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

PART I: THE SUBSTANTIVE LAW AND THE NATURE OF THE PRIVATE RELATIONSHIP

Leslie E. Gerwin*

do not do unrighteousness in justice
do not favor the poor, nor show deference to the rich, but in justice shall you judge your people

Leviticus 19:15

PREFATORY NOTE

The following study and evaluation will be presented in two related articles. Part I, which follows here, examines the development of the substantive law governing the landlord and tenant relationship. This is presented through an analysis of the appellate court's perceptions of its role in protecting both the rights of the disputing parties and the quality of the existing housing supply.

Part II, which will be presented in the next issue of the Catholic University Law Review, details the inability of the present dispute settlement mechanism to apply and implement the substantive law; it also reviews and ana-

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In addition to the academic research and analysis, the preparation of this article has been influenced by a year and a half of practice in and observation of the Landlord and Tenant Branch of the Superior Court of the District of Columbia. The author is particularly indebted to Professor Terence J. Anderson of the University of Miami School of Law, who supervised and encouraged the initial preparation of this study as thesis advisor at the Antioch School of Law. Special thanks is also owed to Professor Florence Wagman Roisman for her challenge to students to be creative and imaginative in the interpretation and use of housing law.
lyzes the previously advanced alternatives for reform of this system. In conclusion, it seeks to identify the considerations for developing a new judicial mechanism and the procedural framework this mechanism will require to resolve landlord and tenant disputes.

At the outset, one limitation upon the conclusions presented here needs to be noted. Although this study proceeds from the recognition that the judiciary cannot solve the housing crisis, it is also based on the proposition that the courts must provide a forum in which the law can continue to be developed and implemented. To achieve this objective, reform of the dispute settlement mechanism, specifically the landlord and tenant court, is required. Such reform, and the doctrinal development it might spawn, could contribute to the shrinkage of the private low-cost housing market as it presently exists. The tension between the implementation of a new doctrine and its broader policy implications may therefore become the predicate for legislative intervention that could then render obsolete any mechanism developed to meet present exigencies. The analysis which follows, therefore, is based upon practical and theoretical legal considerations concerning the nature and imperative of the law at its present stage of evolutionary development.

I. INTRODUCTION: THE NATURE OF THE LANDLORD-TENANT RELATIONSHIP

Traditionally, the lease represented a temporary conveyance of real estate, a transaction governed by the doctrines of independent covenants,1 caveat emptor2 and waste.3 Absent an express agreement, the landlord had no duty to maintain or repair the premises, and further had no obligation to mitigate damages due to a tenant breach. Although the nature of the society changed and the tenant often sought only a place to live, thus renting only the use of an apartment, the characterization of the lease as a land transaction re-

1. The performance by one party was independent of the obligation of the other; thus there was no excuse for a tenant's failure to pay rent because of a landlord breach. 2 R. POWELL, REAL PROPERTY ¶ 230(3) (P. Rohan ed., 1977); 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed., 1952). Similarly, the tenant was not relieved of the duty to pay rent during the lease term even if the premises were destroyed. In Fowler v. Bott, 6 Mass. 63 (1809), lessee was held liable for all rent due during the period covered by the lease notwithstanding destruction by fire of the buildings demised and refusal of the landlord to rebuild.

2. The tenant is held to take the premises "as is" and, absent fraud, has no right of recourse for hidden defects subsequently discovered. R. POWELL, supra note 1, at ¶ 233; L. JONES, LANDLORD & TENANT ¶ 576 (1906).

3. The tenant has a duty to avoid causing any significant change to the condition of the premises, which was often found to include an implied duty not to commit waste. R. POWELL, supra note 2, at ¶ 233; 7 W. HOLDsworth, A HISTORY OF ENGLISH LAW 275-277 (1926).
mained in effect. It was well into the twentieth century before courts began to depart from strict adherence to the property law concepts developed in agrarian feudal society. The District of Columbia was among the first jurisdictions in the United States to reorder the legal relationship of landlord and tenant, but as late as 1952, the United States Court of Appeals for the District of Columbia Circuit cited with approval the following language:

It is settled law that where the owner of premises, by lease, parts with entire possession and control of the premises, and the tenant, either by express provision of the lease or by the silence of the lease on that subject, assumes liability for the keeping of the premises in proper repair, the tenant, and not the owner, will be liable in case of an accident due to negligence in allowing the premises, or any portion thereof, to get out of repair.

In Bowles v. Mahoney, the court denied recovery to a plaintiff who had been injured when a wall collapsed because the defendant-property owner

4. The first appearance of the tenancy for a fixed term of years is not certain, but it was a well-known form of leasehold as early as the thirteenth century. At its inception such a tenancy was created by an oral or written agreement and was considered to be a personal contract. The interest of the lessee for years was treated as a chattel interest because the lease at that time was as often an investment of capital in property as it was merely the letting of land to a farmer. 3 W. Holdsworth, A History of English Law 215 (1927). Both the nature of the agrarian society and that of the interest in land created, however, soon required the application to a lease of legal doctrines different from those used to interpret an ordinary contract. In the sixteenth and seventeenth centuries the law regulating the landlord-tenant relationship evolved for the most part based upon the needs and desires of the owners of great estates. 7 W. Holdsworth, A History of English Law 238 (1926). With some assistance from equity and the legislature, landlord and tenant law emerged based upon foundations of medieval land and contract law and was applied, with some adaptation, to residential properties. Id. at 296. One nineteenth-century historian observed:

The truth is that the law of landlord and tenant has never, at least under any usual conditions, been a law of free contract. It is a law of contract partly express, partly supplied by judicial interpretation, and partly controlled by legislation and sometimes by local custom. So far as the terms and conditions are express, they are in the vast majority of cases framed by landlords or their advisors. The tendency of judicial interpretation has also been, until lately, to incline the scale of presumption in favor of the landlord on doubtful points; and the same may be said of the ruling tendency of legislation down to the middle of the present century. The allowance of local customs, which might have done much to redress the balance if taken up betimes, depends on the tendency of the judges. When special customs were looked on as a kind of natural enemies of common law, and strict proof of them was required, they got little help court.


had failed to repair it. The court held that "[a]bsent any statutory or contractual duty, the lessor is not responsible for an injury resulting from a defect which developed during the term."\(^6\)

It was not until 1970 that the court modified the underlying principle of common law that had characterized the lease as a conveyance of land. Writing for the court in the landmark case of \textit{Javins v. First National Realty Corp.},\(^7\) Judge J. Skelly Wright declared:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.\(^8\)

Under the holding in \textit{Javins} a tenant could not be evicted for nonpayment of rent where the conditions of the premises had abated the duty to pay that rent. The Court based its decision on "a belief that leases of urban dwelling units should be interpreted and construed like any other contract."\(^9\)

This replacement of the common law doctrines of real property, which were the bases of the 1952 \textit{Bowles} decision, with modern principles of contract law, had been preceded by several judicial departures from strict application of the older precedent. These cracks had begun to appear in the case law shortly after the passage by the District of Columbia\(^10\) of the 1955 Housing Regulations.\(^11\) Ironically, these new regulations were not intended to ameliorate the harsh result of decisions denying recovery in tort to tenants whose injuries were caused by conditions of demised property or to give tenants the panoply of rights and remedies available to contracting parties. The updated Housing Regulations were necessitated by the District of Columbia's application for urban renewal and low income housing funds.

In the District of Columbia there had been standards governing maintenance and conditions of residential buildings since 1878. When the United

\(^6\) 202 F.2d at 323.
\(^8\) Id. at 1074.
\(^9\) Id. at 1075.
\(^10\) At that time the District of Columbia government was headed by three commissioners appointed by the President. In 1967 this form of government was replaced by a single commissioner (mayor) and a nine-person city council, all of whom were appointed by the President. In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), which provides for a mayor and a 13-member city council to be elected by the registered voters of the District of Columbia.
States Congress passed the Housing Act of 1954, however, the qualifications for receipt of federal funds required a municipality to establish eligibility by developing a “workable program for community improvement. . . .”12 While the paper program included provisions for the improvement of substandard housing, in its implementation the plan was not intended to offer much relief to low-income tenants. Under the program a city could qualify for federal funds to tear down the slums and build new housing for persons in the middle and upper income brackets. The new structures, as well as those rehabilitated with federal money, would have to be constructed and maintained in accordance with the updated code. That it was primarily the building, rather than the tenant, that was the main concern of the Housing Regulations is evidenced by the provision of criminal sanctions as the sole enforcement mechanism. Only the District of Columbia government and the landlord would be parties to a proceeding for violation of the Regulations, which were silent on the issue of requiring a landlord to correct such violations.

The language of the statement of purpose set forth in the District of Columbia Housing Regulations, however, was sufficiently broad and egalitarian to transcend its pragmatic objective. For example, it read in part:

The Commissioners further find and declare that the aforesaid [slum and blighted] conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.

The Commissioners, accordingly, promulgate these regulations for the purpose of preserving and promoting the public health, safety, welfare, and morals.13

Thus, a mere eight years after the court reiterated the “well settled law” which absolved the landlord from liability to tenants injured by conditions of rental property, the judge who had dissented in that case could write the majority opinion reaching the opposite result in a similar fact situation.14 Writing for virtually the same court as in the earlier case, Judge David Bazelon posed the issue to be whether the Housing Regulations imposed a “statutory duty” on the lessor which was not present at the time of the earlier deci-

sion.\textsuperscript{15} By answering in the affirmative, the court permitted a tenant to recover for injuries sustained when a bedroom ceiling collapsed.

Significantly, however, the court's reasoning was grounded in the application of the new Regulations to traditional common law tort principles. Judge Bazelon cited both Holmes and Cardozo to emphasize that this judicial adjustment of the historical landlord-tenant relationship was mandated by the common law itself.\textsuperscript{16} He thus reasoned that where an injury was caused by the harm sought to be obviated by statutory prescription, the standards of that statute should be considered in determining civil rights and liabilities. "This axiom of tort law," he wrote, "tacitly recognizes that the continued vitality of the common law . . . depends upon its ability to reflect contemporary community values and ethics."\textsuperscript{17}

Following that decision, the Regulations were invoked by the courts\textsuperscript{18} as a basis for avoiding other harsh results previously dictated by the common law. The first such instance arose in a case in which the landlord sought to collect rent in accordance with the terms of a lease from a tenant who had moved from the premises because they were unsafe and unsanitary. The District of Columbia Court of Appeals accepted the tenant's defense that contract law principles should apply when a lease is entered into in violation of a statute.\textsuperscript{19} By declaring the lease void because the landlord had entered into

\textsuperscript{15.} Id. at 944.  
\textsuperscript{16.} Id. at 946.  
\textsuperscript{17.} Id.  
\textsuperscript{18.} Prior to "court reorganization" in 1970, appeal from the trial court and the District of Columbia Court of Appeals [hereinafter "court of appeals"] could be taken to the United States Court of Appeals for the District of Columbia Circuit [hereinafter "circuit court"]. The majority of the landmark landlord-tenant cases were decisions of the circuit court reversing the court of appeals affirmance of trial court decisions. Among the explanations for the reorganization was the following: One of the primary purposes of the Court Reform Act was to restructure the District's court system so that "the District will have a court system comparable to those of the states and other large municipalities." Prior to 1970, the District's local courts and the United States District Court and Court of Appeals for the District of Columbia Circuit, unlike their counterparts in the several States, shared a complex and often confusing form of concurrent jurisdiction. . . . The 1970 Act made fundamental changes in this structure. The District of Columbia Court of Appeals was made the highest court of the District, "similar to a state Supreme Court," and its judgments, made reviewable by this Court [United States Supreme Court] in the same manner that we review judgments by the highest courts of the several States. Pernell v. Southall Realty Co., 416 U.S. 363, 367 (1974) (citations omitted).  
\textsuperscript{19.} Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968). This case arose as an action by a landlord for possession based on nonpayment of rent. The tenant, who lost in the trial court, moved during the pendency of the appeal and did not
it with knowledge that the premises contained numerous violations of the Housing Regulations, the court impliedly modified the strict application of the caveat emptor doctrine to landlord-tenant relationships. That same year, however, the court of appeals distinguished its holding and strictly limited its applicability on the basis that the common law did not envision the lease to be a contract.20

This was the situation in 1970, when Judge J. Skelly Wright, in order to halt the piecemeal approach that was producing conflicting decisions, sought to eliminate "the lingering impact of rules whose policies are long since dead."21 Basing his decision on the Housing Regulations and the exigencies of modern urban society, he wrote:

Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed. As we have said before, "[T]he continued vitality of the common law . . . depends upon its ability to reflect contemporary community values and ethics."22

To reach this point, the courts had seized upon the Housing Regulations to provide (1) a standard for recognizing private actions seeking recovery in tort; (2) a basis for implying a prohibition that renders void a lease agreement entered into in violation thereof; and finally, (3) a rationale for recognizing that a tenant has a full panoply of civil rights and remedies as a contracting party. The Regulations, which provided the basis for these and subsequent decisions, eventually were amended to codify much of the decisional law.23 Thus, development of the regulatory scheme has been due in

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22. Id. at 1074.
23. See 1970 Amendments to D.C. Housing Regulations, supra note 11, article 290.
large measure to the interdependence of legislation and judicial interpretation.

A regulatory scheme for which a court has fashioned a present function different from its original legislative purpose has inherent weaknesses. Initially, the legislature provided little guidance to the courts as to the meaning and applicability of the Regulations. In amending the Regulations it did little more than express its intent to codify the holdings of particular judicial decisions. Thus, a court that is unable or unwilling to recognize and follow the trend of the new decisions can legitimately limit, distinguish, or otherwise avoid application of the Regulations in accordance with the intent expressed by the original court of decision. The regulated interests have less incentive to comply when they know that the regulations are not likely to be enforced in a manner disruptive of the status quo. In addition, the resulting judicial decisions have been confusing, if not contradictory. The tension between courts with differing judicial philosophies has kept the law in an unsettled state. This uncertainty has affected the ability of tenants and landlords to order both their individual behavior and their private relationship, as well as to settle their disputes in a manner that is fair and efficient.24

To these conflicts between the law and its origin, the judicial activists and the conservative jurists, the present housing market of modern society and a court system based upon the outdated needs of an agrarian economy, must be added the conflict between the lessor's right to turn a profit in a free market economy and the lessee's need for a habitable dwelling. Only in theory is the tenant in a bargaining position equal to that of the landlord.

24. A recent example of courts' differing perceptions as to the role of the Regulations in a landlord and tenant dispute is provided by the decision in Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C. 1976). In that case the court of appeals reversed a trial court's award of rent reduction for a landlord's failure to provide air conditioning as promised in the lease. Although it accepted the trial court's finding that a significant portion of rent paid was in consideration for the air conditioning service, the appeals court rejected the conclusion that the tenants were entitled to withhold rent when that service failed or that the tenants could assert the failure as a defense in a possessory action for nonpayment of rent. Basing this rejection on the fact that mechanical air conditioning is not covered by the Housing Regulations, the court stated:

We conclude that the tenant may be relieved of his full contractual rental obligation only when the landlord breaches his implied warranty of habitability, and that the landlord's duties under such a warranty are discharged when he has complied with the applicable standards set forth in the Housing Regulations.

Id. at 189. Thus, the court refused to apply the language of Javins, to the effect that the leases of urban dwellings are to be interpreted like any other contract, to cases where the landlord's breach of the lease agreement does not involve a violation of the Housing Regulations. See discussion, Section C.1, Judicial Resistance to Recognition of Tenant Remedies, infra.
Under such a theory, negotiations between the two parties should produce a lease that minimizes the conflicting expectations of the parties and maximizes the desirable social and economic impact upon the housing market. In reality, the tenant, particularly one in the lower income brackets, has limited bargaining power to effect the condition of the premises he is about to rent. He is restricted both in the number and kind of places to live, and lacks any significant political power. Thus, such tenants usually end up in court, not as plaintiffs seeking enforcement of the law for relief from uninhabitable housing conditions, but as defendants fighting the landlords' attempts to evict them.

