry of a default judgment. See discussion pp. 650, 657 supra.

343. MICH. COMP. LAWS ANN. §§ 600.5643, 600.5652 (1968). The second summons may also be served by tacking on the door of the property.

344. Boston Housing Court Summary Process Form 3A. After six work days, the landlord can execute the judgment. Id.

345. BOSTON HOUSING COURT RULES OF PROCEDURE, Rule 3.

346. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 7(c).
The present practice is to set bench trials for hearing in the afternoon, and to certify cases in which a jury demand is made to the Civil Division trial calendar. In the latter instance a lengthy delay is then incurred in the assignment of the trial date.\textsuperscript{347}

Thus, for the summary proceeding to operate as such, the rules need to be amended to reflect the purposes of the return date. For example, appearance on the return date holds particular usefulness as an opportunity for the parties to explore settlement possibilities.\textsuperscript{348} In addition, it allows the court to inquire preliminarily into the specific reasons for which the action has been brought. The answers elicited will permit the court to accomplish such tasks as the referral of tenants to the social services branch for assistance in appropriate cases,\textsuperscript{349} the assignment of a trial date acceptable to the parties,\textsuperscript{350} and the appointment of counsel for parties who make such a request.\textsuperscript{351}

While ideally the return date should be the deadline for the filing of a responsive pleading or appropriate motions, in the interest of fairness, this is not possible. Even in cases in which a tenant requests appointment of counsel on the return date, however, the extension of time for filing an answer and setting a trial date can be reduced. There are several possible

\textsuperscript{347} The manner in which jury trial demands are handled is an example of how the design of the summary proceeding was perverted by the requirements of the recent changes in the substantive law. By the addition of Rule 6 to the Landlord and Tenant Rules, a tenant is in a position to postpone disposition of the case for at least four to six weeks. See discussion p. 664 supra. In reality, however, the right to jury trial does not impose an intolerable burden on the court system. In 1976, there were 710 jury demands out of a total filing of 114,408 cases. Only four cases went to trial, although there was a final disposition of 460 cases. (There were 263 cases pending as of January 1, 1977.) While these statistics tend to demonstrate the usefulness of a jury demand as a delaying tactic, they do not support the argument that jury trials are a burden on the court system. See Tables 5 & 6.

\textsuperscript{348} But see discussion on curtailing the practice of confessed judgments pp. 740-41 infra.

\textsuperscript{349} At the present time this function is served by the Landlord-Tenant Consultant Service. See pp. 686-89 supra.

\textsuperscript{350} Consideration should also be given to ways in which jury trials can be assigned in a similar fashion. By staffing the Housing Branch or Division with additional decisionmakers and making available to it a pool of jurors, the personnel pool may be sufficient for purposes of allowing the court to maintain its own jury calendar. Needless to say, cases on the jury calendar would include more than possessory actions in light of the court's expanded jurisdiction. See pp. 725-27 supra.

The Detroit Landlord-Tenant Court has operated with two courtrooms. In one, the judge conducted bench trials, the bulk of the cases on the calendar. In the other, a judge presided over jury trials and pre-trial proceedings when a jury demand was made. Mosier & Soble, Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court, 7 U. Mich. J.L. REF. 8, 24 (1973).

\textsuperscript{351} D.C. Sup. Ct. Rules, Landlord & Tenant Rules 9, 11.
solutions for limiting the potential delay in a new judicial forum without significantly prejudicing the interests of either party. First, efficiency would be enhanced by the development of appropriate forms upon which the tenant could state an answer and assert affirmative defenses, demand jury trial, and request permission to proceed in forma pauperis. Similarly, counterclaim forms could also be made available. There is little support for the argument that a landlord, who has been provided a form for initiating an action, would be significantly prejudiced by a properly worded answer or counterclaim form. While the possibility remains that a form may inform a tenant of defenses of which he was previously unaware, the court rules require that the judge make such an inquiry of a tenant who is not represented by counsel.

Providing these forms has the additional advantage of making it possible to file responsive pleadings on the return date. The rules should expressly reserve the right to file a counterclaim, recoupment, or set-off apart from the answer, however, as such counter actions may require additional investigation. The advantages of being able to simplify and expedite the bringing of all relevant information in a contested case to the attention of the court outweigh the speculative disadvantages which may result from providing the tenant with the above-mentioned forms.

Second, if the jury demand is permitted to be filed independently of the answer, in almost every case it could be submitted on the return date.

352. A more limited version of this idea was suggested by the Special Committee of Judges on Reform of Landlord-Tenant Court, pp. 710-11 supra. While forms for showing an accounting of income and expenses are presently available, completed forms must generally be accompanied by a motion, an order and a statement to the effect that the affiant believes in good faith that he has meritorious defenses which warrant a jury trial. The Boston Housing Court supplies a combined answer and counterclaim form with 12 stated defenses and space for a counterclaim. Summary Process Form 2A.

353. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULES 12(a).

354. The provision in the New York City Housing Court Rules that a tenant, who is not represented by counsel and not otherwise filing a written answer, appear pro se before the clerk who will put the answer in writing, could be an acceptable alternative but for the personnel required to do this. See N.Y. REAL PROP. ACTS. LAW § 743 (49½ McKinney Supp. 1976).

355. A maximum time limit in the nature of five days from the date of filing the answer could be specified.

356. Written answers, however, should remain optional. Particularly in cases where the tenant is not represented by a lawyer, the possibility of conducting the proceedings informally should be preserved.

357. It is advisable that a jury demand be filed as soon as possible, preferably by the return date, because there is a lengthy delay between certification and assignment of trial date if jury cases continue to be certified to the Civil Division. In a new court system, prompt notification is in the interests of calendar control, standardization of procedures on the return date, and avoidance of the multiplicity of appearances by counsel.
There are two considerations with respect to this proposed rule change. First, the tenant’s attorney should be permitted to attest to the meritorious defenses of his client which warrant a jury trial in lieu of the present requirement which only permits a tenant to verify the answer. This change is particularly warranted since verification by a landlord’s attorney is sufficient for initiating an action. Second, a trial date could then be scheduled on the return date if the new court was to maintain its own jury calendar, or the case could be immediately certified to the Civil Division jury calendar, conditioned upon the filing of an answer within a specified time. Failure to comply with the deadline would result in the striking of the jury demand. This procedure would also permit the exploration of settlement possibilities prior to the preparation of an answer, without delaying the case if an agreement could not be reached.

