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THE TENANT UNION-LANDLORD RELATIONS ACT: A PROPOSAL

MYRON MOSKOVITZ* & PETER J. HONIGSBERG**

Although tenant unions are increasingly relied upon as a means toward curing urban housing ills, the law surrounding their use is substantially uncharted. Drawing upon the body of housing law and upon analogies to the law of labor unions, Messrs. Moskovitz and Honigsberg introduce a comprehensive Model Act designed to eliminate uncertainty and give tenants and union organizers full opportunity to gain an equal bargaining position.

In the past few years, this nation has seen a marked increase in discontent among apartment dwellers, particularly low-income tenants. There are several reasons for this. The primary cause of such discontent is the shortage of available standard housing. While the population has been expanding, the supply of adequate housing has not kept pace.[1]

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[1] In 1966, Robert C. Weaver, then Secretary of the Department of Housing and Urban Development, reported: "Even in 1966, some 5.8 million occupied dwelling units were classified as substandard; millions more were deteriorating and could become unsalvageable, if we are as foolish as to let this happen." *Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess., pt. 1, at 5 (1968).

In the Housing and Urban Development Act of 1968, Congress itself found that the national goal of a "decent home and a suitable living environment for every American family" has not been realized. 42 U.S.C. § 1441a (Supp. V, 1970).

Government efforts to relieve this shortage have been inadequate.[2] Inner city populations are increasing from internal population growth and in-migration, but almost no new housing is being constructed there. In fact, urban renewal programs have destroyed much of the existing supply, without replacing it with new low-income housing.[3] Nor is new housing for low-income people being produced outside the slums, for poor people are usually not wanted in middle and upperclass neighborhoods.

This wide discrepancy between supply and demand has created a seller's market. The tenant has little or no bargaining power. If he complains about inadequate maintenance or high rents, he can easily be replaced, and he will not be able to find another place where conditions are better. The tenant knows this, so he reluctantly accepts poor maintenance, high rents, and landlord abuse.[4]

In an effort to halt the steady deterioration of rental units, more than 1,000 American communities have enacted housing codes.[5] These codes, however, have not been adequately enforced. This is partly due to the inadequate supply of available housing. Code inspectors are reluctant to use their ultimate weapon, condemnation, because it would force tenants out of their apartments with no place else to go.

The usual method of code enforcement permits a tenant to file a complaint to seek agency enforcement, but it otherwise gives him no right to compel obedience to the codes. When the agency is unsuccessful in its efforts, or when because of a lack of manpower or official indifference, the agency merely places the complaint aside, the tenant usually has no further remedy.[6] Even if the complaint is processed, the landlord

[2] *See* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1968).

[3] *See* Wright, *The Courts Have Failed the Poor,* N.Y. Times, Mar. 9, 1969, § 6 (Magazine), at 110.

[4] The National Capitol Planning Commission reported that in Washington, D. C.:

> "Poor families are responding to Washington's housing shortage by doubling and overcrowding, by living in structurally substandard or other hazardous housing, by sharing or doing without hot water, heat, light, or kitchen or bathroom facilities; by farming out their children wherever they can; by denying their children exist to landlords and public officials; by paying rents which are high compared to incomes so they must sacrifice other living necessities; and by living without dignity or privacy."

Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia,* 36 GEO. WASH. L. REV. 190 n.4 (1967).

[5] Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254, 1260 n.19 (1966).

[6] *See* Grad, *Legal Remedies for Housing Code Violations, Research Report No.* 14, at 1, 113, in NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, (1968). *But see* Javins v. First Nat'l Realty Corp., No. 22,405 (D.C. Cir., May 7, 1970) (upheld the right of a tenant to withold rent if there are building code violations).

still may delay for a long time before complying. Criminal penalties are usually negligible.[7]

The Kerner Commission has reported that "thousands of landlords in disadvantaged neighborhoods openly violate building codes with impunity, thereby providing a constant demonstration of flagrant discrimination by legal authorities .... [I]n most cities, few building code violations are ever corrected, even when tenants complain directly to municipal building departments .... [The] open violation of codes [acts] as a constant source of distress to low income tenants and creates serious hazards to health and safety in disadvantaged neighborhoods." [8]

A second cause of tenant discontent stems from the law. Although a few states have recently enacted certain reforms in their landlord-tenant legislation, the ancient common law bias in favor of landlords still pervades. While most plaintiffs in civil litigation can expect to wait up to a year or two to obtain final judgment in a contested action, most states have enacted special "unlawful detainer" statutes which enable landlords to obtain judgment in a few weeks or less.[9] Most states presently permit the landlord to use this procedure even though he refuses to obey the housing codes.[10] Some states provide special punitive-type damages to landlords, not permitted in any other breach of contract action.[11] Other states require the tenant to post a bond before he can defend an eviction action or before he can appeal.[12]

In short, where the tenant has a month-to-month tenancy, as is usually the case, the law puts him at the landlord's mercy. The landlord can give him a thirty-day notice to leave at any time for any or no reason,[13] and if the tenant fails to leave, the landlord can quickly have him forcibly evicted. If the tenant attempts to withhold rent to compel the landlord to obey the housing codes, the landlord can obtain a sizable judgment in addition to the eviction.

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[7] *See* notes 133-36 *infra* and accompanying text.

[8] NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 472 (1968).

[9] *See, e.g.*, CAL. CIV. PRO. CODE § 1179(a) (West 1955).

[10] *See* notes 128-41 *infra* and accompanying text.

[11] *See, e.g.*, CAL. CIV. PRO. CODE § 1174 (West Supp. 1970). Here the court is permitted to enter judgment "either for the amount of damages and the rent found due or for three times the amount so found."

[12] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-542 (Supp. 1970); GA. CODE ANN. § 61-303 (1966); HAWAII REV. LAWS § 666-19 (1968). The bond requirements in Georgia and Connecticut are currently being examined by the United States Supreme Court. Sanks v. Georgia, 225 Ga. 88, 166 S.E.2d 19 (1969), *appeal granted*, 395 U.S. 974 (No. 1977, 1968 Term; renumbered No. 266, 1969 Term); Simmons v. West Haven Housing Authority, 5 Conn. Cir. Ct. 282, 250 A.2d 527 (1968), *appeal granted*, 394 U.S. 957 (No. 909, 1968 Term; renumbered No. 81, 1969 Term).

[13] *See* note 120 *infra* and accompanying text.

The growing discontent among low-income tenants has combined with their increasing awareness that collective action is necessary. The poor have seen the effectiveness of collective action in improving conditions in their schools, in obtaining welfare rights, and now in obtaining decent housing. In housing, the result has been the formation of organizations known as tenant unions.

The tenant union is roughly modelled after the labor union. Years ago, workers suffered from extremely poor bargaining positions, lack of political influence, ineffective legal protection, and consequent low wages and poor working conditions. Today, employees have organized into unions which use their collective power to deal with employers from a position of strength and to exert substantial influence on local and national political bodies. The effect this has had on improving wages and working conditions is self-evident.

Tenant unions are now forming in most of our major urban areas and in many smaller communities. While some involve only the tenants of a single building, others include tenants of several buildings owned by the same landlord or located in the same neighborhood. Through such tactics as rent strikes and picketing, unions have attempted to induce landlords to repair buildings and lower rents. In some cases, they have sought and obtained collective bargaining agreements, whereby the landlord agrees not only to make certain repairs or to lower rents, but also to maintain a continuing relationship with the tenant union as the representative of the tenants. Some grievance procedures also have been established. In a very few cases, tenant unions have gone even further and have assumed ownership of buildings.[14]

At this stage, tenant unions have probably failed more often than succeeded, if "failure" is defined to include extracting promises from landlords which somehow are never kept nor enforced. Inadequacies in staff, funds, and organizational experience have plagued tenant unions from the beginning.