The court system which they must face when the judicial mechanism is invoked to settle a landlord-tenant dispute is the subject of a subsequent article. This article will focus on the evolution of the substantive landlord-tenant law, the conflicts inherent in the rights and remedies that are now a recognized part of that body of law, and potential for resolving the dilemma between pursuing justice and protecting the supply of habitable housing within the framework of the existing criminal and civil law.

II. THE PUBLIC POLICY PERSPECTIVE: ENFORCEMENT OF THE HOUSING CODE BY CRIMINAL PROSECUTION

The statutory scheme that had the most effect on the recognition of new civil rights and remedies for the tenant initially provided solely for criminal enforcement by public officials. These sanctions were a dismal failure as an enforcement mechanism—they did not require a violator to take any corrective measures, they did not serve as a deterrent to allowing housing to become slums or to permitting violations to go uncorrected, and they did not provide any incentive for maintaining premises in compliance with the Housing Regulations. Reliance on criminal penalties for municipal enforcement of the Regulations not only failed to halt the deterioration of inner city housing, but initially provided the excuse for failure to undertake more effective remedies.

25. See Prefatory Note, supra.

26. It is not the intention of this article to explore potential legislative remedies beyond acknowledging the areas where the judiciary most likely could not be expected to act absent legislative authority.

27. See Daniel, supra note 12, at 913-16. This dilemma is not unique to the District of Columbia. In a study of housing code enforcement in several jurisdictions, including the District of Columbia, it was found that "[t]raditionally, cities have relied exclusively on such negative policing [i.e. criminal penalties] to regulate the quality of their housing inventory. Nowhere, however, has code enforcement been completely successful in preventing the development of slums or in preserving sound neighborhoods." Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 801 (1965).
Enforcement of the Housing Regulations by the District of Columbia currently has two components: criminal prosecution of landlords for regulatory violations and licensing of multi-family residential dwellings. The effectiveness of the latter program, however, is limited by the general inadequacies of the criminal enforcement.28 Traditionally, enforcement efforts have been characterized by delay and very few court actions. The statistics evidence the inadequacies. To police the 278,444 housing units which are subject to the Housing Regulations,29 the District of Columbia currently employs seventy-four housing inspectors.30 While it is reported that there are 382 buildings presently in a condemned status, the Department of Housing and Community Development does not compile statistics on other categories of substandard housing.31 A 1969 study found that approximately 25,000 units required demolishing immediately, another 25,000 units were seriously overcrowded, and 50,000 were in need of major improvements to conform to the Regulations.32 Since the time of that study, there has been no evidence by way of housing legislation, increased appropriations, or other economic indicators which would signify that there has been a substantial change in these statistics.

Similarly undistinguished is the record of prosecutions of landlords who are serious violators of the Regulations. In fact, public enforcement activ-

28. Id. at 826.
29. Although this is the figure contained in the 1970 census, it was provided by the District of Columbia government in response to an inquiry in 1977. Statistics were provided to the D. C. City Council Committee on Government Operations by the Department of Housing and Community Development. Memorandum from Comer S. Coppie, Special Assistant to the Mayor, February 16, 1977. (hereinafter D.C.H.D. Statistics).
30. This figure is current as of January 1, 1977. The District has not filled the total number of inspector positions authorized in its budget. Of those persons working as housing inspectors, 63 are employed in appropriations-funded positions; the appropriations-funded budget authorizes 74 positions. Both the number of authorized and employed housing inspectors under the District budget have decreased in the past two years. In February 1975 the budget authorized employment of 89 inspectors and 72 were employed. Telephone conversation with Mr. William Burnhart, Chief of Planning and Programming, Division of Licenses and Inspections, Feb. 1975.

Employment by the District of additional inspectors is also made possible by some special funding grants. A grant from the U. S. Department of Health, Education and Welfare administered by the D.C. Department of Human Resources, authorizes one position, and the Community Development Block Grant budget authorizes employment of another 10 inspectors. Memorandum from Lorenzo Jacobs, Jr., Director, Department of Housing and Community Development, Feb. 17, 1977 at 2.
31. This figure reflects government records as of Jan. 31, 1977. The number of units included in this figure is unknown.
ity appears to have declined over the past decade. In 1970, the Director of the Department of Economic Development, whose jurisdiction included the Bureau of Licensing and Inspections, announced that the District was "successfully" relying upon the voluntary compliance efforts of the landlords. Since that time, there have been less than thirty prosecutions per year, despite a yearly average of 139 cases referred to the Corporation Counsel's office for prosecution.

The policing of the licensing requirement has not been much better. The owner or operator of a residential dwelling with three or more units in the District of Columbia is required to secure a Housing Business License and a Certificate of Occupancy. The former must be applied for at the com-

33. In fiscal year 1965, there were 58 convictions of landlords for violations of the Regulations. In 16 of these cases, fines were imposed of less than $100.; in 14 instances, the fine was less than $25. Daniel, supra note 12, at 915 n.42. The following year, the number of convictions increased by 30. However, all but one of those 88 convictions resulted in suspension of both fines and jail sentences. Id. In the last six months of 1969, there were only 12 prosecutions and two convictions. Id.

34. District of Columbia "Reorganization Plan #2 of 1975" created the Department of Housing and Community Development, which now has responsibility for all housing inspection functions.

35. Daniel, supra note 12, at 915 n.43.

36. The average number of prosecutions during the seven-year period from 1970 to 1976 was 17, ranging from a low of eight cases in 1973 to a high of 29 in 1976. D.H.C.D. Statistics, supra note 29, at 2. The other cases of Regulations violations which were referred for prosecution were disposed of as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th># Cases Referred</th>
<th>Prosecutions #</th>
<th>Prosecutions (%)</th>
<th>Other Disposition</th>
<th>No Papers</th>
<th>Cases closed*</th>
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<tr>
<td>FY 1970</td>
<td>102</td>
<td>13 (13)</td>
<td>29</td>
<td>5</td>
<td>7</td>
<td>54</td>
</tr>
<tr>
<td>FY 1971</td>
<td>156</td>
<td>17 (11)</td>
<td>33</td>
<td>14</td>
<td>58</td>
<td>122</td>
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<tr>
<td>FY 1972</td>
<td>190</td>
<td>23 (12)</td>
<td>52</td>
<td>9</td>
<td>103</td>
<td>187</td>
</tr>
<tr>
<td>FY 1973</td>
<td>130</td>
<td>8 (6)</td>
<td>47</td>
<td>8</td>
<td>70</td>
<td>133</td>
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<tr>
<td>FY 1974</td>
<td>105</td>
<td>16 (15)</td>
<td>30</td>
<td>18</td>
<td>29</td>
<td>93</td>
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<tr>
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<td>10 (7)</td>
<td>18</td>
<td>22</td>
<td>8</td>
<td>58</td>
</tr>
<tr>
<td>FY 1976</td>
<td>155</td>
<td>29 (12)</td>
<td>58</td>
<td>56</td>
<td>21</td>
<td>164</td>
</tr>
</tbody>
</table>

See id. at 2-3.

* Referral and disposition of a case frequently does not occur in the same fiscal year due to the nature of the prosecution process, so that the number of cases referred in a particular year would not necessarily equal the number of cases disposed of in the same year.

37. The Housing Business License requirement is contained in the D.C. Housing Regulations, § 3102.1. The authorization for imposition of this requirement is found in D.C. Code § 47-2328 (1973). The Certificate of Occupancy is a use permit that is issued to a building on a one-time basis. A new certificate must be applied for only if the building changes hands. Only single-family dwellings are exempt from the latter requirement, which is found in the D.C. Zoning Regulations, § 8104.1, and in the D.C. Building Code, § 110.1. Promulgation of this requirement is authorized in D.C. Code § 5-422 (1973).
mencement of operation of a housing business and must be renewed periodically. While the Regulations are ambiguous as to the frequency of inspection required for each building, they provide that no license shall be issued until the Director of Licenses and Inspection determines that the Regulations have been observed. The Director and other specified local government officials are directed to inspect every building for which a license has been issued or for which a license application has been filed to insure compliance with the applicable regulations and laws. Failure of a licensee to comply with the regulations after notice of deficiencies may result in suspension or revocation of the license.

One limitation against enforcement of the licensing requirements is that the process is only set in motion if an application for inspection is filed. Buildings can be operated without the necessary licenses unless a tenant complains to government authorities about conditions on the premises, or the lack of a license is raised in the context of a court action. Furthermore, effective licensing enforcement has been characterized by the same inactivity as criminal prosecution.

The history of government code enforcement is illustrated by the case of District of Columbia v. First National Realty Corp. On January 26, 1968, Superior Court Judge Timothy Murphy ordered the owner of the Clifton Terrace Apartments to pay a $5,000 fine in an action brought by the Corporation Counsel for failure to correct over 1200 violations. The owner had been notified of the violations over a four-year period. The building had operated without a Housing Business License since 1961. In his sentencing opinion, Judge Murphy wrote: "To describe the prior enforcement system as haphazard is being charitable—it was much worse. . . . It is apparent that the delay and neglect by District officials to enforce its own regulations lead to the exact evil the regulations were designed to prevent."

Three years after the original order, the fine was paid. Payment was forthcoming.
only after a public interest law firm filed a motion for the appointment of a special prosecutor to collect the fine. Efforts to force the payment of interest were unsuccessful.46

It was this same defendant, First National Realty, who, as plaintiff, brought suit to evict Ethel Javins and others from that same building after they refused to pay rent because of the deplorable condition of the premises. By this time the court's opinion cited 1500 violations. On appeal from judgment for the plaintiff, the District of Columbia Court of Appeals affirmed the trial judge's rejection of tenant's offer to prove these violations as a defense to nonpayment of rent.47 Writing for the court, Chief Judge Hood reasoned that where the regulations or statute "merely imposed a penalty for failure to repair and maintain the leased premises in a habitable condition" the court must refuse to recognize civil remedies.48

After the circuit court subsequently reversed the District of Columbia Court of Appeals in this case,49 the City Council amended the Housing Regulations to provide for "civil enforcement of regulations." Included in the Statement of Policy was the language: "It is . . . declared that the abatement of [violations of the housing regulations] by criminal prosecution or by compulsory repair, condemnation and demolition alone has been and continues to be inadequate."50

The authority to enforce the Regulations by private civil actions was not intended to eliminate the criminal penalties or to abrogate the government's role in assuring code compliance. The following example, however, illustrates both the minimal impact of this enforcement mechanism and the frequent ability of a landlord to subvert it.

When the "District's most prosecuted landlord"51 was convicted of having

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48. Id. at 838.
49. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). See discussion pp. 463-64 supra. Javins' recognition of civil remedies for breach of an implied warranty of habitability held to be the equivalent of a substantial violation of the Housing Regulations was based in part on the conclusion that criminal sanctions were ineffective. The court noted that the Commissioners had instituted the criminal penalties structure because "in their judgment, grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective. Innumerable studies have documented the desperate condition of rental housing in the District of Columbia and in the nation." 428 F.2d at 1082.
50. D.C. Regulations, supra note 11, § 2901.2.
51. The landlord, Dr. Shao Ti Hsu, reportedly owns over 500 apartment units in lower income areas of the District and metropolitan area suburbs. A University of Maryland engineering professor, Dr. Hsu is reported to have a net worth of over $3
committed perjury during contempt proceedings for failure to make repairs, the event was of such magnitude as to merit an editorial in The Washington Post.\textsuperscript{52} The newspaper observed that "[d]espite Mr. Hsu's massive record of misconduct, judges in earlier cases had tended to treat him leniently, as if he were an unwitting violator of a technical detail of the housing code."\textsuperscript{53} In recent years several newspaper accounts had reported this landlord's conviction for hundreds of housing and fire code violations resulting in fines totaling several hundred thousand dollars.\textsuperscript{54} In addition, one article detailed the nature of the administrative burden placed upon the District by Hsu's activities. It quoted him as stating that he appealed about eight out of ten violation notices.\textsuperscript{55}

The sentencing judge in the perjury case was the same judge who fined the convicted owner of First National Realty. In sentencing Dr. Hsu to a surprisingly harsh prison sentence, Judge Murphy told the landlord "[y]ou have amassed your wealth by lies and deceit."\textsuperscript{56} It was reported that the judge considered ordering the landlord to live in one of his own apartments but rejected the idea. The reason given was that conditions in the apartments were such that sentencing someone to live there would constitute "cruel and unusual punishment."\textsuperscript{57}

Recent efforts to expand the use of licensing as a means to police housing conditions have also been unsuccessful. The court of appeals recently rejected a defendant-tenant's argument that would have had the effect of providing a civil enforcement mechanism for the licensing requirements.\textsuperscript{58} In that case, a landlord who lacked both a Certificate of Occupancy and a Housing Business License sought possession of apartment units occupied by tenants who had stopped paying rent because the premises allegedly contained numerous and substantial housing code violations. The tenant argued that the landlord's failure to obtain the licenses barred his possessory action, pointing out that the licensing program is an essential part of the legislative effort to maintain standards of housing quality. Thus, they submitted, to allow enforcement of claims involving unlicensed premises

\textsuperscript{52} The Housing of Mr. Hsu, Washington Post, Sept. 25, 1976 § A, at 12, col. 1.
\textsuperscript{53} Id.
\textsuperscript{54} Id. One article reported that "[m]oney judgments do not trouble him. Frequently, he never pays them." The Rich Professor, supra note 51.
\textsuperscript{55} Housing Violator No. 1, Washington Post, Feb. 13, 1976 § A, at 1, col. 5.
\textsuperscript{56} The Housing of Mr. Hsu, supra note 51.
\textsuperscript{57} Dr. Shao Hsu Posts Bond And Is Freed, Washington Post, Sept. 25, 1976 § A, at 12, col. 1.
would frustrate the purposes of the Housing Regulations and imperil the public welfare. Unlike the circuit court in *Javins*, which had taken the initiative to permit civil remedies when the criminal sanctions proved ineffective, the court of appeals specifically refused to do so. On the contrary, it stated:

The District of Columbia's housing laws are silent on the question of how compliance with the regulations is to be attained short of criminal prosecution. Without clear legislative direction we are loath to deny the landlord of a building which has been occupied on a continuing basis his cause of action for nonpayment of rent simply because of the lack of a certificate of occupancy or housing license.

### III. Civil Actions and The Private Relationship

#### A. Landlord Actions and Tenant Defenses

1. **Landlord's Legal Options**

   The judicial remedies available to a landlord seeking to recover possession of his property or a money judgment for back rent or damage to the premises have long been codified, explicit and complete. The most commonly used procedure is the summary proceeding brought by filing a complaint in the Landlord and Tenant Branch of the Superior Court of the District of Columbia seeking to recover possession of property which the tenant is wrongfully detaining. Although rarely used, the landlord also has the option of

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59. In rejecting this argument, the court emphasized that the landlord had recently acquired the building and that he had applied for the necessary licenses, although they had not been granted at the time of trial. The court did not mention that the applications for the licenses had not been filed until the tenants had raised the issue as an affirmative defense in the landlord's suit for possession. Further, it minimized the fact that the record contained no indication of such licenses ever having been granted. "While the failure to issue [the licenses] presumably was occasioned by the uncorrected condition of the premises, the record does not eliminate the possibility that the delay was attributable simply to administrative inefficiency." *Id.* at 688.

60. *Id.* at 690 n.4. The court did permit the tenants to show that they were entitled to abatement of rent because of the substantial housing code violations that affected the habitability of the premises.