Finally, with the trial date scheduled as soon as possible after initiation of the action, if the parties consent and agree upon a time limit for the filing of responsive pleadings, it should be possible to allow filing and service of pleadings. This would avoid the necessity of multiple court appearances merely for routine procedural matters.

for tenants and defendants. The Civil Rules allow a jury demand to be filed within 10 days following the answer. D.C. SUPER. CT. RULE 38.

358. The civil court rules do not contain the requirement that a verified answer accompany a demand for a jury trial. Id.

359. The date set for trial should also allow sufficient time for the parties to file any motions they deem appropriate.

360. The housing courts of other jurisdictions have procedures designed to avoid multiple pre-trial appearances. For example, in Boston the court rules require that an appearance and answer be filed three days before the trial date specified on the summons. BOSTON HOUSING COURT RULES OF PROCEDURE, RULE 3(a). This appearance can be in writing alone on the special answer form. Id.; Boston Housing Court Summary Process Form 2A. The trial date is scheduled by the clerk upon filing of the complaint. It can be no sooner than 14 days, nor later than 30 days in the future. See BOSTON HOUSING COURT RULES OF PROCEDURE, RULE 2; Boston Housing Court Summary Process Form 2 (Directions to Officer Serving this Summons).

In Detroit, at the time of the Mosier & Soble study, supra note 350, the case was automatically set for trial approximately one week after the complaint was filed and a prior appearance or responsive pleading was not required. MICH. COMP. LAWS ANN. § 600.5735(6) (Supp. 1977). The Michigan law also allowed for service on the tenant to be made as late as three days before trial. It should be noted, however, that the default rate in cases not dismissed before the return date was 74.3%. Mosier & Soble, supra note 350, at 26-27. Thus, such a short time period is not advisable where the high rate of defaults is a problem sought to be eliminated by reform of present practices.

361. Counsel must appear on the return date to request a continuance in order to file an answer; counsel must again appear on the date specified in the first continuance order to have a trial date assigned or to request that the case be certified to the jury calendar. There are several variations of this. For example, the case is oftentimes continued by consent so that counsel need not come before the court on that date or
While retention of the requirement that the parties appear in person on
the return date is advisable in the revised summary proceeding, the practice
of judges summarily approving a tenant's confession of judgment as part of
the agreement reached with the landlord's attorney should be sharply cur-
tailed. 362 Consideration should be given to standardizing procedures for
court approval of settlement agreements in the three types of non-payment
cases which are most likely to be settled prior to trial: 363 (1) when the
tenant has withheld rent because of the condition of the premises and is
seeking additional time in which to vacate, (2) when the tenant has fallen
behind in payments, but is willing to make up the lost rent, or the tenant
has deliberately withheld rent because of the landlord's refusal to undertake
repairs, but is now willing to pay all or part of the arrearage, and (3) when
the tenant is unable to pay. 364

In the latter instance, the tenant should be referred to a social services
branch for assistance and the case continued for a short time to allow for
investigation of the possibilities of assistance. 365 Since the landlord's objec-
tive in most nonpayment cases is collection of back rent rather than evic-
tion, 366 this procedure would provide the tenant with both the opportunity
and assistance in making the appropriate arrangements for payment to the

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362. For a discussion of the abuse of this practice and its potential consequences for
the tenant, see pp. 654-60 supra.

363. Obviously, there are a number of variations of these three basic types.

364. The settlement negotiations may be undertaken between counsel for the landlord
and the tenant, by the judge, by a third party appointed by the judge to conciliate the
case, or between the landlord's attorney and the tenant. The latter agreement should
be subject to careful scrutiny by the court prior to approval. Appropriate settlement
forms should be made available by the court, to avoid having to use the landlord's
printed form.

365. A unique practice in New York allows a tenant who is in need of public assist-
ance in order to pay the rent to implicate the local welfare official in a nonpayment
case. This authority is implied in the legislation creating the Housing Part of the New
York City Civil Court, specifically in the provisions concerning summary proceedings
and broad joinder subject to judicial discretion. N.Y. CITY CIV. CT. ACT §§ 110(a)(5),
110(d) (29A McKinney Supp. 1976). See Siegel, Supplementary Practice Commentary:
Impleader of Welfare Department in Nonpayment Case Summary Proceedings, 29A Mc-

366. In a suit brought on the basis of nonpayment of rent, a tenant is permitted
to satisfy the judgment by payment of all rent owing and thus avoid eviction. Cf. Trans-
landlord with a minimum of delay. Once payment of the amount to which the landlord is entitled is made, the case should then be dismissed.

Similarly, if the defendant is willing to move, but is in need of additional time in which to do so, settlement need not require entry of judgment. The parties should be encouraged to agree on a date by which the tenant must vacate and the amount of past or present rent, if any, to be paid in the interim. When there are existing housing code violations, this form of settlement is essentially a fair one. The tenant gives up the right to counterclaim for damages for the landlord’s breach of the lease agreement or to seek restitution by claiming that the lease is void, and the landlord waives his right to judgment which would allow recovery of all back rent without having to file a separate action in another forum. The court would retain jurisdiction while the tenant remains in possession, thereby eliminating the necessity for the landlord to file a new action in the event that the tenant breaches the settlement agreement. When the tenant moves out, the case should be dismissed.