The tenant union movement is expanding, however, and it appears that it will continue to grow. A national conference on tenant rights was held in Chicago in January 1969, bringing together for the first time representatives of tenant groups from around the country. A National Tenants Organization was formed as a result.[15]

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[14] For a comprehensive bibliography of articles on the tenant union movement, see NATIONAL HOUSING AND DEVELOPMENT LAW PROJECT, TENANT UNION GUIDE FOR LEGAL SERVICES ATTORNEYS 127 (1970).

[15] The National Tenants' Organization is located at 425 13th Street, N.W., Washington, D. C. 20004, and now publishes a newsletter, TENANTS OUTLOOK, informing tenant unions and other interested persons of tenant activity throughout the country.

It is inevitable that many conflicts between tenant unions and landlords will arise in the next few years. These conflicts can be fought and resolved in an orderly and peaceful manner, or they can become chaotic and perhaps even violent. At the present time there is little clear law governing either the battles or the peace-making process. What law there is tends to be very restrictive against tenant attempts to assert their demands. Rent strikes, for example, are not sanctioned by law in most states. When a group of tenants discovers that it cannot work within the law to exert any pressure on landlords, it may consider extra-legal tactics. Once tenants decide to step over the line of legality, only their own moral and tactical judgment will control what they do.

If the state legislatures wish to bring some order into this potentially disruptive situation, comprehensive legislation must be enacted. Such legislation is needed to recognize the legality of tenant unions and to protect them from landlord harassment. Legislation likewise is needed to define what tactics unions can use to organize and to broaden the spectrum of each legally permissible tactic. Finally, legislation is needed to facilitate the negotiating process and to make collective bargaining agreements enforceable and workable.

To accomplish these purposes, a proposed model Tenant Union-Landlord Relations Act is set out here. The Act is in four Articles. The first Article is the Preamble, which sets out the purposes of the legislation. Article II deals with the formation and development of the tenant union, focusing upon its organizing stage. Article III is concerned with recognition of the tenant unions and the collective bargaining agreement. Article IV covers needed reforms of existing law which will facilitate a tenant union's organizing efforts.

Each section of the proposed legislation is set out in the following manner: (1) a discussion of the need for the section, (2) a summary of the present state of the law on the subject or on analogous problems, (3) the proposed section, and (4) a commentary on the proposed section.

ARTICLE I PREAMBLE

Many of the proposed provisions discussed will be brand new, with no direct precedent for them. There are only analogous statutes, such as those in the labor law field. Consequently, there is little case law to draw upon for guidance in interepreting this statute.

An effort has been made to make these provisions as clear as possible. An attempt likewise has been made to anticipate the many problems which might arise and to provide for them. Nevertheless, points of conflict between parties, on which these statutes are not clear, are bound to

arise. A Preamble, indicating the general purposes of the legislation, can assist the courts in construing the statute consistently with these purposes. Since no state as yet has adopted any tenant union legislation, no provisions of a nature comparable to this preamble have been enacted.

> § I. (a) *This Act shall be called the Tenant Union-Landlord Relations Act.*
>
> (b) *It is the public policy of this state that an adequate supply of safe, sanitary, and healthful dwellings should be provided and maintained for tenants at rents which tenants can afford and which assure landlords fair returns on their investments.*
>
> (c) *Shortages of housing units in many parts of this state prevent tenants from having a choice in renting suitable housing. Tenants are often obliged to accept dwelling units for their families which are not maintained in accordance with state and local housing codes and which are not safe, sanitary, or healthful.*
>
> (d) *These shortages, together with other factors, have often resulted in unequal bargaining power between landlords and tenants. Individual, unorganized tenants often do not possess true freedom to contract and are unable to effectively assert their rights to full protection under state and local housing codes.*
>
> (e) *Because of these factors, tensions between landlords and tenants are rising and could result in dangers to the public safety and welfare. Tenants are organizing to improve their conditions. Legislation is necessary to insure that such organization takes place, and conflicts are resolved, in as orderly a manner as possible, with full recognition of the rights of all parties and the policies enunciated in this Act.*
>
> (f) *It is the public policy of this state that tenants should have full freedom of association, self-organization, and the right to designate representatives of their choice for the purpose of negotiating the terms and conditions of their tenancies. Tenants must be free from interference or coercion in engaging in such activities and other concerted activities for the purpose of collective bargaining or other mutual aid and protection.*
>
> (g) *In order that the purposes of the Act may be better effectuated, the formation of tenant unions which engage in collective bargaining with landlords on behalf of tenants is hereby encouraged. A tenant union which has entered into a collective bargaining agreement with a landlord shall have the capacity and standing to bring suit to enforce the agreement.*

Subsections (a) through (e) are self-explanatory, generally stating the conditions that give rise to the need for legislation. Certain changes may be appropriate where legislators feel other language would better

reflect the conditions of their state. Subsections (f) and (g) are modelled after statements of policy in the Norris-LaGuardia Act,[16] National Labor Relations Act,[17] and the California Labor Code.[18]

ARTICLE II THE ORGANIZING PROCESSES: PROTECTION FROM HARASSMENT

PROTECTING ORGANIZERS

Recruiting members is central to the establishment of a strong tenant union. Implicit in this recognition is the need to inform tenants of the union's activities and the benefits to be obtained through organization. The tenants must be made aware of the advantages in presenting a united front in contracting with the landlord, of the shared frustration of other tenants similarly being denied code standard housing, and of the fact that by creating a union the tenants can be protected from landlord retaliation against individual tenants. To be effective in their work, organizers who wish to contact tenants in their apartments must be protected from landlords' suits and criminal prosecution for trespass or invasion of privacy.

Handbills, leaflets, and verbal communication are the most direct forms of canvassing tenants.[19] For the most part, canvassing is done on the premises of the building to be organized. Residents in each apartment are personally contacted. In a large building, organizers might also stand in front of the building and distribute materials to entering tenants. In some instances, union leaders might decide that the landlord's place of business or the management company's office should also be leafletted.[20] Prospective tenants would thus be apprised of the landlord's refusal to maintain his buildings up to code standards and may be solicited for union membership.

The organizers need not be tenants of the specific building themselves, though this is the usual case. Tenants of another dwelling owned by the landlord and already organized or in the process of being organized may wish to unite tenants of all buildings which the landlord controls, thereby strengthening their own position. Tenants of neighboring dwellings intent on raising community morale by organizing an entire block would similarly be interested in canvassing the building. Community

[16] 29 U.S.C. § 102 (1964).

[17] *Id.* § 157.

[18] CAL. LABOR CODE § 923 (West 1955).

[19] Picketing is a more complex problem and will be dealt with separately. *See* notes 43-59 *infra* and accompanying text.

[20] The landlord's residence may also be considered, though usually tenant action at the residence is limited to picketing.

organizers whose purpose is to develop an indigenous leadership to assume organizing responsibilities may also be active in the building.