61. In addition, the District of Columbia courts have upheld the landlord's common law right of self-help where the lease so provides, if entry upon the premises can be accomplished without a breach of the peace. In *Snitman v. Goodman*, 118 A.2d 394 (D.C. 1955), the court concluded that the local forcible entry and detainer statute (the statutory predecessor to D.C. Code § 16-1501 (1973)) did not abolish the common law right of the landlord, without use of legal process, to enter "peaceably" onto and take possession of the premises upon cessation of the tenant's right to possession. *Id.* at 397.

bringing an action for ejectment by filing a formal complaint in the Civil Division rather than the simplified form in the Landlord and Tenant Branch.63

The complaint for possession may be joined with a claim for back rent, although a separate action may be filed in the Civil Division or the Small Claims and Conciliation Branch seeking recovery of rent in arrears.64 Additional protections have been codified to give the landlord the right to secure a lien on the tenant's chattels65 and to permit the recovery of double rent under some circumstances.66 The landlord may also institute a civil or small claims action for damages arising from a tenant's breach of a lease covenant or commission of waste.67

The landlord's burden of proof in an action for possession is minimal. He must establish valid service of process and notice to quit, if the latter was not waived by the tenant.68 If the action is based on nonpayment of rent, the tenant demands a jury trial, the case is certified over to the civil jury calendar. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 6. If the issue of title is raised the case is transferred to the Civil Division. LANDLORD & TENANT RULE 5(c). See also Pernell v. Southall Realty, 416 U.S. at 370 n.5.

63. D.C. Code § 45-910 (1973) and D.C. Code § 16-1124 (1973). Although the summary proceeding has been held to be the statutory substitute for the common law ejectment action, see Pernell v. Southall Realty, 416 U.S. at 375, the two actions are separately codified. Compare D.C. Code § 16-1501 (1973) with D.C. Code § 45-910 (1973). The latter action may involve, but is not required to include, an issue of title. Whether or not the issue is raised however, an ejectment action renders the question of title res judicata. Cf. Service Parking Corp. v. Trans-Lux Radio City Corp., 47 A.2d 400, 403 (D.C. Mun. App. 1946).

64. The language of D.C. Code § 45-911 (1973) is permissive. A landlord need not join, but can choose to bring a separate action in the Civil Division. Paregol v. Smith, 103 A.2d 576 (D.C. Mun. App. 1954). Whether or not a claim for back rent is included in the complaint, in an action for nonpayment the court should enter a special finding as to the amount of rent in arrears. See Service Parking Corp. v. Trans-Lux Radio City Corp., 47 A.2d 400 (D.C. Mun. App. 1946). A plaintiff can only seek a judgment for money in addition to possession when personal service upon the defendant has been achieved, or the tenant has asserted a counterclaim or a defense of recoupment or setoff. D.C. SUPER. CT. LANDLORD & TENANT RULE 3.

65. D.C. Code § 45-915 (1973). The Code provides further that this lien may be enforced by prejudgment attachment of chattels executed by a marshal using force if necessary, upon affidavit by the landlord that rent is due and unpaid. The continuing validity of this provision, however, is questionable in light of the Supreme Court's decisions in Sniadach v. Family Finance Corp., 295 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). In these cases, the Court held that a substantive hearing on the merits is required by due process before an individual may be deprived of property.


68. A notice to quit is required to terminate a tenancy from month to month, a tenancy at will, and a tenancy at sufferance. D.C. Code §§ 45-902, 903, 904 (1973). The parties may by agreement waive this requirement under D.C. Code § 45-908 (1973),
landlord must plead and prove the amount owed. If the action\textsuperscript{69} is for wrongful detainer, either by reason of expiration of lease term or of a notice to quit, or because of a tenant breach of a lease covenant, this must be established.\textsuperscript{70} As late as 1967 it was held that upon expiration of a lease or the term of the tenancy, or in the event the tenancy was one at will or at sufferance, the landlord had an absolute right to evict, he could terminate "for any purpose he might desire and the tenant could not question his motives or attack his reasons."\textsuperscript{71}

2. Landlord Procedural Requirements: Tenant Affirmative Defenses

Prior to 1968, the only defenses which the law provided a tenant against wrongful eviction were procedural in nature.\textsuperscript{72} Failure of a landlord to comply with the statutory procedures for eviction might defeat his action if raised by the tenant as an affirmative defense in an answer or as grounds but whether this right of waiver applies for any notice other than in a nonpayment of rent action is doubtful because of the District's rent control law, § 213. See D.C. Law I-33 (1975), the Rental Accommodations Act of 1975. The Act sets forth 90-day notice periods for a landlord who seeks to evict a tenant for reasons other than nonpayment of rent. In any case, service of process must be effected at least seven days before the return date on the summons. D.C. Code § 16-1502 (1973); D.C. Super. Ct. Rules, Landlord & Tenant Rule 4.


\textsuperscript{70} Id.


Whether a modern tenant could sue to be returned to the premises is not a settled question. A tenant seeking this equitable remedy presumably would be required to show the inadequacy of available legal remedies. Historically, the common law remedy of ejectment was designed to give the lessee a cause of action against anyone who ejected him, including the lessor. W. Holdsworth, supra, note 4, at 216; F. Maitland, The Forms of Action at Common Law 47 (1936). During the fourteenth and fifteenth centuries this writ was expanded to permit a tenant evicted in breach of his landlord's agreement to recover not merely compensation for being turned out, but the possession itself, not only against the original landlord, but against a purchaser from him. F. Pollock, supra note 4, at 144. In an unreported per curiam decision, the circuit court reversed a trial court's refusal to grant tenants' motion for emergency relief from a landlord's exercise of his right of self-help by locking out tenants who had failed to pay rent. In addition, the court ordered that the tenants be returned to the premises. Chavez v. Sweeney, No. 23,504 (D.C. Cir. 1969). For a summary of various remedies available in other jurisdictions to tenants who have been wrongfully evicted by a landlord exercising self-help, see Annot. 6 A.L.R.3d 177, 199-237 (1966).
for dismissal in a motion. Historically, landlords have not made impressive efforts to comply with the procedural requirements. Most of these provisions currently in effect are of a highly technical nature. Thus, for the majority of tenants, who do not know of their availability, much less how to raise and prove them properly, they are of limited value.

The procedural defenses concern such elements of the eviction process as notice to quit, service of process, and identification of the real party in interest. A notice to quit that fails to give the tenant at least a full thirty days to vacate (or ninety days in some instances), and which, in the case of a monthly tenancy, does not expire on the day of the month from which the tenancy commenced to run, is subject to challenge in a motion to dismiss.\textsuperscript{73} Service of either or both the notice and the complaint are subject to being quashed if not effected properly.\textsuperscript{74} Waiver of the notice to quit is permissible in nonpayment of rent cases only where such waiver is in writing.\textsuperscript{75} Further, there is a requirement that an action be prosecuted by the real party in interest.\textsuperscript{76} To this may be added the qualification that a plaintiff seeking possession or back rent who is not the property owner, must have a real estate broker’s license.\textsuperscript{77}

\textsuperscript{73} D.C. Code §§ 45-902, 910 (1973). \textit{See also} Zoby v. Kosmadakes, 61 A.2d 618 (D.C. Mun. App. 1948). There remains confusion as to the precise meaning of “the day from which the tenancy commenced to run.” Although courts have tended to consider the “from” as synonymous with “on,” there are persuasive arguments against this position.

\textsuperscript{74} As to notice, see D.C. Code § 45-906 (1973). \textit{See also} Moody v. Winchester Management Corp., 321 A.2d 562 (D.C. 1974). As to service of process, see D.C. Code § 16-1502 (1973), D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 4. \textit{See also} Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970). Notwithstanding the apparent stringent standards for service of process, the District of Columbia courts have often had occasion to question whether good faith efforts are being made to effect personal service in landlord-tenant actions. Statistics indicate that the overwhelming majority of summonses are served by posting. \textit{See} Bell v. Tsintolas Realty Co., 430 F.2d at 477 n.7. \textit{See also} South Potomac Realty v. Straker, No. L73546-73 (D.C. Super. Ct. 1973). The Landlord and Tenant Rules now require special process servers to complete a form that requires that they show “specific facts from which the court can determine the process was served as indicated above and in compliance with D.C. Code Section 16-1501 and SCR Landlord & Tenant 4.” A check of the returned forms reveals that the special process servers specify no more than the manner of service. Where they claim to have posted the summons there is generally no showing that an effort was made to effect personal service.

\textsuperscript{75} D.C. Code § 45-908 (1973).


The most prominent reason that the threat to a landlord of dismissal for failure to comply with these requirements is minimal is the fact that the vast majority of actions filed result in default judgments. To take a default, a landlord need not demonstrate compliance with any of the procedural prerequisites.\textsuperscript{78} If service of process was not properly achieved, a tenant may not have notice to appear in court and therefore cannot challenge the invalid service.\textsuperscript{79} If a tenant does appear, he is rarely aware of the availability of these objections.

In order to raise such a defense, a tenant would have to be among the minority of defendants represented by counsel. Even when a defense is raised, however, many judges will balk at dismissing an otherwise apparently meritorious action on a "mere technicality." The right of a tenant to appeal the wrongful refusal of a judge to recognize such a defense is meaningless unless that same judge grants a stay of execution of judgment or permits an interlocutory appeal, both of which are highly unusual and contrary to the principle of a summary proceeding. Finally, in theory, the most to be gained by successfully invoking a procedural defense is a postponement of a trial on the merits. It is not to be denied, of course, that this often has strategic and tactical advantages for a tenant in negotiating a settlement.

\textbf{B. The Emergence of Tenant Substantive Defense}

Notwithstanding the expansion of procedural protections, the courts have resisted recognition of tenant substantive defenses to an eviction action. The continuing judicial adherence to common law principles underlying the landlord-tenant relationship has not adequately protected the tenant from improper eviction. Prior to 1970, when faced with a case where modification of outdated precedent was clearly appropriate in order to avoid a particularly harsh result, the courts chose to create legal fictions and to tolerate conflicts in the law rather than depart from the "well-settled" common law. Although twentieth-century urban America is far removed from twelfth-century feudal England, the doctrines of independent covenants and caveat emptor developed centuries ago were adhered to and applied by the courts well into the latter half of the twentieth century.\textsuperscript{80}

\textsuperscript{78} Technically, the landlord must file a Return of Service showing that tenant was properly served with a summons and complaint. \textit{But see} discussion at note 74, \textit{supra}.

\textsuperscript{79} Neither the statutory nor case law in the District of Columbia specify whether a tenant evicted by a landlord who has failed to comply with the procedural requirements can bring an action to be restored to his premises. \textit{See} note 72 \textit{supra}.

\textsuperscript{80} The landlord conveanted to deliver possession to the tenant. Whether this required the landlord to put the tenant in actual possession or merely to give him the legal
When the demands of justice required recognition of a tenant's defense seemingly in conflict with the old doctrines, the courts preferred to twist and bend the one covenant implied at common law on the tenant's behalf. Thus it was said to be a breach of the covenant of quiet enjoyment when the tenant was forced to vacate all or a substantial portion of the premises because they had become completely unfit on account of the landlord's wrongful actions. A tenant who vacated the premises was permitted to raise constructive eviction as a defense if the landlord brought suit to recover rent for that part of the tenancy remaining after the tenant's departure. The requirement right to possession, depended upon whether a jurisdiction followed the English (implied covenant to deliver physical possession) or the American (implied covenant to deliver "legal" possession only) rule. For a summary and analysis of these rules, see Hanna v. Dusch, 153 S.E. 824 (Va. 1930). Once delivery was accomplished, the landlord covenanted to leave the tenant in peaceful possession during the term of the lease. This was a covenant against acts of the lessor and those who claimed the land by title paramount to him. It was not a covenant against the act of third-party wrongdoers. Where this covenant of quiet enjoyment was not found in the express language of the lease the court would imply it, unless such implication was contrary to provisions of the lease itself. R. Powell, supra note 1, at ¶ 225(3). 7 W. Holdsworth supra note 4, at 252-3.

The tenant, for his part, covenanted to pay rent during the entire period specified by the lease. If he left before the expiration of the term, either voluntarily or because of a breach of covenant by the landlord, the obligation to pay continued. If he did not pay, the landlord could bring suit to collect. If the tenant sought redress for the landlord's breach of a covenant including that of quiet enjoyment, he had to file a separate action rather than raise it in defense to a landlord's action to collect rent. Holdsworth observed that the rules concerning the tenant's obligation to pay rent developed from a mixture of medieval law and more modern contract ideas, thereby producing a complex body of very technical law. "[I]t is not surprising," he wrote, "that it is neither wholly rational nor wholly intelligible." Id. at 262-64. See discussion on doctrine of independent covenants, supra note 1.

As contrasted with the limitations on a tenant's actions for landlord's breach of covenant, it was generally "common practice to insert in leases . . . provisions enabling the landlord to re-enter and put an end to the lease if the tenant fail[ed] to perform his obligations." F. Pollack, supra note 4, at 149. If the lease did not provide the landlord this remedy, a statute often authorized him to bring an action for ejectment or wrongful detainer. In the majority of cases, a legal proceeding for possession based upon tenant's breach of the covenant to pay rent involved two questions: (1) Is the tenant presently occupying the apartment? and (2) Did the tenant pay the rent? See Quinn & Phillips, The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future, 38 Fordham L. Rev. 225 (1969). In this article the authors observe that "the law in this area is a scandal." Id. at 225.

81. Cases in the District of Columbia recognizing constructive eviction include Ackerhalt v. Smith, 141 A.2d 187 (D.C. 1958), and Goldsmith v. Gisler, 150 A.2d 462 (D.C. 1959). Successful assertion of the defense of partial actual eviction, whereby a substantial portion of the premises becomes untenable or unseasable for the purpose for which it was rented, allows the tenant to remain while granting an entire rent abatement. See, e.g., Okie v. Person, 23 U.S. App. D.C. 170 (1904). Generally, however, this defense is inapplicable to the tenant in a residential apartment because the premises are usually rendered totally uninhabitable. Because the defense of constructive eviction
that the tenant vacate the premises, however, made the defense of little use to
the low income tenant with little possibility of finding suitable alter-
nate housing in an urban area with a housing shortage.\footnote{82}

This was the status of the law when, in 1968, First National Realty Corpo-
racion sought to evict Ethel Javins, Rudolph Saunders, and other tenants at
the Clifton Terrace Apartments for nonpayment of rent. Notwithstanding
the 1500 housing code violations, the plaintiff prevailed both at the trial
level\footnote{83} and in the District of Columbia Court of Appeals.\footnote{84} These courts
held that the tenants were barred by the doctrine of caveat emptor from
raising a defense to nonpayment of rent because they had not vacated their
homes. Affirming the trial court, the court of appeals stated:

The long established rule in this jurisdiction, following the common
law, is that, in the absence of statute or express covenant in the
lease, a landlord does not impliedly covenant or warrant that the
leased premises are in habitable condition and the landlord is not
obligated to make ordinary repairs to the leased premises in the
exclusive control of the tenant.\footnote{85}

The court of appeals reached this conclusion notwithstanding the fact that
the circuit court in \textit{Whetzel v. Jess Fisher Management Co.} had allowed tenant
Audrey Whetzel to recover for personal injuries sustained when an entire
bedroom ceiling collapsed on her. The \textit{Saunders} court, recognizing that
it had to distinguish between the cases, did so by rationalizing that the
\textit{Whetzel} court had merely applied other common law concepts not appro-
priate to First National's action for possession. "We understand it to hold"
explained the court of appeals, "that where a landlord negligently fails to
comply with the Housing Regulations and as a result the tenant is injured,
the tenant may sue the landlord in tort." The court continued:

This was simply an application of the rule that a private action for
negligence may be based upon violation of a penal statute where
the injured party is within the class of persons the statute intended

\footnotesize{is based on the theory that the landlord has breached the covenant of quiet enjoyment,
in order to secure a remedy the tenant would have to move. R. \textit{Powell}, \textit{supra} note
1, at \S 225(3). \textit{See also} \textit{Quinn} \& \textit{Phillips}, \textit{supra} note 80, \textit{Daniel}, \textit{supra} note 12.}

\footnotesize{82. The New York courts have recognized the defenses of partial constructive evic-
tion whereby a tenant is permitted a rent abatement without abandoning the premises.
\textit{Gombo v. Martise}, 44 Misc.2d 239, 253 N.Y.S.2d 459 (Sup. Ct. App. Term), \textit{rev'g}
41 Misc.2d 475, 246 N.Y.S.2d 750 (Civ. Ct. 1964). The District of Columbia courts
achieved essentially the same result by substituting contract defenses for common law
principles in \textit{Brown v. Southall Realty Co.}, and \textit{Javins v. First Nat'l Realty Corp.} For
a discussion of these cases, see \textit{text accompanying footnotes 87-94, infra.}

83. R. \textit{Powell}, \textit{supra} note 1 at \S 225(3).


85. Id. at 838.}
to protect and the injury was of the type the statute intended to prevent. Whetzel did not hold that the Housing Regulations enlarge the contractual duties of a landlord.\(^8\)

Just prior to its holding in Saunders, the District of Columbia Court of Appeals had taken its own first step out of the middle ages. Its decision in Brown v. Southall Realty Co.,\(^8\) provided the tenant with a degree of relief from the strict dictates of the caveat emptor doctrine. In that case the court of appeals reversed the trial court's judgment for the landlord and held that Lillie Brown did not have to pay the arrearage in rent incurred before she vacated her apartment. In so doing, the court indicated that where the landlord rented an apartment with knowledge of violations of the Housing Regulations, the lease was void and rent was not owed thereunder.\(^8\) The court reasoned that where the violations were of a serious nature, the regulations implied a prohibition that rendered void a rental contract entered into in violation of them. Six months later this first application of the law of contracts to the landlord-tenant relationship, however, was explained by the same court as being rather limited:

Our holding in Southall was that where the owner of dwelling property, knowing that Housing Code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced. We did not hold and we now refuse to hold that violations occurring after the tenancy is created void the lease.\(^8\)

As Brown was being decided and distinguished by the court of appeals, the circuit court, in a decision reversing the court of appeals, held that a landlord's right to evict a tenant was not absolute.\(^9\) As in the earlier departures from strict common law doctrines, the circuit court found the basis for its decision in the Housing Regulations:

But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities.