The more difficult type of case to settle is one in which the tenant who has not paid rent wishes to remain in possession. Even in this case, if the landlord and the tenant can agree to a payment schedule, the necessity of protecting the former’s right to receive payment does not compel the entry of a confessed judgment. If a tenant failed to abide by the agreement, the landlord could be adequately protected by being permitted to seek immediate judgment upon a day or two telephone notice to the tenant or his counsel. On the other hand, if the tenant complied with the schedule, the case should be dismissed. This type of settlement is particularly appropriate when the tenant’s premises are in need of repairs which the landlord has neglected to make. In such a case, negotiations can take place on a wide range of conditions relating to the timing and amount of the tenant’s payments of rent in arrears, and to the nature and timetable for the landlord’s performance of repairs and maintenance. The objective should be to reach an agreement in which payment is conditioned upon repairs. By avoiding entry of judgment while providing the proper safeguards, the case would appropriately remain within the jurisdiction of the court, until its terms are satisfied. In

367. When the premises are in substandard condition, the amount of payment provided should be reduced accordingly. If the premises remain in such condition, payment should be conditioned upon the landlord’s agreeing to perform repairs. It is important, however, that the tenant not be subject to the possibility of eviction because a social services agency will not provide rental assistance so long as housing code violations exist, when the tenant has had no control over condition of the premises. If the landlord will not accept the offer of reduced payment, the case may have to proceed to a judicial determination of the amount of abatement warranted, after which time social services assistance should be forthcoming to a qualified tenant.

368. The task of committing this type of agreement to writing could be eased by providing a court-approved form which has space for both the payment and the schedule agreed to by the tenant and the repair obligation assumed by the landlord.
a case in which the landlord is in need of money to make repairs, the court-
supervised private arrangement is preferable to requiring tenant payments
into an escrow account or the court registry, where neither party can make
use of the money. An additional protection would be provided if the court
were given expanded jurisdiction over housing matters. For example, when
the tenant has complied with the agreement, he could seek to enforce the
landlord’s obligation through an injunctive proceeding or a contract action for
breach or specific performance.

Implementation of provisions encouraging fair settlements is especially
needed to curtail the use of the court as a collection machine while not preju-
dicing landlord efforts to collect the rents to which he is entitled. With
respect to the latter objective, consideration should also be given to discourag-
ing landlords from filing suit several times a year against the same tenants
whom the landlord knows will pay, but who merely require more time to do
so. This could be achieved by making court settlements sufficiently cumber-
some and costly so that landlords would be encouraged to pursue private
agreements. In addition, it may be possible to provide a mechanism for
negotiating payment schedules between landlords and tenants which would
not require judicial supervision.

Another practice in need of modification is that of entering default judg-
ments during the first call of the calendar. Requiring a landlord to submit
to the court minimal ex parte proof of entitlement to judgment need not
prolong the proceedings or otherwise prejudice the landlord. For example,

369. For example, appropriate legislation could bar a landlord from collecting court
costs or attorneys’ fees in cases in which either the dispute is settled or the landlord
rejects settlement, but fares no better at trial than the rejected offer. Consideration
might also be given to raising the filing costs. If a rent control program is in effect,
tenants’ rents cannot automatically be raised to reflect the increased cost. The burden
would be on the landlord to justify his increased expenditures which necessitate the rent
increase.

It has also been suggested that the practice of “automatic filings” by landlords the
day after the rent is due be curtailed by requiring a waiting period or payment demand
prior to filing. Jack Martin, Supervisor of the Landlord and Tenant Branch, reported
that a delay in the filing period was used voluntarily by Cafritz Company in order to
reduce their number of filings. They were forced to discontinue the procedure because
they allegedly were losing more money than before the waiting period was instituted.
Memorandum from Robert McNamara, supra note 224, at n.1. In the absence of
further facts on the Cafritz program, however, the idea should not be summarily dis-
missed. Certainly a landlord must distinguish between cases in which late payment will
be forthcoming and those in which rent will not be paid unless a suit is filed. Since
the majority of cases end in default and the next most common forms of dispositions
are dismissals and confessions of judgments, it is hard to understand the basis for the
Cafritz conclusion.

370. See discussion pp. 653-54 supra.

371. The recommended court personnel to whom such proof should be submitted will
be discussed at pp. 747-50 infra.
in an action for possession based upon expiration of a notice to quit, the landlord would be required to present: (1) a copy of the notice from which it can be determined that the tenant was in fact provided with the statutory time period required for termination of the tenancy, and that the landlord complied with any other regulations in effect, such as the eviction provisions of the Rent Control Program, and (2) an affidavit stating the date, time and manner in which such notice was served. When notice is alleged to have been waived, a copy of the document containing the signed waiver provision should be submitted. When the action is based on nonpayment of rent, in addition to the foregoing, the landlord should submit an affidavit, updated as of the day of the return date, stating the amount of rent due and the basis for arriving at that sum. These requirements should discourage landlords’ attorneys from requesting default judgments in cases in which payment has been made, but the landlord has failed to communicate that fact to his counsel. In every case, a request for default should be accompanied by a fully completed return of service form\textsuperscript{372} from which it can be determined that service of process was made in compliance with the provisions of the law and court rules.\textsuperscript{373}

In general, the present rules of procedure concerning filing of motions, conducting trials, and entering judgments would require few significant revisions in order to adapt them to the revised summary proceeding. The new rules, however, should authorize discovery procedures as the rule rather than the exception.\textsuperscript{374} To avoid delay, this pretrial activity could be undertaken on an expedited basis when appropriate. In addition, considering the summary nature of the proceeding, the court might make available approved sets of interrogatories relevant to the grounds upon which the action was brought and the nature of the defenses raised in the answer.

As a supplementary matter, special consideration should be given to pro-

\textsuperscript{372} See Landlord-Tenant Form 3.

\textsuperscript{373} Consideration might also be given to requiring a waiting period between the return date and the entry of a default judgment, particularly if service was achieved by posting.

\textsuperscript{374} The present D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 10 provides for the court to authorize discovery only “[f]or good cause shown and with due regard for the summary nature of the proceedings.” This rule subordinates the litigants’ rights to the interests of efficiency and should be eliminated. With the introduction of additional issues into the possessory actions, discovery serves as a useful method for focusing on the disputed issues in preparation of a case. Rather than require a party to demonstrate the need for discovery, the burden should be placed on a party who chooses to object to show that it is not warranted. See BOSTON HOUSING COURT RULES OF PROCEDURE, RULE 4 which allows discovery “as a matter of course and not by leave of court.” Id.
viding for flexible scheduling of court dates. In the long run, balancing the
terests of the landlord in obtaining a summary disposition against the hard-
ship which an inflexible schedule may impose upon a tenant may be benefi-
cial to both parties. This is particularly true in the case of the tenant who
fails to appear on the return date for good cause and then brings a motion
to vacate the default judgment. The result merely delays the dispute settle-
ment process. In this context, it should be noted that the majority of the
proposals advanced during the discussion of landlord-tenant court reform con-
tained recommendations for expanded evening and weekend sessions.375

b. Procedural Implications of Substantive Reforms: Pleading and Proof

The summary proceeding, when considered from the perspective of modern
landlord and tenant law, will also require more substantive reforms if the
landlord's interests are not to dominate unfairly those of the tenant. To
achieve the proper balance of these interests two reforms are suggested.