The National Labor Relations Act, Clayton Act and Norris-LaGuardia Act provide protection to labor union members whose unionizing activities are very nearly identical to those of tenant union organizers. Provisions in these Acts: (1) prohibit federal courts from issuing injunctions restraining persons from persuading others to cease to perform their work or to patronize or to employ any such party to a dispute, or from peacefully assembling;[21] (2) prohibit injunctions restraining persons from becoming or remaining members of any labor organization, or from giving publicity to the facts involved in a labor dispute by any method not involving fraud or violence;[22] (3) declare it to be the policy of the United States to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating terms and conditions of employment or other mutual aid or protection;[23] (4) declare it to be an unfair labor practice to interfere with this concerted activity of the workers;[24] and (5) establish that the expressing of any view, argument or opinion, or the dissemination thereof, whether written, printed, graphic or visual, shall not constitute an unfair labor practice if such expression contains no threat or reprisal, force, or promise of benefit.[25]

Decisions in the labor law field have interpreted section 7 of the N.L.R.A.[26] as guaranteeing employees the right to self-organization by canvassing and meeting with other employees on company property during nonworking time.[27] Organizers who are not employees (i.e., "strangers"), however, have the right to contact employees on company property only where other means of contact are not available, as where other reasonable efforts to communicate with the employees have unsuccessfully been attempted.[28]

The Michigan and Rhode Island provisions discussed below in the

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[21] 29 U.S.C. § 52 (1964).

[22] *Id.* § 104(b), (e).

[23] *Id.* § 151.

[24] *Id.* § 158(a)(1), (b)(1).

[25] *Id.* § 158(c). Several states have adopted provisions similar to those in the National Labor Relations Act, protecting workers' freedom of association and self-organization. *See, e.g.*, CAL. LABOR CODE § 923 (West 1955); N.Y. LABOR LAW § 700 (McKinney 1965).

[26] 29 U.S.C. § 157 (1964).

[27] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[28] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112-13 (1956).

section on retaliatory actions[29] might be construed to cover landlord retaliation, by eviction or other means, against tenants involved in general organizing and canvassing activity. So far, however, there has been no judicial interpretation of this legislation on this specific issue.

The critical necessity here, however, is to protect the *organizers* from the landlord's attempts to sue or urge prosecution for trespass or invasion of privacy where the organizers pass through the common areas of the building. Tenants of the building who canvass other tenants may be better protected than "strangers" who enter upon the premises for union organizing activities. The former are not likely to be characterized as trespassers in their own building, whether their activity is inimical to the landlord's interests or not.

Strangers to the premises may be more vulnerable to such suit or prosecution. Stronger arguments, however, may be made on their behalf than on behalf of nonemployee organizers canvassing on company property for labor unions. The tenant has a right to possession through his leasehold on the property.[30] The employee does not have similar standing vis-a-vis his employer. Consequently, the tenant's right to possession should protect certain organizing activities which might not be protected on company-owned property.[31] The tenant would have the absolute right to invite whomever he wants into his apartment.[32] By holding an easement over the common areas of a building, the tenant could also provide free access into that building for the organizer. Moreover, an implied license for the organizer to enter may be created by the presence of a bell in the front hallway or by the "habits of the country." [33]

The Supreme Court has held that a city ordinance barring door-to-door distribution of handbills and circulars is a violation of the freedom of speech and the press guaranteed by the first and fourteenth amendments.[34] The Court noted that for centuries it has been common practice for persons not specifically invited to canvass door-to-door to communicate ideas or to invite the occupants to public meetings. The master of each household would determine whether to receive strangers as visitors.[35] Commenting on the fact that laboring groups have used this

[29] *See* notes 69-70 *infra* and accompanying text.

[30] 1 AMERICAN LAW OF PROPERTY § 3-38 (A. Casner ed. 1952).

[31] *See* Note, *Tenant Unions: Collective Bargaining and the Low Income Tenant*, 77 YALE L.J. 1368, 1389 (1968).

[32] *Cf.* Martin v. Struthers, 319 U.S. 141 (1943).

[33] *See* Note, *supra* note 31, at 1389.

[34] Martin v. Struthers, 319 U.S. 141 (1943).

[35] *Id.* at 141.

method in recruiting,[36] the Court indicated that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." [37] While these sorts of case law analogies might be helpful, statutory clarification is needed in this area to guide more precisely the parties and the courts.

§ II-1. (a) *Any person shall have the right to give publicity to the existence of, or to the facts involved in, any landlord-tenant matter or to express a view, argument, or opinion on any such matter. Advertising, speaking, patrolling, handbilling, leafletting, canvassing or any other method not involving fraud or violence may be used. Any material disseminated may be written, printed, graphic, visual or in any other form.*

(b) *Any person or persons shall have the right to assemble peaceably to act or to organize to act in furtherance of his or their interests in any landlord-tenant matter, and shall have the right to agree with, or advise, notify, recommend, urge, persuade or otherwise cause or induce, without fraud or violence, one or more persons to assist, engage or join in the formation of a tenants' union or to become a member or members in the union, or to assist, engage, or join in any other acts heretofore specified or in any other activity which has not expressly been declared to be unlawful by the legislature.*

(c) *No owner or owner's agent shall take any action to prevent any person from coming into any apartment building for the purpose of engaging in any such activity, or shall remove such person or later sue him for damages, so long as such person behaves peacefully and does not enter any tenant's apartment without permission from such tenant or a member of his household.*

(d) *No person shall begin an action to prosecute any person or persons for actions protected by this section in trespass, invasion of privacy, disturbing the peace, or any other criminal offence. Nor shall any court have jurisdiction to issue a restraining order or an injunction against any person or persons for actions protected by this section. Nor shall any person maintain a civil action against any person or persons for actions protected by this section.*

The language of the proposed statute is modelled in part after provisions in the National Labor Relations Act. It is drawn to protect all organizers, both tenants of the building and strangers to it. It also is

[36] *Id.* at 145-46.

[37] *Id.* at 146. *See also* Schneider v. State, 308 U.S. 147, 164 (1939) (An ordinance forbidding unlicensed communication of any views or the advocacy of any cause from door-to-door held invalid.)

intended to protect the multifarious kinds of union organizing activity. Included would be door-to-door canvassing, union meetings in an apartment of a tenant or in a common hallway (the laundry room, for example), leafletting outside the tenement, and handbilling in front of the real estate management's office or the landlord's business premises.[38]

The "fraud or violence" clause is taken from the Norris-LaGuardia Act.[39] Legislators who fear that certain unlawful activity may arise while tenants organize and that such activity may not constitute "fraud or violence" may wish to substitute words like "peacefully", "peaceably", or "lawfully" for "without fraud or violence." [40]

The concluding clause in subsection (b) of the proposed statute protects activity which has not been declared expressly unlawful by the state legislature. The language was chosen specifically to protect tenants in rent-withholding situations. The law on the right to withhold rent when the landlord refuses to maintain the premises up to code standard is uncertain.[41] No civil or criminal conspiracy charges should be allowed against tenant union leaders and members who advise tenants to withhold rent until the state of the law is settled. The landlord is, of course, still protected. He may bring civil suits against the tenants for the rent owed or for eviction.[42]

PICKETING

Canvassing and handbilling are at times insufficient tools for tenants to employ to organize a union and pressure the landlord into negotiating a workable collective bargaining agreement. In furthering the union's purposes, picketing will often appear to be a more effective weapon. The tenant union might set up picket lines outside the building being organized, the landlord's place of business, the management company's office, or the landlord's residence.

A landlord will often feel the effects of picketing and the accompanying adverse publicity it attracts. His earlier unyielding position may become more responsive as a result. On the other hand, the landlord may seek criminal prosecution against the tenant pickets or claim illegal coercion and petition a court for an injunction barring further picketing altogether.

A picketing statute should be adopted which would supplement the

[38] It is also designed to cover tenant or union picketing in lawful circumstances. *See* notes 43-59 *infra* and accompanying text; § II-2 of proposed statute.

[39] 29 U.S.C. § 104(e)-(i) (1964).

[40] *Id.* § 52.

[41] *See* notes 128-55 and accompanying text.

[42] *But see id.*

proposed legislation protecting tenant union organizing activities.[43] It should specifically guarantee tenants the right to picket on public property, regardless of the location.