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86. Id. at 839 (footnote omitted), distinguishing Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960).
88. The continuing validity of this holding was brought into question by the later holding of the court of appeals in William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970). See section C1, infra.
89. Saunders v. First Nat'l Realty Corp., 245 A.2d at 837-38. For a tenant to prevail under Brown v. Southall Realty Co., he would have to prove that the landlord knew of the existence of violations prior to entering into the lease. Needless to say, for the majority of tenants this would be an extremely difficult burden to meet.
As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted.91

The court's reasoning also signaled that perhaps further modification of the common law based upon public policy requirements would be needed. Writing for the circuit court, Judge J. Skelly Wright observed:

In light of the appalling condition and shortage of housing in Washington, the expense of moving the inequality of bargaining power between tenant and landlord and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.92

Then in June, 1970, came the circuit court's decision in Javins v. First National Realty Corp.93 In another reversal of the court of appeals, the circuit court removed the limitation the former court had placed upon the treatment of the lease as a contract. The circuit court not only directed that the lease "should be interpreted and construed like any other contract,"94 it reasoned that the tenant should be accorded the full panoply of rights and remedies as a contracting party.

The opinion of the court was filled with new ideas. The court took judicial notice of the housing shortage and of a tenant's lack of bargaining power to cause the landlord to make repairs. It recognized the tenant's obligation to pay rent to be dependent on the landlord's maintaining the premises in habitable condition. In sum, the court departed from application of old common law doctrines to modern urban housing and declared that leases of such residential property were to be treated as contracts which contained an implied warranty of habitability. Therefore, a tenant could not be evicted for nonpayment of rent where the landlord had violated the obligation to maintain the premises in a safe, sanitary, and habitable condition.

Undaunted, the court of appeals continued its efforts to preserve the vestiges of the common law. Two months after the circuit court in Javins signaled a significant expansion of tenants' rights, the court of appeals announced another restriction. In Robinson v. Diamond Housing Corp.,95 the court of appeals held that the tenant who successfully invoked a Brown defense to defeat an action for possession based on nonpayment of rent could still be evicted upon the service and expiration of a thirty-day notice to quit. To

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91. Id., 397 F.2d at 699 (footnote omitted).
92. Id. at 701 (footnote omitted).
94. Id. at 1075.
reach this anomalous result, the court strained to distinguish the holding of the circuit court which had reversed its decision in *Edwards v. Habib*:96

Furthermore, we are of the opinion that the retaliatory defense of *Edwards v. Habib* . . . is not available to a tenant in a case such as this where she was successful in a prior Landlord and Tenant action and is being evicted after the expiration of a thirty-day notice because the landlord wishes to withdraw the property from the rental market. The *Edwards* case involved a situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities and it should be, we think, limited to its facts.97

In the final landlord and tenant decision to come from the United States Court of Appeals for the District of Columbia Circuit, handed down after *Court Reorganization*,98 this court of appeals decision, like *Edwards* and *Javins (Saunders)* before it, was categorically reversed.99 The circuit court held that an unexplained eviction following successful assertion of a *Javins* or *Brown* defense is “‘inherently destructive’ of tenant’s rights” and, hence, gives rise to the presumption that landlord is motivated by an illegal purpose to seek possession. The court went one step further than *Edwards*, emphasizing that the mere existence of a legitimate reason would not rebut the presumption where the landlord is found to be motivated in fact by some illegitimate reason. The court was unequivocal:

*Southall Realty [Brown]* and the housing code guarantee the right of a tenant to remain in possession without paying rent when the premises are burdened with substantial housing code violations making them unsafe and unsanitary. The landlord of such premises who evicts his tenant because he will not pay rent is in effect evicting him for asserting his legal right to refuse to pay rent. This, of course, is the very sort of reason which, according to *Edwards* and the housing code, will not support an eviction.100

To reach this decision, the court invoked all of the recent case law in this area and, in particular, noted the intersection of the principles it articulated in *Edwards* and *Javins*. Thus it concluded that Lena Robinson would have been entitled to remain in her apartment without paying rent for so long as

97. 267 A.2d at 835.
98. See note 18, *supra*.
100. Id. at 865.
the premises remained in substantial violation of the housing code, had she not vacated prior to the court's handing down of its decision.¹⁰¹

The status of Robinson as precedent however, remains uncertain. Those trial and appellate court judges who have continually resisted the trend of the case law have refused to recognize Robinson as controlling in cases with a similar factual setting because it was decided after Court Reorganization.¹⁰² In a case decided by a 2 to 1 vote in 1976, the District of Columbia Court of Appeals extended the prohibition against retaliatory evictions to cases in which possession is sought at the end of a fixed-term lease.¹⁰³ As authority for its decision, however, the court of appeals rested solely upon the circuit court's reasoning in Edwards. In essence, the court ignored Robinson when it declared: "The controlling decision concerning 'retaliatory eviction' in this jurisdiction is Edwards v. Habib."¹⁰⁴ (citation omitted) Although the court cited Robinson, it did so only as a restatement of the Edwards reasoning and as a reinforcement of judicial support for the retaliatory eviction defense.¹⁰⁵

In light of the continuing resistance of the District of Columbia courts to apply the far-reaching decisions of the United States circuit court, the elo-

¹⁰¹. In a footnote to its opinion, the court directed the trial court on remand to investigate the uncontradicted contention that the premises in question had been repaired and rented to another tenant after Ms. Robinson's departure. Id. at 870 n.29.

¹⁰². See note 18, supra. Following Court Reorganization, the District of Columbia Court of Appeals again undertook to limit a tenant's constitutional rights. In Pernell v. Southall Realty Co., 294 A.2d 490 (D.C. 1972), it held that jury trials are not guaranteed by the seventh amendment when a landlord seeks only repossession of rented premises in an action predicated on nonpayment or other breach of the lease. It further held that a tenant's counterclaim for damages if tried before a jury must be instituted as a separate action. The reversal of this decision had to come from the United States Supreme Court. Pernell v. Southall Realty Co., 416 U.S. 323 (1974). The Court found that the opinion of the court of appeals was contrary to the common law governing landlord-tenant relations. The Court stated: "Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury." 416 U.S. at 373-74.

¹⁰³. Golphin v. Park Monroe Assocs., 353 A.2d 314 (D.C. 1976). In that case the landlord filed an action for possession of defendant's apartment upon the expiration of the one year lease term. At the trial, tenant offered to prove that his eviction was sought in retaliation for his activities as president of a tenants' association and for his reporting of alleged housing violations. He further proffered that, if the landlord was not motivated by retaliatory reasons, upon expiration of the lease he would have been permitted to remain in possession as a month-to-month tenant in accordance with the established policy of the landlord and "in consonance with the express terms of the lease." Id. at 315. The trial judge refused tenant's offer of proof and entered judgment for the landlord. The appellate court reversed, holding that the lower court erred in excluding such evidence.

¹⁰⁴. Id. at 316.

¹⁰⁵. Id. at 318.
quent parting observation of Judge J. Skelly Wright, writing on behalf of the circuit court in Robinson, is significant as a plea for judicial enlightenment. It deserves quotation here in its entirety:

We do not pretend that allowing Mrs. Robinson to assert an Edwards defense will solve the housing crisis in the District of Columbia. That crisis is the product of a constellation of social and economic forces over which no court—and indeed perhaps no legislature—can exercise full control. But while the judicial process is not a deus ex machina which can magically solve problems where the legislature and the executive have failed, neither is it a mere game of wits to be played without regard for the well-being of the helpless spectators. We cannot expect judges to solve the housing dilemma, but at least they should avoid affirmative action which makes it worse. The District’s legislative body has formulated a comprehensive plan, including criminal sanctions, public inspections, subsidies and rent withholding, to tackle our housing difficulties. In the end, that plan may not work. But if it fails, at least the failure should be caused by inherent weaknesses rather than by judicial subversion.¹⁰⁶

C. Affirmative Actions By and On Behalf of Tenants

1. Judicial Resistance to the Recognition of Tenant Remedies

At the present time, a tenant is not permitted to file an independent action in the Landlord and Tenant Branch of the District of Columbia Superior Court. Furthermore, the tenant is limited in the nature of claims he may adjudicate when the landlord institutes an action against him in that court.¹⁰⁷ Thus, a tenant who has not been or who does not want to be sued for eviction must file a complaint in a separate forum and comply with a different set of procedural rules. With the exception of the minimal recovery available in the Small Claims Branch, the civil court rules do not provide for an informal summary proceeding that promises a plaintiff expedited relief. Fur-

¹⁰⁶. 463 F.2d at 871.
¹⁰⁷. The Landlord and Tenant Rule governing counterclaims states: “No other counterclaims [than those relating to the rental obligation or the condition of the premises for which equitable relief is subject] whether based on personal injury or otherwise, may be filed in this branch. This exclusion shall be without prejudice to the prosecution of such claims in other branches of the court.” D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 5(b).

In addition, a recent decision of the court of appeals has further limited the nature of tenant “rent related” counterclaims cognizable in Landlord and Tenant Court. See discussion of Winchester Management Corp. v. Staten, infra.
ther, the Superior Court Rules of Civil Procedure do not include any simplified procedures for resolving tenant claims.\textsuperscript{108}

The foregoing disadvantages notwithstanding, the language of \textit{Javins} was encouraging to the tenant who had historically been limited to the filing of a separate action in order to seek redress for a landlord's breach of a lease covenant or who had to rely on the paternalism of government to prosecute a landlord for failing to maintain rented residential property in habitable condition. But while it appeared to offer the tenant a full panoply of contract rights and remedies, this was not the holding in \textit{Javins}. When read narrowly, the circuit court's opinion recognized that a breach of the warranty of habitability could be raised only as a \textit{defense} to an action by a landlord for possession based on nonpayment of rent.\textsuperscript{109}

By the time Court Reorganization eliminated the circuit court of appeals from the appellate route of a superior court decision, the case law permitted a tenant to \textit{defend} against eviction from an apartment for nonpayment of rent, whether or not the action was based on expiration of a notice to quit, for so long as the dwelling remained in substantially uninhabitable condition. The dicta in those cases and the amendments to the Housing Regulations codifying them, however, clearly recognized that civil enforcement remedies included tenant affirmative actions. The Statement of Policy of the new amendments included the following language:

\begin{quote}
It is the intention of this Section to declare expressly a public policy in favor of speedy abatement of such public nuisances [defined as leased or rental habitations in violation of the regulations which constitute a danger to the health, welfare, or safety of the occupants] if necessary by preliminary and permanent injunction issued by Courts of competent jurisdiction.\textsuperscript{110}
\end{quote}

At present, an affirmative claim against a landlord by a tenant can be raised in three ways: (1) as a counterclaim, recoupment, or set-off in a landlord's action for possession or collection of back rent;\textsuperscript{111} (2) as a complaint

\begin{itemize}
\item \textsuperscript{108} In the case of an emergency, a motion for temporary restraining order may be brought before the Judge in Chambers or the Emergency Judge. D.C. \textsc{Super. Ct. Rules, Landlord \\ & Tenant Rule 12-1(b)}. Judicial exercise of this equitable power does not offer a tenant permanent relief, but on the contrary, sets into motion a long chain of subsequent legal activities in the civil courts. On the other hand, in an action brought by a landlord in the Landlord and Tenant Court, the judicial exercise of its equitable power to award possession may provide the plaintiff with permanent relief. The latter action may be challenged only in the court of appeals.

\item \textsuperscript{109} Technically, the court in \textit{Javins} recognized only the right of a tenant to assert a set-off in order to reduce the rental obligation, in part or full, when nonpayment of rent formed the basis of the landlord's suit for possession. 428 F.2d at 1082-83.

\item \textsuperscript{110} D.C. Housing Regulations, \textit{supra} note 11, art. 290, § 2901.5.

\item \textsuperscript{111} A counterclaim is an affirmative action for relief. The Landlord and Tenant
for injunctive relief, seeking a temporary restraining order or a preliminary or permanent injunction, filed as a motion in the Landlord and Tenant Branch where a landlord action against the tenant is pending, or as a separate action in the Civil Division; or (3) as a civil action brought in the Civil Division,

Rules authorize counterclaims, which specifically include set-off and recoupment, in possessory actions based upon nonpayment of rent or joined with a claim for back rent. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 5(b). Thus, a tenant might interpose a claim in a landlord's suit for possession in order to defeat the latter's action or to reduce the amount of his rent entitlement, or in some cases, to recover a money judgment. See id. The rule, however, limits a tenant's counterclaim to that for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. Id. Counterclaims for damages are practically available only where tenant is seeking an amount in excess of that sought by the landlord. See FED. R. Civ. P. 13(c).

A set-off is a counter demand asserted to diminish or extinguish the landlord's demand. A set-off is said to arise out of a transaction extrinsic of plaintiff's cause of action. It relates, however, to events occurring during the period that the landlord's claim accrued. 3 MOORE'S FEDERAL PRACTICE § 13.02 n.l.

Recoupment, as distinguished from set-off, is a demand which arises from the same transaction as the plaintiff's claim. It goes beyond set-off in that it reaches prior periods, for example, claims occurring during the entire tenancy. It is a defense in the sense that it cannot justify recovery in excess of the amount claimed by the landlord. Recoupment has added significance for the tenant because as an equitable defense it is not subject to the statute of limitations, provided that the landlord's cause of action is timely. Id.

Counterclaim or set-off presumably include the idea of "repair and deduct" although the status of this practice in the District of Columbia is uncertain. A specific provision allowing a tenant to repair and deduct was eliminated from the 1970 amendments to the Housing Regulations prior to their final passage. This was explained on the grounds that a tenant's remedies for a landlord's breach of the warranty of habitability included this right and an amendment to that effect was "considerably more restrictive." See Daniel, supra note 12.