The first would be designed to discourage the filing of an action as a
summary proceeding when the landlord either is not entitled to the relief
sought or the action is not properly one for summary disposition. By adopt-
ing a modified form of code pleading, a landlord could be required to allege
that he has obtained the proper residential housing licenses.376 A legislative
determination would be required as to whether failure to comply with the
licensing requirements would bar a landlord's recovery, until such time as he
secures the licenses, or merely foreclose him from bringing suit in the nature
of a summary action.377 In addition, the landlord could be required to plead
substantial compliance with the Housing Regulations as a condition precedent
to his recovery on the contract in a summary proceeding. While the issue
of substantiality is one of fact, when the premises contain several serious de-
ficiencies, an issue requiring application of the doctrine of mutually dependent
covenants is raised. Since the summary proceeding was developed to imple-

375. See p. 716 & note 280 supra.
376. See discussion on licensing in Gerwin, supra note 4, at 467-69. The required
licenses include a housing business license, a certificate of occupancy, and, if the land-
lord is not the owner, a real estate broker's license. The former two licenses are only
required for multiple dwelling buildings.
377. While the courts have not expressly addressed the issue of whether a landlord
who does not have either a Housing Business License or a Certificate of Occupancy may
maintain an action, the statute expressly forbids an unlicensed real estate broker from
doing so. D.C. CODE § 45-1407 (1973). One Superior Court judge denied recov-
er of back rent and awarded restitution of all monies that had been paid to an unli-
moment the law based on the converse doctrine of independent covenants, it would not be unreasonable for the legislature to bar the landlord from using the summary mechanism in cases in which his breach of a lease covenant is raised as a defense. The legislature could still allow the landlord to maintain a "regular" civil proceeding in the new housing court system for recovery of possession, even though the suit could not be brought as a summary action. In the alternative, the legislature could bar any possessor proceeding until such time as the premises were brought into substantial compliance with the Regulations. In the latter case, if the tenant chose not to move, the landlord would be limited to an action for quasi-contractual relief equal to an amount representing the fair market value of the premises in substandard condition. Thought might also be given to requiring a landlord to plead evidentiary facts which may allow expedited handling of certain cases. For example, a landlord could be required to submit a copy of the notice to quit, together with an affidavit of service, or a copy of the document in which such notice was waived. This would not be an unfair burden as the landlord would be required to offer such proof at trial. If the notice, or service of the notice, or the service of process is defective on its face, however, the action should no longer be permitted to occupy the attention of the court.

The second substantive reform concerns the judicial allocation of the burden of proof. Particularly in a summary proceeding, which can only be undertaken by the landlord to whom the most benefits accrue, the burden of proof should be allocated on the basis of pragmatic considerations of fairness, convenience, and public policy. When the tenant can establish that serious violations of the Housing Regulations have existed over a lengthy time period, whether or not the preponderance of the evidence establishes the time factor necessary to void the lease, such proof should give rise to a presumption in favor of total abatement. Thus, the burden of showing the amount

378. It is not suggested that all cases in which the condition of the premises is at issue should be tried as a regular civil action rather than as a summary one. Were the landlord required to allege substantial compliance with the Regulations, the case could be conducted as a summary proceeding, notwithstanding a tenant defense based on Brown, Javins, or § 2902 of the Housing Regulations, unless, of course, the judge ruled that no reasonable person could find that such premises were in substantial compliance with the Regulations. When the case is conducted as a summary proceeding and the tenant prevails on a Brown or Javins defense, the landlord should not be subject to sanctions for a false pleading unless it could be shown that such statement had not been made in good faith.


of back rent actually owed by the tenant, given the condition of the premises, would rest with the landlord.

This shift in the evidentiary burden is warranted in the majority of cases when the tenant has neither the resources nor the access to experts which the landlord has to prove the diminished value of the premises. On the other hand, the landlord has access to repair information including the nature and cost of work completed or planned to be performed. Such an idea is not totally without precedent. The United States Court of Appeals for the District of Columbia Circuit has placed a similar burden on the landlord in the context of a protective order proceeding. It held that if the tenant demonstrated that the dwelling was in violation of the Housing Regulations, the landlord’s showing of need for a protective order must include proof of the amount to which he was entitled.  

It is arguably within the equitable powers of the court to fashion an appropriate remedy based upon the foregoing procedures in a proceeding which is primarily equitable in character. As a public policy matter, however, enactment of this change should come from the legislature. At the same time, the legislature might consider developing a schedule of values for various violations which would make the burden easier. For example, certain kinds of violations, such as lack of heat, can be assigned a percentage of the rental value. Other defects may warrant a specific market value. A diminution set out in terms of a dollar amount can be computed by comparing the value of similar premises with and without a particular service.

2. Evidentiary Considerations: Establishing Condition of the Premises

It was the consensus of the proposals advanced during the reform discussion of 1970-73 that a housing inspection should be a routine part of a case in which the condition of the premises is raised as a defense. Implied in those proposals, when not specifically expressed, was the idea that when the inspection is ordered by the court, the inspector should serve as a court

382. Using the latter method, one judge determined that air conditioning was worth $1.00 per day. Tenants leasing an apartment advertised as air conditioned were thus entitled to a deduction in rent of $1.00 for every summer day on which the air conditioning did not function. Winchester Management Corp. v. Staten, L & T No. 65215-73 (D.C. Super. Ct., Dec. 6, 1973), rev’d, 361 A.2d 187 (D.C. 1976). This decision was reversed on the ground that lack of air conditioning was not appropriate as an issue raised in a counterclaim in a possessory action. See also Gerwin, supra note 4, at 488-90, for a discussion of the burden of proof in this case.
383. See proposal discussions, pp. 691-722 passim.
384. In a summary proceeding when a defense raising the condition of the premises
witness who would be considered an impartial, qualified expert. His testimony and conclusions would be subject to evidentiary rebuttal by either party. Implementation of a recommendation along these lines is in the interests of conducting both an informed and balanced adjudication on the merits of the case. In addition, in most actions it would mean elimination of a potential expense for both parties.