Provisions in the Clayton Act, Norris-LaGuardia Act, and the National Labor Relations Act protect the labor union when it engages in organizing activities.[44] The NLRA recognizes activities involving recommending, advising, publicizing or persuading others of the union's methods and objectives.[45] In addition to these provisions protecting union activity generally, a few subsections specifically establish the right to picket. Where the object of picketing is to force or require an employer to recognize or bargain with a labor organization as the representative of his employees, and the union has not been certified as the representative of the employees, picketing is not deemed an unfair labor practice if a petition for representation as the exclusive bargaining agent of all the employees in a unit is filed within a reasonable period of time, not to exceed thirty days, from the commencement of such picketing[46] so long as an employer has not recognized another labor organization[47] and no valid election had been held in the previous twelve months.[48] It is also provided that picketing for the purposes of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization shall be lawful unless such picketing has a secondary boycott effect, even when a petition for representation as the exclusive bargaining agent has not been filed.[49] The general legality of primary picketing also appears in a proviso to the section prohibiting secondary boycott activity.[50]

There are presently no statutes dealing with picketing by tenant unions. Picketing as a means of communication and publicity is protected under the first amendment.[51] States, however, have a legitimate interest in regulating picketing where it interferes with traffic, pedestrian or otherwise,[52] or where it involves illegal coercion.[53] Where a valid state law or policy is violated by the picketers, or where they attempt to force a third party to violate such law or policy, illegal coercion may

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[43] *See* notes 19-42 *supra* and accompanying text.
[44] *See* notes 21-25 *supra* and accompanying text.
[45] 29 U.S.C. §§ 157, 158 (1964).
[46] *Id.* § 158(b)(7)(c).
[47] *Id.* § 158(b)(7)(A).
[48] *Id.* § 158(b)(7)(B).
[49] *Id.* § 158(b)(7)(C).
[50] *Id.* § 158(b)(4)(B).
[51] Thornhill v. Alabama, 310 U.S. 88 (1940).
[52] *See* Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).
[53] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 501, 503 (1948).

be found and a court may enjoin the picketers.[54] This state law or policy is not always clearly defined ahead of time, however,[55] and picketers may, therefore, be taking a chance unless statutes clearly give them protection.

The objectives of tenant unions are usually recognition as the exclusive bargaining agent for the tenants and the obtaining of a collective bargaining agreement with the landlord. Picketing for these purposes alone might be regarded by some courts as "illegal coercion." The goals of tenant unions usually also include obtaining compliance with state and local housing codes, however. The purposes of these codes are furthered by the organizing of tenants and their demand for healthy, safe and comfortable housing.[56] Picketing for this purpose should clearly be allowed under present law. Because these goals—recognition, negotiating an agreement, and obtaining code compliance—are usually combined, whether picketing can or will be enjoined is very unclear.

Because some courts might be inclined to limit, or at least temporarily restrain, peaceful union picketing, the following statute is suggested in order that the legal purposes of tenant union picketing be more clearly defined:

> § II-2. (a) *Nothing in this Act shall be construed to prohibit any picketing of a residential building, an owner's place of business, a real estate management company or any other business directly concerned with the management of the building, or an owner's place of residence by tenants or tenant union members for the purpose of inducing an owner to recognize or bargain with a tenant organization in accordance with this Act or for the purpose of inducing an owner to maintain his premises up to standards set up by the state and local housing codes and regulations or to maintain the premises in a healthy, safe and comfortable condition where the owner has failed or refused to comply with the tenants' request to so maintain the premises or where the owner fails or refuses to comply with the provisions of a collective bargaining agreement made between him and a tenant union after a request by the union to so comply has been made.*
>
> (b) *Nothing in this Act shall be construed to prohibit any picketing by tenants or a tenant union for the purposes of truthfully advising the public (including other tenants) at any time that an owner does not maintain his premises up to the standards set by the state and local housing codes and regulations or does*

[54] *Id.* at 502.

[55] *See* Hughes v. Superior Ct., 339 U.S. 460 (1950).

[56] *See* Note, *supra* note 31, at 1392-93.

not have a contract with a tenant organization or is violating such a contract.

(c) *Picketing for purposes set out in this section may not be enjoined, so long as such picketing is otherwise peaceful, orderly, and lawful.*

The statute proposed uses wording similar to an NLRA subsection defining the extent of the right to picket.[57] The statute should be read as a supplement to the provisions guaranteeing a general right to organize and publicize, proposed earlier in the section on organizing.

Under the proposed statute, coercive picketing is permitted in two instances. The first is for the purpose of requiring an owner to bargain with a tenant union. Picketing for a coercive purpose is also allowed when the tenants or tenant seek to force the owner to comply with the state and local housing codes and regulations or to maintain the premises in a healthy, safe and comfortable condition. Where there is no collective bargaining agreement between the union and the owner, the tenants or the union must first request the owner to maintain the premises or to comply with the codes. Where the landlord gives no response, is noncommittal or refuses, the tenants or the union may proceed to picket. If a collective bargaining agreement does exist between the union and the landlord, coercive picketing is permitted when the landlord fails or refuses to comply with the agreement after a request by the union to comply is made.

Picketing for the purposes of truthfully advising the public and other tenants that an owner is not complying with the housing codes and regulations, or that he does not have a collective bargaining agreement with a tenant union, is authorized at any time. This is picketing for the purposes of communication only and involves no coercive intent. Without this provision, such picketing might still be protected under the first amendment[58] and by the legislation proposed earlier in the section on organizing activities. Nevertheless, this provision is included so that the law can be clearly set forth and picketing problems can be resolved before expensive litigation becomes necessary.

The owner is still protected from unlawful picketing under this section. Though he cannot obtain an injunction against the tenant or union picketers on coercion grounds in the two basic instances where picketing will usually arise (for recognition or for seeking compliance with the codes), he may still proceed to seek prosecution of picketers when they violate valid laws such as those prohibiting unlawful blocking of access

[57] 29 U.S.C. § 158(b)(7)(C) (1964).

[58] *See* Thornhill v. Alabama, 310 U.S. 88 (1940).

to property. Any other valid state or local laws limiting the number of pickets in certain areas or the times of day during which picketing will be permitted, requiring prior notice to the police department that a picket line will be set up, and similar provisions are, of course, unaffected by this legislation and can be enforced by the municipality or county.

Picketing leading to secondary boycotts and secondary picketing, though important in the labor law field,[59] is not a significant problem in the landlord-tenant area. A tenant union is not likely to picket at places other than the building being organized, the owner's place of business or that of his management company, or the owner's residence. Since the landlord produces no product, there is little likelihood that a problem will arise involving picketing of others who handle his merchandise or deliver his supplies, as is the case in employee-employer circumstances. Consequently, no provision for secondary picketing or boycotts was included in this legislation.

RETALIATORY ACTIONS AGAINST TENANTS

A central element in molding a self-sustaining tenant union is the protecting of union members from landlord harassment. Unless tenants can promote their activities without fear of retaliation from the owner, the prospects of maintaining a viable union organization are not promising. Because leases often run from month-to-month, especially leases held by low income tenants, tenants involved in union activity may be evicted at any time by the owner. The landlord has only to give a 30-day notice to quit; he need not even state a reason. Alternatively, he may raise the tenant's rent appreciably, knowing that the tenant cannot afford the additional expense and would have to vacate. By such devices "agitators" are eliminated from the building. A not-so-subtle warning is thereby given to the other tenants that their best interests would be served by not participating in any future union activity.

The labor movement and the subsequent legislation adopted to protect incipient labor organizations provides an analogous situation. Workers who wished to unionize in order to obtain better conditions and wages were threatened with summary dismissal. Usually an employer had no compunctions about firing a union organizer or sympathizer and hiring from among the vast market of unemployed labor someone who was more disposed to accept the status quo. A person who needed employment was required to accept it at the terms dictated by the company. An "adhesion contract" existed then, as it often does in rental agreements today.