The dicta in Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir., 1970), discussing a tenant's defense to a protective order, state that among the circumstances which permit the court to order an amount less than the normal monthly rent to be paid into the court registry is a tenant's demonstration that "some portion of his potential payment of rent was instead expended in repairs to the premises." Id. at 484. In support of this position the court cited the leading repair and deduct decision of Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). In the decision in that case, however, the court emphasized that a tenant was not relieved from payment of rent for the landlord's failure to repair. Instead, it recognized that a tenant has the "alternative remedies of making the repairs or removing from the premises upon such a constructive eviction." 56 N.J. at 147, 265 A.2d at 535. If that reasoning is accepted, such a remedy has limited value as an affirmative tenant claim for it fails to provide a deterrent to a landlord who refuses to repair, or compensation to a tenant for hardship or injuries incurred during the time before repairs were undertaken. In addition, this remedy does not provide enough money to rehabilitate premises containing substantial code violations. (The Uniform Residential Landlord and Tenant Act includes a limited repair and deduct provision. See § 4-103).

112. On this issue the Landlord-Tenant Manual prepared for the Students in Court Program at Georgetown Law School states:
or the Small Claims Branch if the recovery sought is less than $750. Theoretically, a tenant can bring an action in tort for compensatory and possibly exemplary damages on a negligence or nuisance theory.

In addition, a tenant presumably could sue in contract for restitution, rescission, or reformation on the grounds that the landlord breached the warranty of habitability or some other lease covenant, or that the lease is void or voidable.

Two characteristics mark the courts' decisions in the area of tenant affirmative actions. The first is confusion as to the applicability of the newly recognized contract principles when other more acceptable legal concepts are also applicable. The decision of the court as to which reasoning to employ is important to the value of the case as future precedent. The second characteristic of these decisions is resistance by the District of Columbia trial and appellate courts to full implementation of legal principles that constitute a radical departure from the common law tradition, and which were handed down in decisions reversing holdings of the court of appeals. The court of appeals continues to read narrowly each new circuit court decision in order to limit the applicability of contract principles to future landlord and tenant cases. Since these decisions may no longer be appealed as a matter of right to a higher court, the narrow interpretations are those most likely to be followed at the trial level. In addition, in some cases the court has resisted acquiescence.

Preliminary injunctions represent a means of putting pressure on the landlord either to do something he should be doing or to refrain from doing something he should not be doing. Even if an injunction once secured is not always successful in producing the result as quickly as desired, the effort is worthwhile for whatever pressure it brings. When an injunction is outstanding and the threat of contempt is hanging over his head, the landlord may suddenly choose to start repairing that furnace or to permit a tenant to enter once again.

Id. at 1000. Although the Landlord and Tenant Branch lacks general equitable powers, the circuit court, prior to Court Reorganization, recognized the authority of the Landlord and Tenant Branch to grant interim relief. Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969). This same conclusion was reached by Chief Judge Greene in Wheeler v. Thompson, 98 Wash. L. Rep. 41 (No. L & T 103875-69, Dec. 9, 1969).

113. For example in Whetzel v. Jess Fisher Management Co., 282 F.2d 943 (D.C. Cir. 1960), the court's reasoning is grounded on a theory of negligence in which the criminal statute is a basis for imposing civil liability because the plaintiff's injury was caused by harm from which the statute sought to protect persons in the plaintiff's class.

114. The Housing Regulations impose a statutory duty, expressly declaring "a public policy in favor of speedy abatement of such public nuisances ...." Section 2901.5. The Regulations further require that the premises be maintained "in a clean, safe and sanitary condition, in repair, and free from rodents or vermin." Section 2304. Injury to person, property, or value of the leasehold which are proximately caused by violations of the Regulations should thus be compensable.

115. These theories are based upon the holdings in Brown and Javins and the District of Columbia Housing Regulations codifying those decisions, supra note 11, §§ 2902.1(a) and (b) and 2902.2. Cf. William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. 1970).

116. As a result of this resistance, where the applicability of a new decision is at
ing in or adopting decisions handed down after the effective date of Court Reorganization.

An illustration of the court's confusion in applying newly recognized contract principles in a case in which it recognized the tenant's right to bring an affirmative action theretofore unknown at common law is provided by Kline v. 1500 Massachusetts Ave. Apartment Corp. In that case the court could have chosen between relying upon a statutory duty based on principles of traditional tort law or considering that duty as a contractual obligation. The reasoning as to which theory it chose remains obscure.

Sarah Kline, a tenant at 1500 Massachusetts Avenue, brought an action to recover for injuries sustained when she was criminally assaulted in the common hallway of her apartment house. The court permitted the plaintiff to recover and, in so doing, departed from the common law doctrine under which a landlord assumed no responsibility for the acts of third-party intruders. In its decision, the court first reasoned that a duty of protection was owed by a landlord of a modern multiple unit dwelling which arose from "the logic of the situation itself." This logic being somewhat vague, the court proceeded to reason that the lease contract implied "an obligation on the landlord to provide those protective measures which are within his reasonable capacity." The opinion next discussed the tenant's right to expect that the same degree of security as existed when she moved in would be maintained so long as the rent continued at its original level. The court noted that while the original rent had been maintained, the security had decreased. Finally, the court concluded that the basis for awarding damages to the tenant was that the landlord had breached the "standard of care," which, for purposes of this case, it defined as the responsibility for maintaining security in the building. Not only was it unclear whether tort or contract principles controlled but the court also implied that the common

issue in a case before the landlord and tenant court, frequently that decision is not construed in favor of a tenant's claim. Thus, on appeal, the tenant begins from the disadvantaged position of an appellant before a court reluctant to reverse a decision of the lower court.

118. Id. at 483.
119. Id. at 485.
120. Id.
121. Id. at 486.
122. Id. at 486-87.
123. For example, the court at one point stated: "The appellant tenant was entitled to performance by the landlord measured by this standard of protection whether the landlord's obligation be viewed as grounded in contract or in tort." Id. at 486.
law doctrine that holds an innkeeper to a higher duty of care was also applicable to the case of Ms. Kline.\[124]\n
While the importance of each case in which a tenant achieves some recovery is not to be minimized, where the reasoning is such as to provide minimal guidance for reaching the same result in future cases, its value as precedent is limited. The need for well-supported holdings is important in light of the resistance of the court of appeals to implementation of the contract law principles which the circuit court has held applicable to landlord-tenant relationships. This is particularly true for cases that require reversal of a trial court in order to reach a conclusion favorable to the tenant.\[125]\n
The first indication that the court of appeals would not be deterred by the broader implications of Brown, Javins, and the Housing Regulations came in an opinion reversing a superior court decision granting summary judgment in favor of a tenant suing to recover rent paid under a lease that was void because of housing code violations.\[126]\n
In its decision, the court of appeals conceded the tenant's entitlement to restitution, but added, "we feel that the normal rule denying quasi-contractual recovery should not be followed."\[127\]

\[124\] Id. at 482.
\[125\] For example, a recent decision of the court of appeals held that the rule prohibiting retaliatory evictions was applicable to tenants for a fixed term. In dissenting from the majority's extension of the rule fashioned by the circuit court, Judge Nebeker began his opinion: "My colleagues step over established legal principles of property law in their effort to extend the latter-day rule respecting ulterior motive for eviction." Dolphin v. Park Monroe Assocs., 353 A.2d 314, 319 (D.C. 1976) (Nebeker, J., dissenting).

Another illustration of this resistance is provided by the court of appeals decision in Pernell, which refused to recognize a tenant's right to trial by jury even though breach of contract had been asserted as a defense to the landlord's possessory action. By way of explaining its holding, which was subsequently reversed by the United States Supreme Court, the court of appeals concluded that the circuit court's "suggestion" in Javins that a modern lease be interpreted as a contract did not intend any seventh amendment consequences for two reasons. First, it argued that the circuit court was really suggesting that the more appropriate approach was civil law where a jury trial was rarely used. In addition, seizing upon the language in a footnote of the circuit court's opinion, the court of appeals stated:

In fact, the author of the Javins opinion goes so far as to declare that the modern apartment tenant more closely resembles a guest in an inn—for whose eviction the intervention of a jury has never been required—than the typically agrarian tenant to whom the common law applied. (citation omitted)


\[127\] Id. at 416. This principle of contract law was recognized in Rubin v. Douglas, 59 A.2d 690 (D.C. Mun. App. 1948), where the court stated that "if the parties are not in pari delicto and one of them has not been guilty of serious moral turpitude, he may repudiate the contract and recover what he has paid under it." Id. at 691. In Miller v. Peoples Contractors Ltd., 257 A.2d 476 (D.C. 1969), the court, following this
Instead, the court held that the landlord was entitled to a set-off from the tenant's recovery in an amount representing "the reasonable value of the premises in its condition as it was when occupied."128

This decision raised two problems: First, it impliedly questioned the scope of the holding in Brown, which had appeared to relieve the tenant of an obligation to pay rent under a void contract. Second, it ignored the language in Javins that the lease should be interpreted "like any other contract," which appeared to promise the tenant a full panoply of contract remedies.129 Thus, the court of appeals made it clear that it would continue to draw a distinction between the generally recognized principles of contract law and those principles that it would apply to a lease agreement when considering what remedies to make available to a tenant.

This substantive distinction has procedural implications as well. Two new complications posed by the post-Javins retreat in the area of tenant affirmative actions are illustrated in the disposition of Winchester Management Corp. v. Staten at the trial level and on appeal.130 In the first instance, the judicial approach to decision-making in the resolution of the tenants' claims at the trial level exemplifies the reluctance of the Landlord and Tenant Court to consider the full implications of treating the lease as a contract. On appeal, the court of appeals' reversal of that part of the trial judge's decision which recognized a claim grounded in a contract theory that previously had not been considered by the appellate courts, illustrates its inclination to avoid applying the newer precedent. Instead, the appeals court relied upon familiar principles of property law to limit the nature of tenant counterclaims that could be raised in Landlord and Tenant Court.

At the trial level in Staten, the landlord sought possession of twenty-four apartment units based upon the failure of the tenants to pay rent. The actions principle, reasoned that a wrongdoer should be prohibited from enjoying the fruits of his illegal agreement. It ordered an unlicensed contractor to make full restitution of all payments accepted under a home improvement contract entered into in violation of regulations forbidding prepayment to unlicensed contractors, notwithstanding partial completion of the contracted work.

128. Id.

129. Although Davis was decided before Court Reorganization, this case was not appealed to the circuit court. In Robinson v. Diamond Housing Corp., 463 F.2d 853 (D. C. Cir. 1972), that court specifically declined to discuss the applicability of the quantum meruit theory to its decision permitting a tenant to remain in her apartment rent free while it was in serious violation of the Housing Regulations. While the issue of retaliatory eviction in Robinson was not present in Davis v. Slade, it is arguable that the underlying philosophy and language of the circuit court's opinion is in conflict with the earlier holding of the court of appeals in Davis.

were consolidated and the tenants answered claiming that no money was owing under two affirmative defenses: breach of warranty of habitability and void lease *ab initio*. The trial court found that there was a history of disputes over inadequate services in the building and, in particular, that the tenants had not been provided with air conditioning and adequate hot running water on a continuous basis. The court also found that other deficiencies, having been subsequently corrected, were not "substantial enough to warrant specific findings of rent adjustments."\(^\text{131}\)

The trial court specifically refused to reach the issue of whether the leases in question were void *ab initio* as alleged in the tenants' answer, although it gave no reason for doing so. Instead, the court proceeded on the theory that the landlord had breached the rental contract by failing to provide hot water and air conditioning as promised in the lease. It therefore determined that the tenants were entitled to a reduction in the amount of rent owed under the contract, although it never discussed whether the lack of air conditioning amounted to a violation of the Housing Regulations.\(^\text{132}\)

The judge calculated the appropriate amount of deductions to which tenants were entitled by determining a fixed value of each service per day and relying on tenants' extensive records as to the number of days they were denied such service. In each instance, the judge used the minimum figure claimed by the tenants for the basis of his calculation.

While the outcome was favorable to the tenants, the approach of the court was backward. The judge first should have addressed the question of whether the leases were void before he required the tenants to prove the amount of the rent abatement to which they were entitled. The distinction is crucial because it determined upon which party the burden of proof should fall, and also affected the amount of money each party could recover.

Under the rules of procedure that permit alternative pleading, a tenant can plead affirmatively both that the lease is void and that the landlord has breached his warranty of habitability. If the court concludes that the lease is void, the tenant can be relieved of performance, and may, if he files the appropriate counterclaim, be entitled to restitution.\(^\text{133}\) At that point the

\(^{131}\) Id. at 7.

\(^{132}\) The trial judge did acknowledge that the lack of hot water "neatly falls within the *Javins* doctrine." Id. at 14. The court of appeals subsequently found that the lack of air conditioning was not a violation of the Housing Regulations and hence did not fall within *Javins*. It therefore denied tenants a reduction in rent for the landlord's failure to provide that service, notwithstanding the fact that the lease specified an obligation to do so. The reduction for lack of hot water was upheld. 361 A.2d 187 (D.C. 1976).

\(^{133}\) The tenant can establish that the lease is void *ab initio* under *Brown* or its statutory counterpart, D.C. Housing Regulations § 2902.1(a), or that the lease has been
case would end. A landlord who seeks to recover the fair market value of the premises would have to file a separate action in a forum other than the Landlord and Tenant Court. The landlord would then bear the burden of proving the amount of quasi-contractual recovery to which he is entitled.134

On the other hand, if the proof available to tenants is insufficient to prove that the lease is void, they may still be able to establish that the landlord has breached the warranty of habitability. In this event, the tenant who asserts a set-off or recoupment may be entitled to a reduction in the amount of rent owed, providing the diminution in value attributable to the breach can be proved.

While it is not asserted here that the lease in Staten was in fact void, it is submitted that the appropriate decision-making approach would have been to address this question. If the leases were void, the landlord's recovery in quasi-contract would be limited to the minimum number of days for which he could prove that full services were provided. Instead, the case was approached from the position that the landlord was entitled to the full rental value, less the amount designated as compensation for the minimum length of time that the tenants could prove they were without full services.

This case is not an isolated example. It is unique in that it produced a well-reasoned written opinion from a sympathetic judge who believed that the tenants were entitled to some measure of relief. In general, however, it illustrates the practice of the courts when presented with alternate affirmative tenant claims in the context of a possessory action. In such cases the courts often fail or refuse to consider the distinction between a void lease and a breach of warranty and, thus, do not reach the issue of the validity of the lease. A court that confuses the remedies of restitution and abatement leaves a tenant with the burden of establishing not only the conditions that render the lease void, but also of negating the landlord's claim that there has been no diminution of rental value. The tenant may thus be faced with a situation in which he could prove a landlord breach but still be denied recovery because the evidence of the value of the loss was too speculative to enable a jury to determine the diminution in the rental value of the premises.135

rendered void by the continuing substantial violations of the Regulations. The latter provision is a statutory extension of the right to relief recognized in Javins for violations which arise after the inception of the tenancy.

135. Cf. Cooks v. Fowler, 459 F.2d 1269, 1271 n.8 (D.C. Cir. 1971). The theory and method of proving damages that will entitle tenants to partial rent abatement is presently a confusing and unsettled area of the landlord and tenant law that will not be addressed in this article. Notwithstanding this uncertainty, it is submitted that the first
In addition to problems of proof, the "piece-meal approach" of basing the amount of the abatement upon the value of the individual violations works against the idea that several serious violations, existing together for an unreasonable length of time, may defeat a landlord's entitlement to any rent for the period of their existence. Theoretically, this could be the case even though the sum of the values of each individual violation would not total the amount of the outstanding rental obligation. An additional consequence of using this approach as the sole basis for determining the diminution in rent is to foreclose consideration of whether the tenants may have incurred consequential damages during such time as the landlord was in breach of the lease agreement.