In a judicial forum with expanded jurisdiction over rental property matters, the inspector's report would serve a significant function in all types of actions, including injunctions, criminal prosecutions and civil suits. Considerations of both efficiency and expense would dictate that, absent a valid objection, the inspection report should be recognized by court rule as *prima facie* evidence of the facts contained therein. This would avoid the necessity of summoning an inspector every time a report is used.385

Although there has been some opposition in the District of Columbia to the suggestion of attaching a housing inspection branch to the new judicial housing forum,386 an even more extensive provision was included in the enabling legislation of the Boston Housing Court.387 That legislation provided for the appointment of Housing Specialists who would be required to have knowledge of building maintenance, problems of landlords and tenants regarding housing units, funds, financing, resolution of problems, and application of rules and regulations (the Housing Code).388 The act further provided that such personnel be given whatever powers and duties the judge prescribed.389 The value in utilizing this system is that it offers the court the opportunity to consider the variety of factors which may cause or explain the condition of the premises.

Another significant feature of a housing court would be its potential for developing and maintaining a data bank which would contain records of all inspections and litigation involving a particular building within a certain number of years. Such records should be made available to the court and

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385. See MASS. GEN. LAWS ch. 185A, § 23 (West 1977).
386. Judge Greene's final memorandum of April 5, 1973, acknowledged that some judges had objected to the idea of inspectors being court employees. The Chief Judge stated that he had no objection to the inspectors remaining in the executive branch if they would be assigned to the court on a full-time or substantially full-time basis. *Id.* at 4.
387. MASS. GEN. ANN. LAWS ch. 185A, § 16 (West 1977).
388. *Id.*
389. *Id.*
the parties when the history of maintenance efforts, past litigation, and Housing Regulation compliance are relevant issues. In addition, licensing information covering the same time period could be maintained and made available by the appropriate government administrative agency.

A similar requirement is considered an important function of the New York City civil court system and was one of the purposes behind the creation of the separate housing court section. In that court system, the majority of hearings are conducted by hearing examiners assigned full-time to the Housing Part. An examiner has continuing jurisdiction over a building, and thus all actions by or against an owner of the building or his representative are referred to the same examiner who retains records of all prior inspections and litigation. Another feature of the New York system is the availability of a computerized information sheet regarding all actions taken with respect to a particular building over an extended period of years.

E. Decisionmakers

The type of decisionmakers which should be employed in the new Housing Branch or Division is the subject which meets with the widest disagreement among the various persons and organizations having an interest in court reform. For example, on the subject of judges, the Advisory Commission recommended that the necessary judges be assigned to its proposed Housing Court for a substantial period of time, perhaps three years. Neighborhood Legal Services, along with others, recommended that judges be assigned for an extended rotation period of between three and six months, and that afterwards they carry with them the receivership and other cases requiring continuing jurisdiction which arose during their term. Boston, on the other hand, has two permanent full-time judges, while New York has a rotating judge and sixteen full-time hearing examiners, who have the same powers as a judge. Detroit has two rotating judges, one to pre-

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390. This information was obtained in an interview with Anthony Gliedman, General Counsel, Housing Development Administration, New York City, March 13, 1975. See also N.Y. CITY CIV. CT. ACT § 110 and Commentary (29A McKinney Supp. 1976).
391. Id.
393. Neighborhood Legal Services Program Report, supra note 51.
394. MASS. GEN. ANN. LAWS ch. 185A, § 8 (West 1977).
side over bench trials and the other to preside in jury cases and pre-trial matters.396

From all these different proposals, certain common requirements can be identified, as well as several organizational possibilities. As a starting point, it is evident that a new judicial forum with expanded jurisdiction, such as that discussed here, will require more than one decisionmaker to preside over the court for longer than the current one month period. It is also desirable that such decisionmakers possess some degree of expertise in the area of landlord and tenant law. Furthermore, it is essential that the decisionmakers be willing to implement the applicable statutory and case law within the permissible bounds of flexible judicial interpretation. While the foregoing might appear obvious, judges hostile to the recent changes in the common law, given the lack of tenant legal representation and the infrequency of appeal, have been able to thwart its implementation in all too many cases.

Additional decisionmakers also offer the opportunity to divide and delegate judicial responsibilities. For example, a multiple judge housing court could be organized along lines similar to the present Criminal Division of the Superior Court, with one judge assigned to preside over bench trials (the equivalent of misdemeanors) and another over jury trials. The latter, or a third judge, could be given responsibility for assignment, calendar control, motions, and preliminary matters. Another organizational possibility would have one judge assigned to summary proceedings, another to all other legal actions, perhaps with a third detailed to handle pre-trial, motions, actions for equitable relief, and other miscellaneous matters. Under this organizational model, jury trials could continue to be certified to the general civil jury calendar. Obviously, the possibilities are numerous and any conclusions would have to be based upon the specific nature and kinds of procedures adopted.

The most controversial consideration involves the advantages and disadvantages of defining a role in the new court system for hearing examiners, hearing officers, or other individuals serving in a similar capacity. In the absence of an adequate number of judges, additional non-judicial, or extra-judicial assistance must be provided. The major reservation to their employment, expressed primarily by tenant representatives who oppose the examiner concept, concerns the difficulty of finding qualified and impartial individuals to serve in this limited decisionmaking capacity. Admittedly, human frailties will detract from what might appear to be a well-designed system. This is true, however, for both judicial and non-judicial decisionmakers.