[59] *See* 29 U.S.C. § 158(b)(4)(B) (1964).

The National Labor Relations Act was designed to balance the power relationship between labor and management. Specific provisions were included which shielded employees involved in trade unionism from retributive employer harassment. These provisions were premised upon the recognition that: (1) the individual unorganized worker who was helpless to effectively exercise his right to "freedom of contract" should be free to associate with others and to designate representatives in his dealings with the employer;[60] (2) "yellow dog" contracts were contrary to the public policy of the United States and thereby unenforeable;[61] (3) no court should have jurisdiction to issue an injunction restraining an employee from becoming or remaining a member of a labor organization;[62] (4) employees should have the right to self-organization and to engage in concerted activity for the purpose of mutual aid or protection;[63] and (5) it should be an unfair labor practice for an employer to interfere, restrain, or coerce employees in their exercise of these rights or to discriminate in employment for the purpose of discouraging union membership,[64] or to discharge or otherwise discriminate against an employee because he had filed charges or given testimony.[65]

The employee has also been protected from management reprisals by state legislation. Where there exists legislation that employees shall have the right to organize, many courts have held that an employer may not terminate an employment at will merely because an employee joins a union.[66] Nor may a landowner evict a tenant-employee because he went on strike.[67]

Harassment of tenant union organizers is similar to the retaliatory action taken by the owner against tenants who report housing code or health law violations to the local enforcing agency, usually the health or inspection department. Tenants desiring assistance from city and county agencies are hesitant to request help when they fear reprisals, whether in the form of an eviction or a substantial increase in rent. Several states have recently prohibited such retaliation.[68]

Michigan and Rhode Island appear to provide protection to the tenant

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[60] *Id.* § 102.

[61] *Id.* § 103.

[62] *Id.* § 104(b).

[63] *Id.* § 157.

[64] *Id.* § 158(a)(1), (3).

[65] *Id.* § 158(4).

[66] *See, e.g.*, Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Sand v. Queen City Packing Co., 180 N.W.2d 448 (N.D. 1961).

[67] *See* Hotel & Restaurant Employees v. Boca Raton Club, 73 So. 2d 867, 871 (Fla. 1954).

[68] *See* notes 122-27 *infra* and accompanying text.

against landlord reprisals in situations beyond those involving retaliation after reporting a code or health violation. The Rhode Island statute contains a provision allowing the tenant to defend his possession on the ground "that the alleged termination was intended as a penalty for any other justified lawful act of the defendant." [69] Michigan has a similar provision.[70] These provisions might be construed to protect organizing activities. Whether the tenant is an organizer canvassing the building or merely a sympathizer who has signed a pledge card, he has been asserting his rights under the first amendment. This is a "lawful act" by the tenant and the tenant should be protected by these provisions. However, there has been no judicial interpretation of the extent of these provisions. Beyond the possible safeguards in Michigan and Rhode Island, at the present time no state has enacted legislation restricting reprisals against tenant union activity. Nor has there been any case law on this subject.

> § II-3. (a) *No owner or officer, agent, or employee of an owner of a building shall threaten to or shall attempt to evict, increase the rent, or in any other manner take reprisals against any tenant for the purpose of deterring or punishing a tenant who forms, joins, assists or sympathizes with lawful tenant union activity. Nor shall an owner or officer, agent or employee of an owner provide or promise any benefits to any tenant or prospective tenant conditioned on such tenant's not affiliating or associating with any tenant union.*
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> (b) *No action for possession of real property shall be maintained if the dominant purpose in bringing the action is reprisal. Also, no such action shall be maintained if the plaintiff attempted to increase the tenant's obligations under the lease or contract as such a reprisal and the tenant's failure to perform such additional obligations was a material reason for bringing such action. Also, no such action shall be maintained on the ground of refusal to pay rent if the plaintiff threatened to or did decrease his obligations under the lease or contract as such a reprisal, and the tenant refused to pay rent because of such reprisal.*

Much of the proposed statute is modelled on existing legislation protecting tenants who report code violations. The provision is comprehensive and is intended to protect the tenant not only in situations where the owner brings an eviction action as a result of the tenant union's activity, but also where the tenant's rent is raised or in any instance where

[69] R.I. GEN. LAWS ANN. § 34-20-10(6) (1969).

[70] "[T]hat the alleged termination was intended as retribution for any other lawful act arising out of the tenancy." MICH. COMP. LAWS ANN. § 600 5646(4)(c) (West Supp. 1970).

the landlord increases the tenant's obligations or decreases his own obligations in reprisal against such activity.

There may be difficulty in establishing the retaliatory motive of the landlord. The landlord may contend that he is bringing the eviction action against the tenant because the tenant often has been late in paying rent, has been noisy, or has pets. Even where none of these excuses are viable, if the owner has made no statement as to why he is retaliating, the problem of proving his motive still remains.

Though there is little case law on this subject in landlord-tenant relations, the labor law field furnishes many analogous cases. Under the National Labor Relations Act and many state laws, an employer may not discharge or refuse to hire an employee because of his union activity. In establishing the employer's motives, the courts have held that discrimination against union activity need not be the sole motive, but need only be "a substantial, or motivating reason." [71] Thus, if an employer has several legitimate grounds for firing an employee but the employee's union affiliation was the "motivating force," the employee must be reinstated.[72] Similarly, in landlord-tenant cases even where the owner would otherwise be justified in evicting a tenant, he should be barred from doing so where his motivating concern was the tenant's union activity.

As to the kinds of evidence which might be introduced to demonstrate that the owner intended to take reprisals against the tenant, it might be shown that: (1) the tenant has always paid rent on time and behaved properly, and therefore the landlord's only possible reason for evicting the tenant is a retaliatory one; (2) the landlord refused to respond or was evasive when the tenant requested a reason for the eviction; (3) though the tenant may have been late in rent payments or was at times noisy, the landlord had never complained about this to the tenant; or (4) other tenants were late in paying rent for longer periods and with more frequency than the tenant.[73]

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[71] *See* NLRB v. Whitin Mach. Works, 204 F.2d 883 (1st Cir. 1953); Sand v. Queen City Packing Co., 180 N.W.2d 448 (N.D. 1961).

[72] *See* A. P. Green Fire Brick Co. v. NLRB, 326 F.2d 910, 916 (8th Cir. 1964); NLRB v. Howe Scale Co., 311 F.2d 502, 505 (7th Cir. 1963).

[73] *See, e.g.*, NLRB v. Melrose Processing Co., 351 F.2d 693 (8th Cir. 1965); Hosey v. Club Van Courtlandt, 299 F. Supp. 501 (S.D.N.Y. 1969). In *Hosey*, the court found that "the coincidence of the tenants' meeting [to consider making complaints other than the one just reported to the city] and the landlord's threat to evict" together with the absence of threats to evict prior to the tenants' meeting would probably furnish proof that "the overriding reason" for the threats of eviction was retaliation. 299 F. Supp. at 503. *See also* Moskovitz, *Retaliatory Evictions—The Law and the Facts*, CLEARINGHOUSE L. REV., May 1969, at 4, 11-12.