On the cross-appeals of the tenants and landlord from the decision of the trial judge in Staten, the court of appeals marked its farthest movement to date in its post-Javins retreat. Rather than examining the approach of Judge Norman in applying contract principles to the settlement of landlord and tenant disputes, the court determined that in certain instances the relationship was not to be considered as purely contractual. The court refused to read Javins as having "portended a mutual interdependence of the obligation of the tenant to pay rent and any obligation, oral or written, of the landlord to the tenant." Thus, it concluded that where the landlord

issue to be met is who should bear that burden of proof. In addition to the court's failure in Staten to recognize the issue of which party bears the burden of proving the economic consequences of a landlord's failure to provide promised services, the case poses a question concerning the level of proof required of a litigant. The court required the tenants to establish the fact of the breach and then limited their recovery to minimum provable damages. The poor, illiterate tenant, who has been without adequate heat, hot water, and other necessities for a substantial length of time and, in desperation, withholds rent, or is finally sued after having withheld rent, rarely keeps the kind of detailed records that permitted Judge Norman to make his calculations in Staten. That the court system favors the landlord can be seen in the development of judicial procedures that favor the possibility that, notwithstanding a landlord's breach, a tenant may be left without a remedy.

136. Under the Housing Regulations a lease can be rendered void by substantial violations which develop and continue for an unreasonable length of time following the inception of the tenancy. Section 2902.1(b). See note 133 supra.


138. Id. at 190. The court of appeals chose to cite summary language from the opening paragraphs of the Javins opinion to support its conclusion that the warranty of habitability was to be measured solely by the Housing Regulations. In so doing, the court ignored language found elsewhere in the circuit court's opinion, which appeared to express that court's intent that the earlier statement should be given a broader application: "In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition." 428 F.2d at 1082.
breached a lease provision that was not a violation of the Housing Regulations, the tenant was not entitled to certain of the rights of action normally incident to breach of contract.

By limiting the landlord-tenant contractual relationship to the reciprocal commitments of the tenant to pay rent in exchange for the landlord's compliance with the warranty of habitability, the court served notice that the doctrine of independent covenants had not been abandoned. Based upon this reasoning, the court concluded that the tenants could not seek a recoupment or set-off from their rental obligation for landlord's failure to provide the promised air conditioning service. The court further indicated that assertion of a counterclaim for damages based upon a non-regulation violation would also be inappropriate in a landlord's possessory action.

The court explained:

In the unique context of a landlord's summary suit for possession, a defense premised upon a failure of the landlord to perform other obligations is inappropriate. Such a failure on the part of the landlord is irrelevant in asserting the propriety of possessory relief, for a tenant is not entitled to withhold rent based on any other asserted breach of contract.

The court reasoned that the right of the tenant to withhold rent is recognized only where there has been a breach of the warranty of habitability as a result of the existence of housing code violations. It found that the failure of the landlord to provide air conditioning was not a code violation. It therefore concluded that the landlord's breach of a lease covenant that was not also a violation of the Housing Regulations was not a germane defense because it would not be sufficient, in whole or in part, to defeat the landlord's claim that the tenants unjustifiably failed to pay rent.

The court explained:

[W]hen the tenants unjustifiably withheld those portions of the rent which they asserted to have been equivalent in value to their loss of air conditioning, they could no longer properly assert a counterclaim for money damages for that amount. Had the tenants paid those sums, pursuant to their rental obligation, rather than withhold them, a counterclaim for money damages based upon such payment might have been available to them in the possessory actions.

The “catch” is in the fact that there would have been no basis for the landlord to sue for possession because of nonpayment of rent unless the tenants had withheld rent.

This apparent inconsistency arguably can be explained in either of two ways. The first is by recalling that the landlord refused to accept the tenants' tender of reduced rent checks. Thus, the landlord's claim was based upon the tenants' failure to pay an amount of rent which exceeded the value of hot water and air conditioning; therefore, the withholding of this excess amount was unjustified. This explanation is unsatisfactory because the landlord himself was responsible for creating this inequity. He is, therefore,
This decision poses several problems. Not only does it mark a retreat from the modern trend noted and embraced by the court in *Javins*, but the decision to preserve the common law real property doctrines at the cost of limiting the applicability of contract principles cannot be easily reconciled with the reasoning found in *Javins*. The circuit court in *Javins* indicated that it was not unmindful of the fact that a landlord-tenant transaction involves a transaction in land. Nevertheless, it concluded that the relationship would be better governed by contract principles. The circuit court explained:

The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.

We also intend no alteration of statutory or case law definition of the term “real property” for purposes of statutes or decisions on recordation, descent, conveyancing, creditors’ rights, etc. We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between themselves. The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law.141

profiting by his wrongdoing in that the tenants are deprived of raising a counterclaim that would complicate his possessory action. *Cf.* Rubin v. Douglas, 59 A.2d 690 (D.C. Mun. App. 1948). *See also* Lalekos v. Manset, 47 A.2d 617 (D.C. Mun. App. 1946). In that case, the court reversed a directed verdict for the landlord where the latter brought an action after refusing an offer of partial rent from tenants who had been able to occupy only one of the three floors in the building that they had leased.

A second possible explanation is that the court might permit a tenant to counterclaim for a landlord’s non-code related breach of contract provided that his premises also contain defects that qualify as code violations justifying the withholding of rent. This explanation is not wholly satisfactory either. In effect, it would create a situation in which the tenant profits from having code violations. Furthermore, as pointed out in the dissent, such a limitation on rent-related counterclaims is contrary to the established case law that requires the trial court in a landlord’s action based on nonpayment of rent to make a finding as to the amount of rent, if any, owed by the tenant. 361 A.2d at 193 (Fickling, J., dissenting). The effect of this interpretation would be that a court could only make an accurate determination of the amount of rent owed in cases where the tenant is “fortunate” to have code violations existing on his premises.

While these explanations technically defeat the “catch 22,” the court leaves little doubt that it does not favor counterclaims that raise independent claims based upon breach of contract. Although the court disclaims the need to consider the merits of such actions, it states in a footnote: “We decline to further defeat the summary nature of a possessory action by sanctioning the resolution therein of additional claims which the tenant might seek to interpose.” *Id.* at 192 n.14. The only effect of such an interpretation by the court will be generally to discourage a tenant from pursuing a claim.

Notwithstanding this language, the court of appeals in *Staten*, acting now as the highest court of local jurisdiction, appears to have resurrected the doctrine of independent covenants. In its opinion, this common law doctrine is only to be set aside insofar as a particular case involves violations of the Housing Regulations. The court thus upheld that portion of the rent abatement based upon lack of hot water, but refused to allow a reduction for the failure to provide air conditioning.

The above-cited language from *Javins* also appears at odds with the court of appeals' reasoning that a precise definition of the warranty of habitability was needed in order to achieve consistent results in all future cases, regardless of the equities in individual cases. The court argues that the Housing Regulations provide mandatory, detailed, precise and easily understandable minimum standards for measuring habitability. This precision, in its opinion, is preferable to "leaving it to the whim of the tenant and the discretion of the trial court to determine what does and does not constitute a habitable dwelling for purposes of the landlord's warranty. . . ."142

In addition, the court's restrictive definition of the warranty of habitability ignores two other significant aspects concerning the *Javins* decision. The first is the circuit court's reasoning by analogy to the Uniform Commercial Code warranties of merchantability and fitness for a particular purpose.143 Specifically, in the case of merchantability, the Code makes it clear that the standards set out as a minimum definition144 do "not purport to exhaust the meaning of 'merchantable' nor to negate any of its attributes not specifically mentioned in the text of the statute . . . ."145 Similarly, while the *Javins* court fashioned a warranty of habitability measured by the standards of the Housing Regulations, its reasoning does not support the idea that its intention was to foreclose consideration of other features of habitability.

The court of appeals' reasoning also fails to take account of the legislative amendments to the Housing Regulations enacted after *Javins*.146 The court in *Staten* adopts a definition of the warranty of habitability based upon its interpretation of a 1968 decision that in turn was based upon regulations as they existed at that time. The court does not even acknowledge that the District of Columbia City Council amended those regulations in 1970. It thus appears that the court, in searching for its theoretical body of consistent principles, has in reality, only raised additional questions.147

143. U.C.C. §§ 2-314, 2-315.
144. U.C.C. § 2-314(2)(a)-(f).
145. Id. at Official Comment 6.
146. Effective date June 12, 1970, Order of the Commissioner No. 70-220.
147. It is not meant to suggest here that the amendments did in fact alter the nature
One other important implication of the court's opinion in *Staten* should not be overlooked. When that decision is read together with other procedural considerations, the tenant appears to be caught in a procedural squeeze. On one hand, the court has served notice that the Landlord and Tenant Court will not necessarily entertain those counterclaims which, under the Federal Rules of Civil Procedure, would be designated as "mandatory." On the other hand, it has refused to assure the tenant the right to file an independent claim after an action in the Landlord and Tenant Court has been concluded.

Rather than reading the landlord and tenant counterclaim rule as authorizing counterclaims which arise out of the subject matter upon which the landlord's action is based, the court has decided that relief for a non-code contractual breach should be sought by the tenant in a different forum. To reach this conclusion, the court places emphasis on the landlord's need for the prompt resolution of this claim. It does not consider, however, the probability that the tenants might be deterred from pursuing their claims if required to initiate an action in a different forum. While the disadvantages faced by a landlord in the "already-impeded and overburdened summary possessory proceedings" are not to be minimized, the court does not address the issue of whether allowing these tenant claims would in fact add any significant complications. The problems of expense and delay and the additional procedural complexities faced by a tenant in filing a civil action are ignored by the court. The sole reference to these problems is found in a footnote to the court's decision in *Staten*: "We perceive no unwarranted burden on the tenant resulting from our holding which would outweigh the effect an opposite holding would have . . . ." This unexplained conclusion is not in

of the warranty. It is submitted however, that in view of the court's narrow reading of *Javins*, it was obligated to discuss whether the changes in the Regulations had any effect on the nature of the warranty of habitability.

148. The District of Columbia Court Reorganization Act of 1970, D.C. Code § 11-946 (1973), specifies that the Superior Court is to conduct its business according to the Federal Rules of Civil Procedure. Fed. R. Civ. P. 13(a) defines a "compulsory counterclaim" as any claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. The Landlord and Tenant Branch does not incorporate Rule 13 into its rules, presumably because of the summary nature of the proceeding and the absence of any provision requiring a tenant to file an answer. The rules, however, do permit a tenant to file a counterclaim in certain cases. D.C. SUPER. CT. RULES, LANDLORD & TENANT RULE 5(b). See note 111, supra. While the Court Reorganization Act grants to the Superior Court the power to modify these Federal Rules accordingly, there was no indication prior to *Staten* that the reasons for not incorporating Federal Rule 13 into the Landlord and Tenant Rules was intended to prevent that court from exercising its discretion to entertain a counterclaim of a mandatory nature.

150. *Id.*
keeping with the court's responsibility to balance the interests of landlords and tenants in determining the nature of the summary proceeding. The need to perform this function was addressed by the United States Supreme Court in its decision in Pernell, recognizing the right of tenants to a jury trial:

Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have 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.\footnote{151}

In addition to its failure to balance the needs of both parties to a landlord-tenant dispute, the court of appeals' new interpretation of the counterclaim rule ignores available guidelines for determining which claims it should permit. The court admits that the Landlord and Tenant Rule itself provides no guidance with respect to the nature of the claims cognizable.\footnote{152} The effect of the court's decision is to bar the Landlord and Tenant Court from entertaining counterclaims defined under those rules as mandatory, even though such claims arise out of the subject matter upon which the landlord's claim is based. The court has therefore ignored the considerations behind the Landlord and Tenant Rule, as well as the present trend of the case law towards recognition of full contract rights for tenants, and has excluded any discussion on the impact which a different result might have upon the interests of the parties.

While limiting the nature of tenant counterclaims on the one hand, the court on the other has indicated that it may limit the tenant's opportunity to file an independent action. The court has specifically refused to assure the tenant that he retains the right to file an independent action arising out of the subject matter of a landlord's possessory action following disposition of that action by the Landlord and Tenant Court.

The issue arose in the case of Tutt v. Doby,\footnote{153} decided by the circuit court after the effective date of Court Reorganization. Reversing the court of appeals, the circuit court ruled that a tenant who had not been personally served in a previous possessory action was not estopped from litigating the issue in a subsequent action brought by the landlord.\footnote{154} Shortly after this

154. The landlord sought to collect the amount of unpaid rent which had been the subject matter of his possessory action, and the tenant filed a set-off and counterclaim. An earlier action filed in the Landlord and Tenant Court had ended in a default judgment against the tenant who subsequently vacated the premises.}
decision was handed down, however, the court of appeals labeled as an “open question” the issue of whether a prior judgment for possession would have a res judicata effect on a tenant’s affirmative action to recover back rent or on his affirmative defense to defeat the landlord’s action to collect unpaid rent. The court explained that part of the reason the issue remained unsettled was due to “the absence of any holding by this court acquiescing in or disagreeing with Tutt v. Doby.”

Thus, to preserve the nature of the summary proceedings in the Landlord and Tenant Branch, the court of appeals has decided not to permit tenants to seek affirmative relief in certain cases, even though such claims would be considered mandatory counterclaims elsewhere in the court system. At the same time, the court has indicated that independent tenant actions may be barred if filed subsequent to the conclusion of the summary proceedings in Landlord and Tenant Court. At present the only certainty appears to be that a tenant may file an independent action in another forum prior to the conclusion of the landlord’s possessory action. Thus, in theory at least, a tenant could be involved in two separate but related trials at the same time. While the subject matter and parties in each case would be essentially the same, in one action the tenant would be a defendant and in the other, a plaintiff.

2. Unexercised Government Authority to Protect Residential Housing

The statute books of the District of Columbia contain legislative authorization for governmental action to protect private residential housing. These provisions may serve as the basis for civil action alternatives to criminal enforcement of the housing regulations. They are catalogued here for purposes of illustrating both the present powers of the executive branch of government and potential jurisdiction of the judiciary should it have a cooperative plaintiff.

The District can order a residential building to be vacated immediately when it determines that the structure is unsafe for habitation. The Housing Regulations allow the District to announce its intention to order that

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155. Pernell v. Southall Realty Co., 294 A.2d at 497 n.22. The court of appeals does refer to Tutt v. Doby in its decision in Staten. The former case is cited in support of the proposition that the power of the trial court to assess the amount of rent owed by a tenant in the context of a summary possessory proceeding does not give rise to an expanded authority simultaneously to adjudicate all conflicting claims between a landlord and a tenant. 361 A.2d at 192 n.13. The dissent in Staten argued that the trial court’s authority to determine the amount of rent owed meant that the tenant could assert any defenses he claimed as credits against that amount. Id. at 194 (Fickling, J., dissenting). The court however, does not alleviate the confusion as to when a tenant may or must file an affirmative claim.

a building be vacated within thirty days unless conditions are corrected.\textsuperscript{157} In less than emergency situations, the District can order repair or condemnation, in which case the owner is given six months to repair or demolish the premises.\textsuperscript{158} If the owner fails or refuses to undertake the ordered repairs, the District is authorized to make them at its own expense and to assess the cost against the property as a tax or a fine.\textsuperscript{159} Admittedly these powers have limited value for tenants, particularly where a housing shortage exists. At a minimum, compliance with these orders will require that the building be vacated. Further, there is the possibility that the end result might be demolition of the structure, which would further reduce the housing supply.