396. Mosier & Soble, supra note 350. There were only nine jury trials held in the course of the one year covered by the study.
In a mechanism such as that outlined in this section, hearing officers could serve an important and useful function, if they are not called upon to render decisions of law, and if their powers are carefully circumscribed. Areas in which such officers could provide needed assistance include: receiving ex *parte* proof from a landlord or his attorney, seeking entry of a default judgment, reviewing settlement agreements which allow a continuance for tenant payment and landlord repair, providing mediation or conciliation services, dismissing, for want of prosecution, cases in which the landlord is not present on the return date, and conducting pre-trial conferences.

While the removal of any judicial function from a judge to some other court personnel will meet with opposition from some sources, it should be noted that major metropolitan cities have utilized some form of extra-judicial hearing officials in their local court system for settling housing disputes or small claims matters. In New York, the primary differences between a hearing before a judge and examiner are the method of transcription of the proceedings and the size of the hearing room. The examiners have smaller rooms and use tape recorders, while the judge sits in the courtroom and has a stenographer. Both men wear black judicial robes and the decision of either may be appealed directly to a higher court. The examiners usually have more expertise in the area of landlord and tenant law, having undergone an educational orientation and having qualified for appointment after five years in the active practice of law. As a general practice, cases are assigned to a hearing examiner on the return date. He "conferences" the case off the record on that date in order to reach a settlement or payment arrangement. If he is unable to settle the case, it is set for trial approximately eight days later. If a payment schedule is arranged he may adjourn the case until after the final payment date. It has been unofficially estimated that about ninety percent of the cases are resolved in this manner.

An alternative court model could utilize extra-judicial decision makers to preside over proceedings which are the equivalent of pre-trial conferences. When the pleadings filed by the landlord and the tenant indicate the existence of disputed issues for trial, a court clerk would be empowered to appoint an attorney to act as an examiner from a list of qualified applicants to conduct an informal, off-the-record hearing. This conference would be designed either to reach a settlement or define the issues for trial. A form provided by the clerk would enable the attorney-examiner to report to the

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397. See discussion on suggested procedural reforms in a summary proceeding pp. 733-43 *supra*.

court information that would aid in a prompt disposition of the case. Matters upon which the examiner could comment include: disputed facts that the parties are likely to litigate, discovery proceedings required by each litigant (and approved by the examiner if he is provided with that authority), the trial date agreed upon by the parties, the identification of witnesses including experts, the examiner's estimate of the length of the trial, and possible stipulations as to evidence and damages.

The roles ascribed to court officials, other than judges in housing courts reflect the realization that providing assistance for the judge is required to achieve complete adjudication of a landlord-tenant dispute. In the District of Columbia no two facts are more apparent than that a single decisionmaker in the present system is incapable of assuring that justice is done for all parties who come to court, and that a new system eliminating the inequities of the present one will require additional decisionmakers. In the new system detailed in this proposal there are many tasks which, while more than merely administrative, do not require decisions of law. Thus, while offering the possibility of improved efficiency, a hearing officer would not interfere with the basic judicial decisionmaking responsibilities, and both landlords and tenants would neither be prevented nor discouraged from exercising their right to a day in court. The suggestion for the use of such additional personnel is based upon the belief that once a landlord-tenant dispute enters the judicial system, the resolution of that dispute should receive the attention of an objective third person with sufficient expertise to prevent misuse of the judicial process and a miscarriage of justice.

F. Conclusion

The preceding discussion has sought to propose a judicial mechanism for the resolution of landlord-tenant disputes and to identify the procedures, procedural devices and relevant substantive considerations which the new system should include. While these proposals have emerged from the earlier considerations of the development of substantive law, the present system, and the previously advanced alternatives, it is not claimed that all the ideas are consonant with the political and practical realities revealed in those earlier sections. These ideas are not definitive solutions, they are recommendations for consideration; they combine the practical and the theoretical in an effort to suggest an effective mechanism for resolving disputes. The impera-

399. See Gerwin, supra note 4.
400. See discussion pp. 649-90 supra.
401. See discussion pp. 690-722 supra.
tive behind this task is that the District of Columbia establish a judicial dispute settlement mechanism which will apply the evolving substantive law and achieve results which are just and equitable in their impact upon the parties. If, in the end, these twin objectives prove exclusive of one another, or if they produce consequences which are contrary to desirable social, political, and economic realities, then legislative action to revise the law or reform the mechanism should follow. In such a situation, it would not be unlikely that the reforms suggested here would become obsolete or be rendered inoperable.

While the goal has been to search for concrete proposals designed to resolve legal disputes between landlords and tenants in a manner which will maximize the socially desirable conduct of each party, the task has also included an effort to objectify and incorporate into these proposals the less tangible concepts of equity and justice. The injunction for such an undertaking is not new; it is of Biblical origins:

Do not do unrighteousness in judgment; do not favor the poor, nor show deference to the rich, but in Justice shall you judge your people.

*Leviticus* 19:15
TABLE 1
COMPARISON OF CASES ENDED BY DEFAULT WITH CASES RECEIVING ATTENTION OF LANDLORD AND TENANT JUDGE (1966-1976)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases Filed</th>
<th>Number of Defaults</th>
<th>Percentage of Cases Ending in Default</th>
<th>Number of Cases Before L &amp; T Judge</th>
<th>Percentage of Cases Before L &amp; T Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>110,814</td>
<td>74,945</td>
<td>67.6</td>
<td>5,488</td>
<td>5.0</td>
</tr>
<tr>
<td>1967</td>
<td>117,651</td>
<td>80,269</td>
<td>68.2</td>
<td>3,982</td>
<td>3.4</td>
</tr>
<tr>
<td>1968</td>
<td>119,078</td>
<td>81,412</td>
<td>68.4</td>
<td>4,193</td>
<td>3.5</td>
</tr>
<tr>
<td>1969</td>
<td>121,444</td>
<td>79,637</td>
<td>65.5</td>
<td>3,984</td>
<td>3.3</td>
</tr>
<tr>
<td>1970</td>
<td>120,813</td>
<td>74,980</td>
<td>62.1</td>
<td>5,115</td>
<td>4.2</td>
</tr>
<tr>
<td>1971</td>
<td>122,357</td>
<td>71,570</td>
<td>58.5</td>
<td>5,149</td>
<td>4.2</td>
</tr>
<tr>
<td>1972</td>
<td>120,653</td>
<td>65,041</td>
<td>53.9</td>
<td>9,830</td>
<td>8.1</td>
</tr>
<tr>
<td>1973</td>
<td>115,703</td>
<td>58,797</td>
<td>50.8</td>
<td>13,151</td>
<td>11.4</td>
</tr>
<tr>
<td>1974</td>
<td>116,782</td>
<td>60,402</td>
<td>51.7</td>
<td>15,799</td>
<td>13.5</td>
</tr>
<tr>
<td>1975</td>
<td>120,608</td>
<td>59,821</td>
<td>49.6</td>
<td>17,482</td>
<td>14.5</td>
</tr>
<tr>
<td>1976</td>
<td>114,408</td>
<td>55,319</td>
<td>48.3</td>
<td>19,491</td>
<td>17.0</td>
</tr>
</tbody>
</table>