ARTICLE III TENANT UNION ORGANIZATION AND THE COLLECTIVE BARGAINING AGREEMENT

LEGAL STATUS OF THE TENANT UNION

At its inception, the tenant union will be an unincorporated association. The leaders of the union may wish to incorporate the organization, thereby protecting the individual members from unlimited liability and endowing the group with a more formal legal status. Incorporation is not immediate, however, nor is it always advisible. Many states have special requirements for non-profit corporations with which the union may not wish to comply. The time which will pass before the corporation is legally established may often be months. Moreover, where legal services attorneys are not available, the cost of the union for attorney's fees for incorporation might be prohibitive. Filing fees may also be too expensive for the newly organized group. Finally, incorporating will require filing tax returns and qualifying as a tax-exempt organization.[74] It might also mean complying with state reporting requirements for non-profit corporations. During its early stages, the unions are simply not set up to handle these procedures. Many unions will wait, therefore, until they have cemented their strength before incorporating.

Several jurisdictions do not attach any legal status to such voluntary associations apart from the persons composing it.[75] Where there is no statute establishing the association as a legal entity, lawsuits by the group may sometimes be instituted by those persons constituting the association, or they may be brought as a class suit, or in the name of a trustee who is authorized to sue or in whom a property right is vested.[76] These alternatives, however, are not adequate. If the union is to maintain a strong position in the community, it will have to be recognized as a legal entity in its own right. Unless the union is endowed with the power to contract, to acquire, hold and transfer property, and to sue and be sued, the landlord might not attach much import to negotiations with the union, and enforcement of any agreement arising therefrom might be difficult. Moreover, its prestige among its members and its ability to attract new member-tenants rests on its establishing itself as more than a hollow body through which its leaders speak. The union should be recognized in law as an independent entity.[77]

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[74] INT. REV. CODE of 1954, §§ 11(a), 501(c).

[75] *See, e.g.*, Schallenkamp v. Stevens, 138 N.W.2d 657 (S.D. 1965); Prin v. DeLuca, 218 N.Y.S.2d 761 (Sup. Ct. 1961).

[76] *See, e.g.*, Carpenters Union v. Citizens Comm., 333 Ill. 225, 164 N.E. 393 (1928); United Packing House Workers v. Boynton, 240 Iowa 213, 35 N.W.2d 881 (1949).

[77] The National Labor Relations Act prescribes that a "labor organization may sue

At common law, an unincorporated association had no legal status distinct from the persons composing it.[78] Many jurisdictions have reversed this rule by statute, permitting associations to sue and be sued,[79] and to acquire, hold and transfer property.[80] Several cases have held that one who deals with an association as an entity capable of transacting business and in consequence receives value from it may be estopped from denying its rights to contract or the legality of its existence.[81] It is also generally held that failure to challenge the capacity of an association to sue or be sued in its own name is a waiver of the objection.[82] In those states which have failed to provide legal status to unincorporated associations, the proposed statute would be necessary.

> § III-1. *Any unincorporated voluntary association of tenants having a distinguished name may make contracts, acquire, hold and transfer property, and sue or be sued in its association name. An action shall not abate by reason of the death, resignation, removal or legal incapacity of any officer of the organization or association or by reason of any change in its membership.*[83]

RECOGNITION AND REPRESENTATION

Once the union wins recognition as the exclusive bargaining agent for the tenants in the building, it will have established itself as a formidable figure in future landlord-tenant matters. No longer will the landlord be able to make separate and diverse agreements with his several tenants. He will be obligated to negotiate with the union and its representatives on all matters affecting the tenants.

The National Labor Relations Act provides that where a union is selected as their bargaining representative by a majority of the employees in the unit, it shall be the exclusive representative of all employees in the unit.[84] Because *exclusive* representation is required by law, the

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or be sued as an entity and in behalf of the employees whom it represents." 29 U.S.C. § 185(b) (1964).

[78] *See* Carson v. McIntosh, 99 Mass. 443, 85 N.E. 529 (1908).

[79] *See, e.g.*, McNulty v. Higginbotham, 252 Ala. 218, 40 So. 2d. 414 (1949); Jardine v. Superior Ct., 213 Cal. 301, 2 P.2d 756 (1931), *appeal dismissed*, 284 U.S. 592 (1932).

[80] *See, e.g.*, United Bhd. v. Stephens Broadcasting Co., 214 La. 928, 39 So. 2d 422 (1959); Heiskell v. Chikasaw Lodge, 87 Tenn. 668, 11 S.W. 825 (1889).

[81] *See, e.g.*, Petty v. Brunswick & W. Ry., 109 Ga. 667, 35 S.E. 82 (1900); Lamm v. Stoen, 226 Iowa 622, 284 N.W. 465 (1939).

[82] *See, e.g.*, Jardine v. Superior Ct., 213 Cal. 301, 2 P.2d 756 (1931); Barnes v. Typographical Union, 232 Ill. 402, 83 N.E. 932 (1908).

[83] The second sentence of the proposed statute is taken from a New Jersey provision. N.J. STAT. ANN. § 2A-64-1 (1952).

[84] 29 U.S.C. § 159(a) (1964).

section also provides that the National Labor Relations Board shall supervise elections to determine whether a majority actually want a particular union.[85]

Similar administrative machinery would be necessary if such a requirement of exclusive representation were imposed in the landlord-tenant union area. The expense to the state and the parties of setting up and working through this machinery may make it unattractive. For this reason, it may be preferable at this stage of development to require the landlord to deal with the union, but to leave to the parties the decision as to whether the tenant union will represent (and the collective bargaining agreement will cover) only union members, all tenants in the building, or all such tenants and all future tenants.

Legislation providing for such recognition and the authorizing of a "union shop" on the premises is necessary. Under the National Labor Relations Act, a closed shop is prohibited.[86] In a closed shop situation, a worker must belong to the union before he is employed in the unit. In a union shop, a non-union worker may be employed, though he must later join the union as a condition to his continuing work. This seems an appropriate approach to take in landlord-tenant union relations as well. To require a tenant to be a member of the union before he can become a tenant might have a depressing effect on the credibility of a tenant union as representing the true desires of its "members." At this early stage in the development of tenant unions, credibility is crucial.

Union shops are permitted under the NLRA.[87] A similar statute in the tenant union field, authorizing agreements requiring tenants to join the union 30 days after moving in, would be more acceptable than a closed shop provision. However, as some legislators may feel that a union shop agreement should not be binding on tenants who wish to contract independently with the landlord, an alternative provision will also be included.

Tenants who live in the building at the time the union is recognized and who do not wish to become members create a slightly different problem. Several of the nonunion member tenants may have leases running for one year or more with the landlord. The union should not compel the landlord to breach these contracts and impose the collective bargaining agreement on these tenants. Tenants with month-to-month tenancies would have to be given 30 days notice before the landlord could change the terms of their tenancies. Without a clarifying provision, a court con-

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[85] *Id.* § 159(c), (d), (e).
[86] *Id.* § 158(a).
[87] *Id.*

ceivably might interpret the public policy expressed in the Preamble as allowing the interruption of leases in midterm. To the extent that this might happen, a provision protecting the continuation of these leases is included in the proposed statute.

The National Labor Relations Board was set up by the Wagner Act to administer elections and to certify the winner if two or more unions vied for control.[88] Such an agency may be necessary at a later date in landlord-tenant matters. At the present time, because of the unlikelihood that more than one group of tenants will wish to organize in any given building, the proposed statute will be drawn to provide for union representation without recourse to a certification board. There is no authority, whether by statute or case law, on the rights of tenants to select representatives to represent them in their dealings with landlords.