Perhaps potentially the most useful statutory authority is the power of the District to order code compliance.\textsuperscript{160} The District is further authorized to enforce its order where an owner fails to comply by undertaking the necessary work and assessing the costs against the property as a tax.\textsuperscript{161} One commentator has observed that “[t]his remedy could offer rapid and systematic repair of deteriorating slum properties, but the power has seldom been used, largely for want of funds to finance repair costs.”\textsuperscript{162}

\begin{itemize}
\item[157. ] D.C. Housing Regulations, \emph{supra} note 11, § 3301.
\item[159. ] D.C. Code §§ 5-622, 631 (1973). The latter provision specified criminal penalties for failure to pay the assessed lien. Since FY 1970 the funds appropriated for demolishing or rendering buildings sanitary pursuant to D.C. Code § 5-622 have totalled $697,329, of which $342,075 actually has been spent. These funds were spent to demolish or rehabilitate 489 buildings. D.H.C.D. Statistics, \emph{supra} note 29, at 5-6. \textit{See also} note 162 \emph{infra}.
\item[161. ] D.C. Code § 5-313 (1973). Since 1972 when this section was separately funded, $635,500 has been appropriated. The District has spent $462,875 of this money to abate code violations in 806 cases. D.H.C.D. Statistics, \emph{supra} note 29, at 5-6. In FY 1976 the expenditure of appropriated funds increased by more than 150% over any previous year. \textit{Id.}
\item[162. ] Daniel, \emph{supra} note 12, at 919. This observation was made in 1970. At that time, although the provision had been on the books for 64 years, it had not yet been funded. As noted above, the District has begun to appropriate and expend money pursuant to this and other sections of the D.C. Code which authorize the government to direct that housing improvements be performed. \textit{See} notes 159 & 161 \emph{supra}.
\end{itemize}

In addition, since 1970 the District has levied fines in the amount of $922,120.13 for work performed pursuant to D.C. Code §§ 5-313, 622. Of that amount, $537,944.91 has been collected. This latter figure, however, does not include money redeemed through tax sales. The D.C. Department of Finance and Revenue estimates that if the collection figure reflected (1) the amount of taxes or liens redeemed at the time of the tax sale and (2) the fact that the assessments are payable in three installments over a two-year period, collections might eventually be as much as 99.9% of the initial levies. \textit{See Memorandum to D.C. City Council Committee on Government Operations, Department of Finance and Revenue, at 7} (Feb. 16, 1977). One weakness of the program lies in the budgetary process, which requires that recovered funds be returned to a
This provision was invoked in 1970 by the United States District Court for the District of Columbia as a basis for ordering the Mayor to insure that the tenant-plaintiffs, residents of a substandard apartment complex, were provided gas and electricity free of charge. The case had come before the court on plaintiffs' motion for injunctive relief to prevent the discontinuation of their utilities services. Government assistance was sought after the landlord stopped collecting the rent and honoring the utility bills following plaintiffs' filing of a civil action against him.

The court's reasoning for granting the preliminary injunction pendente lite is significant for the burden it placed on the District government. Although it acknowledged that failure to provide adequate utilities is a violation by the landlord of the Housing Regulations, the court found that the District shared a "heavy responsibility for the conditions that have brought this nuisance about. . . ." The court determined that the municipality had the inherent power to abate public nuisances, but it also noted that there were statutory provisions which allowed the District to correct Housing Regulation violations and recoup the costs as a tax lien. Thus, it concluded that since the District under the present circumstances possessed "both the best means and opportunity to protect the public interest, equity require[d] that this obligation be placed in the first instance on the municipal authorities." The importance of this opinion, however, also lies in what the court noted the District did not and could not do:

The city has no authority to take over structures by way of receivership and operate them at city expense for the public good. Lacking funds, the city administration has apparently determined to tolerate substandard housing, marginal conditions of safety and sanitation, and the overreaching habits of certain landlords simply because the necessary resources to stop the inexorable blight of the inner city have not been provided.

. . . . Maintenance of proper conditions of safety and sanitation is an essential responsibility of good government. Enforcement of the housing laws and regulations would have prevented the present situation from arising.

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164. Id. at 533.
165. It is noted that a separate provision allows the District a lien for unpaid water charges. D.C. Code § 45-4524(c) (1972).
167. Id. at 532. The largest amount spent by the District on properties owned for a multiple-property landlord pursuant to this provision of the Code reportedly totaled
IV. EVALUATION AND PERSPECTIVE OF THE PRESENT STATUS OF THE EVOLUTIONARY DEVELOPMENT OF LANDLORD-TENANT LAW

The judicial development of the legal doctrines that govern landlord and tenant relationships detailed in the preceding sections follows a pattern not unlike that observed by Newton in his Third Law of Motion, to the effect that for every action there is an equal and opposite reaction. The distinction between the scientific and legal perceptions of forward motion, however, lies in the "opposing force;" the reaction is not equal. What the circuit court pronounced in broad terms, the court of appeals narrowed in scope and limited in subsequent application. But it has neither abandoned nor erased the impact of the former court's decisions. The formulation of legal doctrines applicable to a twentieth century urban American setting continues.

Although it may be somewhat unsettling, particularly to those who must order their activities based upon these judicial pronouncements, this process is legitimate. Both the courts' creation and use of precedent, in most instances are within what Karl Llewelyn identifies as "the leeways of precedent." In one respect, the growth pattern of the case law in this area is a documentation of the judicial process in action. As Justice Cardozo observed in his essay on The Nature of the Judicial Process: "For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'"

Within the evolutionary process to date, four forces can be identified as creating a conceptual framework for analyzing judicial responses to future developments in this area of law. Each addresses an aspect of the process and its impact upon judicial decision-making. Together they embody the tension which is a creative force in the development of legal doctrines applicable to the perceived needs of present society.

While each force is inter-

over $19,000. The repairs were performed by a private contractor at the direction of District government officials over a thirteen month period beginning in January, 1975. See Housing Violator No. 1, Washington Post, Feb. 15, 1976, § A, at 1, col. 1. See also discussion on enforcement by criminal prosecution, pp. 465-71 supra.

The City Council has recently passed legislation which would authorize the mayor to assess a lien of up to twice the amount of the actual cost of the repairs. The enactment of this penalty provision is intended to encourage landlords to cause the repairs to be undertaken rather than waiting for the city to do so. While the constitutionality of such an enforcement scheme remains questionable, the mayor allowed the bill to become law without signing it. The Nuisance Elimination Act of 1976, Council Bill No. 1-303, 23 D.C. Reg. 5949, amending D.C. Code § 6-902 (1973).


170. Of this process, Justice Cardozo has observed: "The changes, as they were made
grated with the next, they can be separately identified as: 1) the judicial intuition of public policy which serves as both an affirmation and a goal; 2) the political, social, and economic realities which limit the ability of the common law alone to effectuate the policy; 3) the challenge to and by the courts to continue to transcend these limitations; and, 4) the tendency towards judicial creation of a motivating force that will incite forces outside the judiciary to bring about change in accordance with avowed public policy. Examination of each aspect of the process also provides a basis for understanding the interrelationship of the substantive law and the mechanism for settlement of landlord and tenant disputes.\textsuperscript{171}

The first aspect of this evolutionary process concerns the nature of public policy with respect to private residential housing and its affect upon the landlord-tenant relationship. In classic terms it is the interaction between the legislative process and judicial recognition and development of the "situation sense."\textsuperscript{172}

Judicial definition of public policy in the area of housing is probably among the earliest contributions to the evolutionary process of the modern body of law. In 1921, Justice Holmes, in the Supreme Court decision upholding the District of Columbia Rent Control Statute, declared: "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."\textsuperscript{173} Some years later, shortly after Congress authorized funds for "urban renewal," which provided the incentive for the development of modern housing codes, the Supreme Court recognized that:

\[ \text{[t]} \text{he need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government.}\textsuperscript{174} \]

\textit{in this case or that, may not have seemed momentous in the making. The result however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize and transform." The Nature of the Judicial Process, supra note 169 at 27-28. \textsuperscript{171} This subject will be addressed in a sequel to this article which will appear in the next issue of the Catholic University Law Review. See Prefatory Note, supra. \textsuperscript{172} According to Llewelyn, the term "situation-sense" serves "to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with." The Common Law Tradition, supra note 168, at 60. In the context of deciding appeals, the courts resort to situation-sense "as a guide for testing, for phrasing, for redirecting the applicable rule or principle: the steady and required judicial review of prior judicial decision." Id. at 260. \textsuperscript{173} Block v. Hirsh, 256 U.S. 135, 156 (1921). \textsuperscript{174} Frank v. Maryland, 359 U.S. 360, 371 (1959).}
Not long afterwards, the riots of the 1960's made it painfully obvious that when some members of a community are permitted to live in unsafe and unsanitary dwellings, it is detrimental to the well-being of that society and the national populace as a whole.

The recognition that decent shelter is essential, both for the survival of the human being and of the society, necessarily required judicial intervention—in the name of public policy—into what had been until then a purely private landlord-tenant relationship. Recognition that the law provided certain protections for the tenant meant that it placed limits upon the landlord's freedom to manipulate without restriction both the housing quality and quantity within the so-called "free market" system. The shift in the "situation-sense" from real estate to housing, and in operative legal doctrines from common law real property to principles of contract law, provided a new framework within which the private landlord and tenant relationship could function.\textsuperscript{175} In the interests of reaching a just result in a particular dispute, it became repeatedly necessary for the appellate courts to sanction instances of legislative and judicial interference with the freedom of private parties to operate.\textsuperscript{176}

The second aspect of this process involves the combination of forces that restrict the ability of the law, as common law, to effectuate the purposes of the announced public policy. An understanding of this operative force requires that a distinction be made between the substantive nature of the present and potential legal doctrines and the effect of their implementation and enforcement. This dichotomy was recognized by the National Advisory Commission on Civil Disorders which concluded:

The Uniform Residential Landlord-Tenant Act or even the progressive pro-tenant state laws of New Jersey, Illinois, or Washington, D.C. have done little or nothing to alleviate the hardships on

\textsuperscript{175} Compare Llewelyn:

Thus to urge the primacy of the problem-situation as a type . . . [is] to insist that a court should seek to channel the impetus from the concrete, to channel it into a search for a situation-pattern of significance which can be somewhat worked over for its general sense and tendency so as to test the wisdom of letting the equities of the fireside prevail or even count; and, if they should be so permitted, then to capitalize their poignancy or illustrative power to produce a bit of sounder law for that whole situation.

\textsuperscript{176} For example, in Javins the court held that urban residential leases contained an implied warranty of habitability. The right of a landlord to evict a tenant at the end of the lease term was restricted in cases where the landlord acted out of retaliatory motives. Edwards v. Habib, 227 A.2d 388 (D.C. 1967), rev'd, 397 F.2d 687 (D.C. Cir.), cert. denied, 393 U.S. 1016 (1968). In addition, the parties were not permitted to include provisions in the lease exempting or limiting the landlord's tort liability or waiving compliance with the Housing Regulations, cited supra note 11, §§ 2906, 2912.
low and moderate income tenants caused by the inadequate supply of affordable, habitable housing and commensurate lack of bargaining power of such tenants.\(^{177}\)

Neither the full implementation of progressive laws nor the vigorous enforcement thereof can, without more, eliminate the slums or solve their root causes.

An additional factor which contributes to the tension between formulation and implementation of legal doctrines is the paradox, in the law itself which has helped to foster the slum housing dilemma. Enforcement of the law against slum landlords intensifies the low-cost housing shortage, but the failure of effective enforcement perpetuates slum conditions, preserves the status quo, and thus avoids generating the intense public pressure needed for legislative action. The limitations of the law were acknowledged by the drafters of the Model Residential Landlord-Tenant Code and the later Uniform Act. Included in the Introduction to the Model Code was the disclaimer that: \["N\]o mere law reform will bring about the massive injections of public money, or the modernization of the home building industry or the equalization of poor tenants' economic ability to pay . . . . [It] is not, and cannot be, a panacea for poverty.\(^{178}\)

Recognition of these limitations however, does not eliminate the necessity of using the judicial process to accomplish certain operative goals relating to a circumstance of particular equities. The tension between the limitations of legal doctrine to solve the underlying social and economic problems and the responsibility of the court to apply and shape that doctrine so as to achieve what the decision-maker perceives to be a just result for a particular set of litigants, can be a creative force.\(^{179}\) The third aspect of the evolutionary process, therefore, focuses on the essential role which the courts have assumed in furthering development and reform of the landlord and tenant law. There are two elements of this undertaking: the courts have been challenged to continue the present evolutionary process of the law, and they have sought to challenge those conditions which breed and maintain injustice within the legal system.

\(^{177}\) REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 472 (Bantam ed., 1968).

\(^{178}\) AMERICAN BAR FOUNDATION, MODEL PROPOSED RESIDENTIAL LANDLORD AND TENANT CODE (MODEL CODE), Introduction 10 (1969).

\(^{179}\) Consider Justice Cardozo's insight on the responsibility of the courts. \"[O]nce the precedent is known as it really is," he writes, "only half or less than half of the work has yet been done. The problem remains to fix the bounds and tendencies of development and growth to set the directive force in motion along the right path at the parting of the ways." B. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 30 (1921).
While this role cannot be assumed without acknowledging the limitations upon its potential for accomplishing the articulated policy, it is nonetheless a significant force in the evolutionary process. The observation of Professor Florence Wagman Roisman, an experienced and skilled practitioner in the area of the District of Columbia housing laws, is particularly noteworthy:

Our housing problem is a political problem that will be resolved ultimately in the legislatures—or on the streets. But one of the ways in which we can help tenants to achieve and assert the political leverage that they need is to vindicate what rights they do have in the courts.¹⁸⁰

The challenge to and by the courts is to be creative. The approach to decision-making in furtherance of this objective is twofold. The first involves the logical extension of the law in this area, based upon the recognition that existing legal doctrines within the perceived “situation-sense” are applicable to the particular equities of a given case.¹⁸¹ The second requires creation

¹⁸¹ An example of this practice would be for the court to hold that it will invoke the principles of good faith and unconscionability in order to determine the validity of the lease agreement and the allocation of the burden of proof when a dispute between landlord and tenant arises. For discussion of the applicability of the U.C.C. provisions on good faith (§ 1-203) and unconscionability (§ 2-302) see Uniform Residential Landlord and Tenant Act, §§ 1.302 (Obligation of Good Faith), 1.303 (Unconscionability); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). Cf. K. Llewelyn, The Common Law Tradition, supra note 168. Llewelyn argues in favor of extending the applicability of U.C.C. provisions to other contracts not covered by these sections, and of considering good faith in the determination of unconscionability. Id. at 360-72.

Discussion of the doctrine of unconscionability can be found in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), and Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (N.J. 1960) (including discussion of public policy considerations). Generally, where the circumstances at the time of entering into a contract were such that there was a lack of meaningful choice on the part of one party, and where the contract terms are unreasonably favorable to the other party, the court may refuse to enforce the contract.

In a case between landlord and tenant, the critical housing shortage, the inequality in bargaining power, the form lease containing provisions which violate the Housing Regulations or which are phrased in an attempt to circumvent them, may negate the meaningfulness of choice and may cause execution of a contract so one-sided as to be unconscionable. Where the court refuses to enforce the agreement or declares it void in the context of a possessory action, the landlord’s claim would be dismissed. To recover back rent or a set-off from tenant’s suit for restitution, under a quasi-contractual theory, the landlord must bear the burden of proof of value. Cf. Brown v. Southall Realty, 237 A.2d 834 (D.C. 1968); William J. Davis Inc. v. Slade, 271 A.2d 412 (D.C. 1970). In the District of Columbia, although the regulatory language is clear, see D.C. Housing Regulations § 2912, the cases are in conflict as to whether inclusion of an illegal provision in a lease voids the agreement in toto. Compare Park Monroe v. Watson, L & T No. 112057-73 (D.C. Super. Ct., May 28, 1974), and Park Monroe
of new obligations and remedies by analogizing to the legal and equitable
principles of other areas of law.\textsuperscript{182} The benefits of such a venture would
not be inconsequential. The short-term effects would include the possibility
that tenants, either individually or as a class, might experience on occasion
a part of the government "system" responding to their avowed needs. On
a more tangible level, in isolated instances it may mean improvement, al-
though most likely temporary, in their actual housing situation. In the long-

Assoc. v. Parker, L & T No. 83199-74 (D.C. Super. Ct., June 28, 1974) (both cases
voiding the leases) \textit{with} Park Monroe Assoc. v. Levenberry, L & T No. 61962-74 (D.C.
Super. Ct., Sept. 1974) (striking only the illegal parts from the same lease).