TABLE 2
DISPOSITION OF CASES OTHER THAN BY DEFAULT (1972-1976)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Cases Filed</th>
<th>Confessed Judgments w/ prejudice</th>
<th>Dismissals w/o prejudice</th>
<th>Sent to non-Jury Trials</th>
<th>Certified For Jury</th>
<th>Totals (Percentage of cases filed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>120,653</td>
<td>5,140(4.3%)</td>
<td>44,399(36.8%)</td>
<td>830(0.7%)</td>
<td>1,399(1.2%)</td>
<td>70,181(58.2%)</td>
</tr>
<tr>
<td>1973</td>
<td>115,703</td>
<td>5,223(4.5%)</td>
<td>43,311(37.4%)</td>
<td>1,064(0.9%)</td>
<td>633(0.6%)</td>
<td>64,030(55.3%)</td>
</tr>
<tr>
<td>1974</td>
<td>116,782</td>
<td>6,053(5.2%)</td>
<td>45,168(38.7%)</td>
<td>803(0.7%)</td>
<td>1,211(1.0%)</td>
<td>66,455(56.9%)</td>
</tr>
<tr>
<td>1975</td>
<td>120,608</td>
<td>7,425(6.2%)</td>
<td>50,296(41.7%)</td>
<td>857(0.7%)</td>
<td>959(0.8%)</td>
<td>67,246(55.8%)</td>
</tr>
<tr>
<td>1976</td>
<td>114,408</td>
<td>9,508(8.3%)</td>
<td>46,311(40.5%)</td>
<td>530(0.5%)</td>
<td>860(0.8%)</td>
<td>64,827(56.7%)</td>
</tr>
</tbody>
</table>

TABLE 3
CASES RECEIVING IMMEDIATE SUMMARY DISPOSITION (1972-1976)

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Filed</th>
<th>Judgments Entered Default + Confession = Total</th>
<th>% Cases Ending in Default or Confession</th>
<th>% Cases Ending in Default or Confession or Dismissal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>120,653</td>
<td>65,041</td>
<td>5,140</td>
<td>70,181</td>
</tr>
<tr>
<td>1973</td>
<td>115,703</td>
<td>58,797</td>
<td>5,223</td>
<td>64,030</td>
</tr>
<tr>
<td>1974</td>
<td>116,782</td>
<td>60,402</td>
<td>6,053</td>
<td>66,455</td>
</tr>
<tr>
<td>1975</td>
<td>120,608</td>
<td>59,821</td>
<td>7,425</td>
<td>67,246</td>
</tr>
<tr>
<td>1976</td>
<td>114,408</td>
<td>55,319</td>
<td>9,508</td>
<td>64,827</td>
</tr>
</tbody>
</table>

1. Dismissal figure includes cases dismissed with prejudice and those dismissed without prejudice pursuant to D.C. Super. Ct. Rules, Landlord & Tenant Rule 11, which authorizes the clerk to dismiss a case in which neither the landlord nor tenant appear on the return date. The overwhelming majority of cases dismissed each year are done so voluntarily by the landlord or with his consent. See note 67 supra.
### TABLE 4

**NUMBER AND NATURE OF MATTERS RECEIVING ATTENTION OF JUDGE PRESIDING IN LANDLORD AND TENANT COURT**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Before L &amp; T Judge</th>
<th>Confessed Judgments</th>
<th>Continuances</th>
<th>Bench Trials &amp; Motions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number Per Year</td>
<td>Average Per Day</td>
<td>Number Per Year</td>
<td>Average Per Day</td>
</tr>
<tr>
<td>1972</td>
<td>9,830</td>
<td>39</td>
<td>5,140</td>
<td>20</td>
</tr>
<tr>
<td>1973</td>
<td>13,151</td>
<td>52</td>
<td>5,223</td>
<td>21</td>
</tr>
<tr>
<td>1974</td>
<td>15,799</td>
<td>62</td>
<td>6,052</td>
<td>24</td>
</tr>
<tr>
<td>1975</td>
<td>17,482</td>
<td>69</td>
<td>7,425</td>
<td>29</td>
</tr>
<tr>
<td>1976</td>
<td>19,491</td>
<td>77</td>
<td>9,508</td>
<td>37</td>
</tr>
</tbody>
</table>

1. Other matters which may receive judicial attention not shown in table include: certifying cases to the jury calendar (or to another judge) and returning to the files for further proceedings cases in which the landlord fails to appear pursuant to D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 12. In 1976, these ministerial tasks were performed in only 1.4% of the cases filed, but amounted to 8.4% of the matters receiving the attention of the judge. This figure has increased since the recognition of the tenant's right to jury trial because the judge is required to certify the case to the jury calendar.

2. It is not unusual for more than one continuance to be granted in a contested case, particularly in cases in which counsel is appointed before the first appearance of the tenant in court in answer to the landlord's complaint. See discussion *supra*, at pp. 19-20.

3. Computation based upon a 254 working-day year (approximately 21 days per month excluding weekends and allowing for six week-day holidays).