§ III-2. (a) *A tenant union holding membership cards of one or more tenants in a building shall be recognized by the owner of the building as the sole collective bargaining agent of such tenants in negotiating with the owner.*

(b) *Such tenant union so designated or selected shall represent all such tenants in respect to rents, periods of tenancies, maintenance of premises, and other conditions of the building and terms of the leases. The owner must negotiate in good faith with the union on such matters.*

(c) *Any agreement between the tenant union and the owner may be binding for no more than one year.*

(d) *A collective bargaining agreement made between the union and the owner may require the owner to negotiate or adopt leases with nonunion member tenants of the building on the same terms as those set forth in the agreement, provided, however, that tenants whose leases have not expired shall not be bound by the agreement during the duration of their lease, and provided further that tenants who have tenancies from month-to-month shall be given thirty days notice before the terms of their leases are changed.*

(e) *A collective bargaining agreement may contain a provision requiring persons becoming tenants subsequent to the execution of the agreement to pay initiation fees and membership dues to the union within thirty days after becoming tenants. Notwithstanding any agreement to the contrary, no tenant shall be required to become a member of a tenant union before he agrees with the owner to lease an apartment unit in the building or before he moves in.*

[88] *Id.* § 159.

(f) *The agreement may contain a provision making the terms of the agreement applicable to new tenants whether or not they become members of the union.*

(g) *Commercial tenants may become members of the union.*

(h) *"Tenant" shall be defined in this section as the head of a household in an apartment unit.*

Subsections (a) and (b) require the landlord to negotiate with a union representing its members who are tenants. In addition, any other tenants covered by the collective bargaining agreement are represented by the union. This, together with subsections (d), (e), and (f), is intended to permit exclusive representation while not requiring it by law.

Subsection (d) of the proposed statute provides that the collective bargaining agreement may provide that the landlord enter into the same terms and conditions with nonunion member tenants as with union members. A proviso insuring that landlords will not be obligated by the collective bargaining agreement to breach existing leases with nonmember tenants is included.

Subsection (e) permits a union shop agreement. Subsection (f) allows for a collective bargaining agreement binding new tenants to the agreement whether or not they become members of the union. Legislators who are concerned with the tenant union's ability to impinge upon a new tenant's freedom of contract[89] may wish to add the following paragraph to the one proposed:

In the event that a new tenant does not wish to be covered by the collective bargaining agreement, he may exclude himself by informing the union in writing before entering into a lease agreement that he does not wish the collective bargaining agreement to become part of his lease; provided, however, that the landlord shall make no threats, promises or accusations to such prospective tenant intended to discourage him from accepting such agreement or from communicating with or joining the union.

This additional provision permits the new tenant to reject the collective bargaining agreement and enter into a separate agreement with the landlord. It nevertheless still will tend to prevent a landlord from taking advantage of normal tenant turnover by gradually filling up the building with tenants not covered by the agreement. Subsection (g) allows commercial tenants who have an interest in the union's activities to become members of the union.[90]

[89] *Cf.* 29 U.S.C. § 164(b) (1964).

[90] *Cf. id.* § 164(a). This provision does not prohibit supervisors from union member-

CONSIDERATION AND DURESS

The usual objective of the tenant union is a collective bargaining agreement between the landlord and the union. Such an agreement would provide a regular and organized means of communication between the two parties to permit them to resolve differences harmoniously, stabilize the tenant situation and improve conditions in the building.

The union's ability to enforce the agreement will determine the agreement's effectiveness. If the landlord believes that he can free himself from the burdens of the contract by alleging a failure of consideration or by contending that he was compelled to sign the agreement under "duress," he will not perform its obligations. The expenses the union would have to incur to obtain a judicial determination on these issues may be beyond its means. The delay may seriously dampen union morale. If the landlord succeeds in court, then the tenants will have to begin negotiations, or perhaps even organizing activities, all over again. The possible discordant or disruptive effect on the union and the landlord-tenant relationship is obvious. For these reasons, if there is substantial room in the common law for a "no-consideration" challenge to the agreement, a statute should be enacted to protect such agreements from this defense. A statute likewise is needed to clarify what types of pressure constitute "duress."

If the collective bargaining agreement does not incorporate by reference the leases which run to individual tenants, the burden of showing sufficient consideration on the part of the union may depend largely upon those sections of the agreement which impose obligations upon the union and its members. In any judicial determination of the adequacy of consideration, a court will probably have to look at the actual circumstances within which such obligations were undertaken in order to find that the landlord has obtained something of value beyond that which he was already receiving through the leases.

Consideration might consist of the union's promise to encourage tenant maintenance of the apartments. Vandalism is consequently reduced. Tenant turnover may also be arrested. The problem is that most housing codes already impose some duty of proper maintenance on tenants.[91] Though the tenants' duty may be an existing legal obligation, the *union* had no previous duty to assist in this law enforcement effort. In actu-

ship but says that no employer shall be required to deem supervisors as employees for the purpose of any law relating to collective bargaining.

[91] *See* Note, *supra* note 31, at 1397; 1A A. CORBIN, CONTRACTS § 171 (1963) (pre-existing legal obligation rule).

ality, the landlord may be substantially benefitted by the union's assumption of this obligation.[92]

Other ways in which consideration may be found include the union's promise not to sanction rent-withholding except when certain conditions arise and to abide by decisions of an arbitrator. In labor situations, the promise not to strike has been recognized as good consideration for company undertakings.[93]

It is not likely that the landlord's consideration will be challenged. In the event it is, his promises to submit to binding arbitration and to recognize the union as the sole bargaining agent should be sufficient. The landlord's promises to repair beyond the obligations of the code would unquestionably be consideration. Such promises might include such matters as the installation and maintenance of coin-operated washing machines and dryers or the use of all interior walls of non-lead base paint which will not streak upon washing.

The problem of consideration might be avoided if the collective bargaining agreement is actually stipulated to be the lease between the tenants and the landlord, as well as the union-landlord contract. The tenants' promises to pay rent would clearly be sufficient consideration for the landlord's promises.[94]

Duress is defined in the Restatement of Contracts as the compelling of a manifestation of apparent assent by another without his volition[95] or the inducing of another by threat in such a manner as to preclude him from exercising free will and judgment.[96] Every bargaining situation involves "duress" of some kind. The landlord's claim, therefore, would need to be substantially supported. Where tenant union activity is not unlawful, an analogy may be drawn with labor law cases holding that a lawful strike does not constitute legal duress.[97] Where the tenant activity is illegal, the landlord's claim is stronger.[98] Finally, a party will be deemed to have ratified a contract if he accepts any of the benefits arising

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92 *See* Note, *supra* note 31, at 1397.

93 Harper v. Local 520, Electrical Workers, 48 S.W.2d 1033, 1040-41 (Tex. Civ. App. 1932).

94 Making the agreement also serve as the lease may cause a problem in the future. If a modification becomes desirable, a signature of every tenant who signed the agreement might be necessary to effect the change.

95 RESTATEMENT OF CONTRACTS § 492(a) (1932).

96 *Id.* § 492(b).

97 *See* Lewis v. Quality Coal Corp., 270 F.2d 140, 143 (7th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960).

98 *See* Cappy's Inc. v. Dorgan, 313 Mass. 170, 174, 46 N.E.2d 538, 541 (1943) (court indicated that the employer should seek legal relief in the court against the unlawful activity).

from the agreement, delays for a considerable time before repudiating, or acts upon any of the provisions of the agreement.[99]

> § III-3. (a) *The defense of failure of consideration, when raised by a party to a collective bargaining agreement between a landlord and a tenant union, shall not be recognized by any court of law in this state.*
>
> (b) *The defense of duress when raised by a party to a collective bargaining agreement between a landlord and a tenant union shall be permitted only where the other party engaged in activity which was contrary to statute and which was the immediate and direct cause of the duress. A party may raise this defense only if he has not accepted any benefit arising from the agreement, nor delayed more than a reasonable time before repudiating, nor acted upon any of the provisions of the agreement.*

The proposed statute forecloses the defense of failure of consideration. A party to a collective bargaining agreement should be precluded from avoiding the responsibilities he has assumed under the contract because of a technical failure of consideration.