182. For example, in addition to the application of the doctrines of good faith
and unconscionability, discussed supra note 181, it can be argued that by analogy to the Uni-
form Commercial Code, § 2-103(b)(1), the landlord should be held to the good faith
requirement of a merchant. In such a case, in addition to honesty in fact, the landlord
would be required to observe "reasonable commercial standards of fair dealing in the
trade." \textit{See} U.C.C. § 2-103(b)(2). Adoption of this standard would have wide-ranging
implications. For example, where it can be shown that the standard commercial practice
of landlords is to permit monthly tenants to remain in possession indefinitely, the arbi-
trary termination of a particular tenant would require the landlord to prove a bona fide
reason for eviction, rather than requiring the tenant to prove a defense which fits within
the retaliatory eviction doctrine. \textit{Cf.} D.C. Housing Regulations, § 2910; Edwards v.
U.S. 1016 (1968); Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir.
1972). Termination by a landlord in order to avoid making repairs which he is obli-
gated to perform, or a decrease in services without a corresponding rent reduction, would
not necessarily be acceptable reasons, absent a showing of legitimate business purpose.

An extension of this principle is what Professor Roisman argues should be the next
warranty recognized by the courts. She terms it "the implied warranty of continuity." Under such a warranty, in the absence of a tenant breach, the tenant would be permitted
to remain in possession. The landlord could terminate where he could prove a legiti-
mate business reason. While a similar provision is normally part of a rent control pro-
gram, even in the absence of such legislation, it may be appropriate to analogize to the policy behind that part of the program. At a minimum, the warranty of continuity might be invoked for purposes of shifting the burden of proof to the landlord to give
a reason for seeking eviction in a case not based upon nonpayment of rent. In \textit{Javins}
where the circuit court fashioned the implied warranty of habitability drawing an anal-
gogy to the U.C.C. warranties of merchantability and fitness for a particular purpose
(§ 2-314 and § 2-315, respectively), the court implied that the tenant \textit{vis-à-vis} the land-
lord was in a position much like that of the buyer who "must rely on the skill and hon-
esty of the supplier." 428 F.2d at 1075.

A further step in the direction of this new warranty was taken recently by the court
in Golphin v. Park Monroe Assocs., 353 A.2d 314 (D.C. 1976). In that case the
court reversed the trial judge's award of possession to the landlord based solely upon
the finding that the lease had expired. The court of appeals held that it was error
to exclude evidence that the landlord's established practice was to permit tenants to re-
main as month-to-month tenants after expiration of their lease term, where such evi-
dence tended to support the defendant's contention that his eviction was motivated by
retaliation.

For another example of creating new legal doctrines by analogy to established legal
principles, \textit{see} discussion of "slumlordism" as a tort, \textit{infra} note 190.
run, the implementation of such court decisions should impact upon the finances of the "monied interests," such as landlords, mortgage-holding banks, government bodies, and taxpayers, in such a manner as to create the conditions precedent to legislative action in the housing area.

Despite its inherent conflicts and limitations, this analysis recognizes that the judiciary is the branch of government that responds most directly to the

183. See, e.g., Connor v. Great Western Sav. & Loan Ass'n, 69 Cal.2d 850, 447 P.2d 609 (Cal. Sup. Ct. 1968). In that case the California Supreme Court, en banc, reversed a nonsuit in favor of the defendant savings and loan which had provided the funds for construction of a housing development. In a decision written by Justice Traynor, the court held that the defendant had breached a duty recognized by the tort law to the homebuyers in that development. It defined that duty as the exercise of reasonable care to protect them from damages caused by major structural defects. In addition to the "traditional" findings relating to the standard duty of care in a tort case, the court found that substantial moral blame attached to the defendant's conduct. It thus concluded: "The admonitory policy of the law of torts calls for the imposition of liability on Great Western for its conduct in this case. Rules that tend to discourage misconduct are particularly appropriate when applied to an established industry." Id. at 618.

This case was noted by Judge Wright in Javins. He observed that "following the developments in other areas, very recent decisions and commentary suggest the possible extension of liability to parties other than the immediate seller for improper construction of residential real estate." 428 F.2d at 1076.

Recently, District of Columbia officials, frustrated in their legal attempts to force a recalcitrant landlord to comply with the Housing Regulations, turned to the landlord's mortgage holders. The director of the neighborhood improvements administration of the D.C. Dept. of Housing and Community Development was reported to have "appraised the bankers that under the law they have responsibility for code compliance." He told reporters that this was "an action 'we almost never have to take.'" One bank threatened to foreclose unless all violations on the premises for which it held the mortgage were corrected. A month later, it foreclosed for nonpayment of the notes on the mortgage. Landlord Views Self as Victim of Social Ills, Washington Post, March 23, 1976 at 1, col. 1.

184. The argument advanced in opposition to requiring improvement of housing properties at the expense of the landlord is that the costs are recouped by raising the rent. Since those persons most in need of low-cost housing are the poor who cannot afford higher rents, the argument concludes that these persons will be forced into even more overcrowded and delapidated slum housing. While examination of the merits of this argument is outside the scope of this article, a fundamental underpinning of the analysis presented here is that the judiciary alone cannot solve the underlying social and economic problems which create and perpetuate slum housing. The unique position of the District of Columbia as a non-state however, makes it unlikely that relief for the "monied interests" in this jurisdiction will be achieved at the expense of limiting or eliminating the rights of tenants. The source of major legislative relief in the form of financial assistance for housing construction, maintenance, rehabilitation and repair, for rent supplements, or for other related enterprises is the United States Congress. The District of Columbia, however, has a measure of home rule sufficient to give its City Council, rather than the Congress, jurisdiction over the Housing Regulations and those sections of the District of Columbia Code concerning building regulations, types of actions, and other provisions relating to real property. See, e.g., D.C. Code, titles 5, 16, 45. Since the primary constituencies of the members of Congress and of the City Council are landlords and tenants, respectively, a measure of legislative protection is provided for each interest.
tenant's quest for relief and justice. The courts are both more accessible to tenant claims and less subject to the political pressures and direct influence of those interests more powerful than tenants. It must be emphasized that the task of the court is not to "legislate" in the sense that it assumes the function of the representative law-making body. Rather, its responsibility is to exercise actively its power as a co-equal branch of government, balancing the interests in a system which, if left unchecked, would produce results contrary to declared public policies.

The American Law Institute recently focused on the issue of judicial activism in the landlord-tenant area. When it presented for approval its draft of that section of the Restatement of Law, Second, Property, recognizing a landlord's covenant of habitability, Institute Director Herbert Wechsler wrote in the foreword:

Those who are troubled by the fact that the Reporter's formulations move in some respects beyond the statutory mandates with respect to tenant's rights and remedies may find some comfort in the famous statement by Mr. Justice Stone at the Harvard Tercentenary in 1936: "I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning." (The Common Law in the United States, 50 Harv L. Rev. 4, 13). What is occurring at long last in this important field is that the total body of statutory law, together with its underlying policy, has become "a premise for legal reasoning" in the judicial reappraisal of old rules and doctrines urged to be unsuitable for modern needs. The challenge of this draft is to discern the proper implications of this process in the areas presented for consideration.

Finally, implicit in the evaluation of this point is the recognition of a developing tension between judicial activism and customary societal resistance to change. The search for legal and equitable relief by and on behalf of tenants appears to be moving towards a direct confrontation with the search for profit by landlords and other business interests within the market system. The fourth element of the evolutionary process is inherent in the previous three forces of public policy, limitations on judicial accomplishments, and challenge to be creative in the development and application of legal doctrine.

185. In addition, the unique status of the District of Columbia leaves the tenant even farther removed from a position of influence vis-à-vis the legislative source of "ultimate relief." See note 184, supra.

For want of a better term, it can be labeled as the "motivation" of the law as defined by public policy declarations and the decision-maker's concept of judicial responsibility. As used in this context, "motivation" may be described as the compelling consideration that takes precedence over all other factors that may influence the court's decision. The motivation of a decision is achievement oriented. It includes both the primary purpose to be accomplished in the settlement of an individual dispute and the impact of its decision on future cases. Ideally, the motivation is the achievement of a just result in accordance with both the particular equities and the "situation-sense." In the continuing evolution of landlord and tenant law however, this operative ethical imperative of justice is subject to challenge by those with differing situational perceptions.

The judicial decision-making process is influenced by a variety of forces which furnish authority for a decision. Justice Cardozo offered the following summary:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.\(^{187}\)

Similarly, individual decision-makers articulate different motivations for deciding the outcome of a particular case. The history of the evolution of the landlord and tenant law in the District of Columbia illustrates extremes in decision-motivating forces. At one end of the judicial spectrum are the judges who appear to act out of a belief that they can postpone, if not avert, what could likely be the eventual consequence of full implementation and enforcement of the present case law. In doing so, they must often ignore the unsatisfactory outcome in the case before them and/or defend the result with uncertain reasoning. At the other extreme are the judges who appear compelled by the need to balance the equities in a particular case. Some of them show little awareness that their decision holds the seeds of creating a deterrent to investment in or continuing ownership of residential property.

While decisions of the former type tend to create confusion and uncertainty, the latter decisions raise the specter of change in the status quo. This change is discomforting, both because it is new and because it impacts upon the financial interests of a powerful segment of society. Thus far the courts have avoided directing discussion to the conflicting perceptions of justice held

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by the landlord on one side, and by tenants, reenforced by the decisions of the circuit court, on the other. The failure to attempt resolution of the conflict and to minimize the confusion results in reducing the effect of each new case as precedent, notwithstanding the motivation articulated or implied in the court's decision. The problem raised by this conflict was addressed by a member of the American Law Institute as a basis for challenging the Restatement's recognition of the landlord's covenant of habitability. Professor Charles Meyers concluded that it is not the underlying law or policies which require change, but the present economic conditions of both the poor and the housing market available to them. He argued: "In short, the Restatement's rationale for the habitability duty is based on moral philosophy and distributive justice, but the objectives it seeks to achieve cannot be accomplished outside the narrow and perhaps selfish confines of economic behavior." 188

Whatever the theoretical merits of Professor Meyers' argument, two characteristics of the present evolutionary development in the District of Columbia challenge his solution that the judiciary should refrain from activism in this area. To begin with, the District of Columbia has judicially recognized, and the City Council has enacted into the Housing Regulations, a warranty of habitability. Furthermore, the decisions of the District of Columbia courts have established a trend in which new legal doctrines have been created and applied to the settlement of landlord and tenant disputes, and hence, to the

188. Meyers, The Covenant of Habitability and the American Law Institute, 27 STAN. L. REV. 879, 881 (1975). Professor Meyers' position is that the judiciary is not the appropriate branch to promulgate new rules. He argues in favor of tenants' freedom to choose voluntarily to live in lower-quality, lower-priced housing, and to this end suggests that enforcement of the housing code should be suspended in times of a housing shortage. The choices of how to change the law, he maintains, are "political," and "must be made by the society in order to gain acceptance." Id. at 902-03. His opposition to the Restatement is based on his conclusions that it is likely to involve the courts in excessive litigation, will injure tenants by pricing them out of some housing and causing abandonment, and will victimize landlords as well as tenants by requiring them to undertake maintenance and repair of premises although it may be economically unprofitable. (He does not discuss such subjects as tax shelters or other government sponsored programs which create economic incentives by interfering with the unrestrained operations of the so-called free market.)

While arguments grounded in economic analyses are currently quite popular among academicians, the courts have not shown a willingness to conform their decisions and reasoning to the constraints of the appropriate economic models. Perhaps this is because the individual interests involved in a dispute have likewise not conformed their behavior to that of pure economic self-interest. In fairness to judges and legislators, it should be pointed out that it is not always possible to separate purely economic considerations from political questions. Thus legislators have, at times, been known to act in cases where the society at large might not have realized that it was unprepared for the effects of particular legislation.
ordering of the landlord and tenant relationship. While Professor Meyers would have the courts delay action until the acceptance of these ideas by the society at large, a wait he admits may be lengthy, the courts have refused to do so. To the contrary, it was with full knowledge that the judiciary cannot solve economic and social problems of poverty and housing that Judge J. Skelly Wright declared that the courts should avoid action or inaction that will make these problems worse.189

Furthermore, the operative judicial sense that the legislatively declared public policy contains an ethical imperative that motivates courts in their decision-making is within the acceptable bounds of the common law tradition.190 While Professor Meyers ultimately may be correct in his argument that the objectives sought by a warranty of habitability are unattainable in the context of the present housing market, this consideration has not deterred the courts in continuing the present trend. In his final landlord and tenant decision before the full implementation of Court Reorganization, Judge Wright wrote:

Thus all we hold today is that when the legislature creates a broad based scheme for dealing with a problem in the public interest, courts should not permit private, selfishly motivated litigants to undermine it. This 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.191

The District of Columbia courts have refused to await legislative recognition of society's readiness to reorder the landlord and tenant relationship in a manner conforming to economic models. Instead, they have established

189. See, e.g., Robinson v. Diamond Housing Corp., 463 F.2d at 871.
190. In a highly creative law review article suggesting the development of a tort of "slumlordism," the authors argue that judicial initiative in this area does not require additional legislative authorization. According to their thesis, the courts can create a remedy for tenants victimized by this situation by drawing upon analogies from common law doctrines and other relevant areas of law, such as antitrust, in which private economic self-interest serves as a basis for private law enforcement. Thus, the injured person would be provided with a private means for seeking retribution. The authors argue:

If there are laws on the books . . . and if we all agree that they state a basic and desirable social goal, are the courts fulfilling their proper role only so long as those laws remain ineffective? . . . If the "proper" role of the courts is thus limited, the courts are not a truly co-equal branch of government. No one is asking them to contravene standards which the legislatures have adopted, and which executive branch officials have time and again asserted; they are only being asked to enforce those standards . . . [i]f the legislatures have meant what they have said, let them get busy and implement their principles.

a trend which would require legislative action were this trend to be discontinued or reversed. Some of the present appellate judges may be reluctant to embrace totally the motivation of the more recent circuit court decisions. Furthermore, the trial court judges may appear unwilling or unable to implement fully the legal doctrines. But absent a legislative declaration of a shift in policy, the present evolutionary trend is likely to continue.

V. CONCLUSION: AND BEGINNING

In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment.

As the foregoing analysis details, the evolution of the substantive landlord and tenant law is a continuing process. The appellate courts have modified ancient doctrines and created new ones to govern a landlord and tenant relationship set in twentieth-century urban America. Acknowledgment of the new setting of this relationship has brought a measure of judicial approval for such ideas as government interference into private transactions and welfare economics.

The process of shaping, interpreting, modifying, and avoiding the new precedent has been limited largely to the context of the isolated dispute that has reached the appellate level. The task of applying this precedent to the more than 100,000 landlord and tenant disputes that seek judicial resolution each year has fallen upon a court of law that is not equipped to adjust to the new procedural requirements inherent in the recent appellate decisions. In short, the dispute settlement mechanism has not evolved simultaneously with the substantive law.

Conceptually, the summary judicial proceeding was developed to meet the needs of a relationship dominated by landlords and governed by the doctrine of independent covenants. The law required only a simple procedure, where the questions of fact concerned only whether a landlord was entitled to possession by reason of an expired lease or of a tenant breach of a lease covenant. No further questions were raised as to the reasons the landlord sought

192. It is also important to note that the character of the District of Columbia Court of Appeals is likely to change over the next several years. As of this writing, two younger black judges have recently been appointed to the bench, one of whom was designated Chief Judge.

eviction or the tenant breached the lease. As it developed, the mechanism provided the landlord with possession of his property or collection of the rent owed him. For the tenant it provided an alternative to the landlord's exercise of self-help. Protection of the tenant's living environment, in theory, would be provided by the state through its enforcement of housing, building, and sanitation codes.

This situation in the landlord and tenant court is a restraining force on the evolution of the substantive law. Procedures based upon outdated doctrines have created a conflict between considerations of efficiency and the achievement of justice. This has resulted in a body of substantive judicial pronouncements which hold the seeds of rights for which there may not be remedies, expectations which may be incapable of fulfillment, and confusion without provision of clues as to where order lies.

The precedent has been articulated. The task remains to design a mechanism which can begin the process of implementation and enforcement. To allow the present system to continue is to risk those unacceptable consequences best stated in Justice Frankfurter's classic question: "But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequality and injustice?"194 If each case is to be considered an experiment, its result must be validated or invalidated by experience. This experience gives life to the law.

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