4. The practice of conducting bench trials was more popular among judges when the issues were simpler in the years prior to court reorganization, the implementation of the appellate courts' decisions and the Housing Regulations recognizing tenant defenses, and development of a full-scale Law Students In Court program. Between 1966 and 1971 inclusive, the average number of bench trials per year amounted to 4,606. This figure dropped dramatically in 1972, although the total number of cases filed did not fluctuate substantially. See Table 1. A partial explanation of the variance can be found in the differing practices of recordkeeping among courtroom clerks. In addition, based upon the substantial increases both in the number of cases continued and of motions filed, it can be speculated that prior to 1972 judges preferred to conduct trials rather than to allow time for settlement.

5. This figure includes all types of motions cognizable in the Landlord and Tenant Branch, including, for example, motions for summary judgment, to strike defendant's counterclaim, to quash service, or for a protective order in cases certified for jury trial. See D.C. SUPER. CT. RULES, LANDLORD & TENANT RULES 2 & 13.
### TABLE 5

Comparison of Judgments Secured with Evictions Requested, Scheduled and Executed (1972-1976)

<table>
<thead>
<tr>
<th>Year</th>
<th># Cases Filed</th>
<th>Defaults &amp; Confessions</th>
<th>Evictions</th>
<th>Confessions &amp; Judgments</th>
<th>Restitution Issued</th>
<th>Scheduled</th>
<th>Executed</th>
<th>% Judgments</th>
<th>% Confessions</th>
<th>% Restitution Issued</th>
<th>% Evictions</th>
<th>% Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>120,653</td>
<td>70,181</td>
<td>35,244</td>
<td>3,185</td>
<td>1,890</td>
<td>50.2%</td>
<td>9.0%</td>
<td>2.7%</td>
<td>1.6%</td>
<td>3.4%</td>
<td>45.6%</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>115,703</td>
<td>64,020</td>
<td>32,049</td>
<td>3,776</td>
<td>2,057</td>
<td>50.1%</td>
<td>11.8%</td>
<td>3.2%</td>
<td>1.8%</td>
<td>3.5%</td>
<td>47.5%</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>116,782</td>
<td>66,455</td>
<td>31,594</td>
<td>3,823</td>
<td>2,296</td>
<td>47.5%</td>
<td>12.1%</td>
<td>3.5%</td>
<td>2.0%</td>
<td>3.9%</td>
<td>46.3%</td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td>120,608</td>
<td>67,246</td>
<td>31,153</td>
<td>3,609</td>
<td>2,260</td>
<td>46.3%</td>
<td>11.6%</td>
<td>3.4%</td>
<td>1.9%</td>
<td>3.9%</td>
<td>45.6%</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>114,408</td>
<td>64,825</td>
<td>29,536</td>
<td>3,934</td>
<td>2,514</td>
<td>45.6%</td>
<td>13.3%</td>
<td>3.9%</td>
<td>2.2%</td>
<td>45.6%</td>
<td>46.6%</td>
<td></td>
</tr>
</tbody>
</table>

### TABLE 6

Disposition of Jury Demands (1972-1976)

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Certified for Jury</th>
<th>Jury Trials Held</th>
<th>Other Dispositions of Jury Demands</th>
<th>Cases Unresolved of Years End</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>212</td>
<td>5</td>
<td>210</td>
<td>0</td>
</tr>
<tr>
<td>1973</td>
<td>11</td>
<td>0</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>1974</td>
<td>485</td>
<td>1</td>
<td>339(^2)</td>
<td>146</td>
</tr>
<tr>
<td>1975</td>
<td>876</td>
<td>2</td>
<td>491(^3)</td>
<td>394(^4)</td>
</tr>
<tr>
<td>1976</td>
<td>710</td>
<td>4</td>
<td>460(^5)</td>
<td>263(^6)</td>
</tr>
</tbody>
</table>

1. This figure includes settlements, dismissals, judgments rendered before the conclusion of a trial and jury demands stricken or withdrawn. Since 1974, at least 70% of these cases were settled or dismissed prior to trial. See notes 2 and 3 infra.

2. In 1974, judgments were entered without a trial in 23% of the cases in which jury demands had been filed. Of these 78 cases, judgment for the landlord was had in 95% (74 cases); the tenant had judgment in 5% (4 cases).

3. In 1975, judgments were entered in 29% of the cases in which a jury demand was filed. In these 144 cases, judgment for the landlord was had in 91% of them (131 cases); the tenant had judgment in 9% (13 cases).

4. In 1976, of the 123 cases in which judgment was entered, the landlord prevailed in 88% of them (108 cases) and the tenant in 12% (15 cases).

5. This figure includes nine cases pending from 1974.

6. This figure includes seven cases from 1974, six cases from 1975, and 250 cases from 1976.


TABLE 7

**Comparison of Jury and Non-Jury Cases (1972-1976)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Non-Jury Trials</th>
<th>Jury Trials</th>
<th>Non-Jury Trials Pending</th>
<th>Unresolved Cases not Certified for Jury Trial</th>
<th>Unresolved Cases Certif'd for Jury Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>5</td>
<td>5</td>
<td>*</td>
<td>3,606</td>
<td>0</td>
</tr>
<tr>
<td>1973</td>
<td>75</td>
<td>0</td>
<td>120</td>
<td>6,487</td>
<td>2</td>
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<tr>
<td>1974</td>
<td>116</td>
<td>1</td>
<td>52</td>
<td>2,534</td>
<td>146</td>
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<tr>
<td>1975</td>
<td>36</td>
<td>2</td>
<td>50</td>
<td>1,123</td>
<td>394</td>
</tr>
<tr>
<td>1976</td>
<td>44</td>
<td>4</td>
<td>38</td>
<td>1,044</td>
<td>263</td>
</tr>
</tbody>
</table>

* unavailable

1. This figure is arrived at by subtracting from the number of new cases filed each year the total of the following categories of case disposition: dismissals, defaults, confessions, certified for jury, dismissed without prejudice (Rule 11), returned to files, certified to another judge, plea of title, non-jury trial. This large figure compared with the small number of non-jury trials pending can be explained in several ways. Since well over 1,000 new cases are filed each month, many of the cases could have been filed in one year and been assigned a return date in the following year. In addition, it is likely that some cases were continued for a variety of reasons without having been assigned a trial date. It is also possible that the yearly statistical summary is not precise with respect to disposition of all landlord and tenant cases.

2. This figure also includes cases pending from previous years. See Table 6 notes 5 & 6.