Duress is permitted as a defense in some instances. Certainly pressure may be exerted upon a party to encourage him to come to terms. That is the usual procedure in most labor situations. The same reasoning applies to landlord-tenant relations. Where activity "contrary to statute" is used, however, the other party should be allowed to plead duress. This provision requires, however, that the illegal activity be the direct and immediate cause of the duress alleged, and that the party claiming the defense receive no benefits from, nor act upon, the agreement, nor delay in repudiating it.

The phrase "activity contrary to statute" was selected instead of "unlawful activity" because the latter could be construed to include a rent strike. While rent strikes are not expressly forbidden by statute, they might be considered "unlawful" in those states whose common law is inerpreted not to allow rent withholding where substantial code violations exist. Such a result is obviated by the carefully selected language above.

AUTHORIZATION OF ARBITRATION AND RENT WITHHOLDING

A collective bargaining agreement which stands up in court against legal challenges of failure of consideration and duress may, nevertheless, be important in practical effect. Certain provisions should be inserted to assure its effectiveness. These would include a binding arbitration pro-

[99] *See* Barnette v. Wells Fargo Nat'l Bank, 270 U.S. 438 (1926).

vision and a rent-withholding clause which may be used by the union if the landlord substantially fails to conform with the contract. Legislation should be adopted authorizing these two provisions.

Binding arbitration can be helpful in resolving disputes which will undoubtedly arise during the life of the contract. If it is effectively set up in the agreement, the procedure can be speedy and inexpensive. Legislation should be drafted upholding the validity of an arbitration provision. It should also provide for the naming of an arbitrator by a court if no agreement to the contrary is made by the parties.

Rent-withholding is an important union tool, not only in organizing activities, but also in providing private enforcement of the collective bargaining agreement. The parties should be free to agree that this economic pressure be available to the tenant union to assure that the landlord does not drag his feet in fulfilling his obligations under the contract. Legislation should protect rent-withholding in those instances where the collective bargaining agreement provides for it.

Under the common law an agreement to arbitrate future disputes was not enforceable in the courts. It was revocable at the will of either party.[100] Several states, however, have adopted provisions which make agreements to arbitrate valid, irrevocable and enforceable.[101]

> § III-4. (a) *A provision in a collective bargaining agreement made between a landlord and a tenant union to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.*
>
> (b) *If the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, the court on petition of a party to the arbitration agreement shall appoint the arbitrator and designate the time and place the parties to the agreement are to meet with the arbitrator. The court shall select the arbitrator from lists supplied to him by the parties, the landlord-tenant relations board, or any disinterested association concerned with arbitration.*
>
> (c) *A provision in a collective bargaining agreement made between a landlord and a tenant union which provides that tenants may withhold rent whenever the landlord substantially breaches*

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100 *See* International Union, UAW v. Benton Harbor Malleable Indus., 242 F.2d 536, 538 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957).

101 *See, e.g.*, CAL. CIV. PRO. CODE §§ 1280-94.2 (West Supp. 1969); N.Y. CIV. PRAC. LAW, §§ 7501-7601 (McKinney 1963); N.J. STAT. ANN. §§ 2A:24-1 to -11 (1952). *See also* 9 U.S.C. § 2 (1964).

certain specified provisions in the agreement is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. No court shall deem such a provision to be in conflict with any existing statute of this state or with the public policy of this state.

No provision is included in the statute to make arbitration or rent-withholding mandatory. It is best if the landlord and the tenant union decide themselves whether these provisions would serve their interests. The statute only authorizes these provisions and includes some means of maintaining their effectiveness.

The first two subsections of the proposed statute are largely based upon the California arbitration statute.[102] Often, parties to a collective bargaining agreement will provide for a grievance procedure as a preliminary step before arbitration.[103] The landlord and tenant union may wish to write such machinery into the agreement. A complaint would be conveyed from one party to the other, either directly or through an agent. The parties would then meet to resolve it. If the grievance could not be settled, the parties would proceed to arbitration. This informal grievance procedure could be included in the arbitration provision in the agreement and is thereby also authorized in the statute. Subsection (b) leaves the naming of the arbitrator and the time and place he is to meet with the parties to the agreement, or, where the parties fail to agree, to the discretion of the court.

The authorization of rent-withholding in this section is wholly distinct from any other statutory scheme on rent-withholding found in the jurisdiction. Usually, the provisions of the collective bargaining agreement would allow rent-withholding when the landlord substantially breaches his obligations under the contract to make certain repairs.[104] Whether an escrow account is set up and under what conditions the provision may take effect would be determined by the collective bargaining agreement. Under this provision, the existence of another statute providing for rent-withholding in the judisdiction only under certain conditions could not be used to limit the power of the parties to contract over other specific instances where rent withholding would be permitted.

LANDLORD-TENANT RELATIONS BOARD

A state Landlord-Tenant Relations Board, if informal in its procedures

102 CAL. CIV. PRO. CODE § 1281.6 (West Supp. 1969).

103 *See* NATIONAL HOUSING & DEVELOPMENT LAW PROJECT, LANDLORD TENANT MATERIALS, TENANT UNION GUIDE FOR LEGAL SERVICES ATTORNEYS 73 (1969).

104 *See id.* at 62.

and elastic in its conception, is advisable. The Board would be established by the state and would include in its composition representatives of both landlords and tenants. Its primary purpose would be to furnish arbitrators and mediators to the parties to help resolve disputes arising out of the collective bargaining agreement or otherwise.

The Board would not be given enforcement powers. The objective of landlord-tenant union legislation should be to promote workable and cordial relations between both parties. This can be effected only if the parties themselves determine the means of settlement of any controversy. Arbitration and mediation services would be made avaliable to the parties or to the court upon request. In no instance, however, will the Board have the authority to impose requirements upon the parties.

The National Labor Relations Board was established by the Congress to referee the complex problems which arise in employer employee relations. It is charged with the authority to determine the appropriate unit for the purpose of collective bargaining,[105] to investigate and provide for hearings, to determine whether a question of representation exists,[106] to direct an election or take a secret ballot and certify the results thereof,[107] and to determine whether an unfair labor practice has been committed by the employer or the labor union.[108]

The difficulties faced in the establishment of tenant unions and in their relations with landlords are much narrower in scope. The problem of competing tenant unions is not a significant one, at least at the present time. Determining the appropriate unit or conducting an election is consequently unnecessary; since only one building will usually be involved, the tactics of the parties will probably not be very far reaching in effect. Ascribing powers comparable to those held by the NLRB to a state-oriented Landlord-Tenant Relations Board would consequently be unnecessary at this time.

The Government also set up a Federal Mediation and Conciliation Service, an agency separate and distinct from the NLRB.[109] Its purpose was to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes and to assist parties in the settling of such disputes through conciliation and mediation.[110] The Service was not provided with enforcement powers.[111]

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[105] 29 U.S.C. § 159(b) (1964).

[106] *Id.* § 159(c).

[107] *Id.* § 159(c), (e).

[108] *Id.* § 160(a).

[109] *Id.* § 172.

[110] *Id.* § 173(a).

[111] This is also true in states which have established labor mediation panels. *See, e.g.,*

The purpose and structure of the Landlord-Tenant Relations Board would be very similar to the Service. The Board might also be empowered or required to make studies of landlord-tenant problems and make recommendations to the legislature. No state has established such a Landlord-Tenant Relations Board, although several jurisdictions have set up management-labor relations boards and mediation panels.[112]

> § III-5. (a) *There is hereby created an independent state agency to be known as the Landlord-Tenant Relations Board. The Board shall consist of — members and shall be composed of representatives of landlords and of tenants who shall be appointed by the Governor. In the interest of preventing and resolving landlord-tenant disputes, the Board shall endeavor to promote sound landlord-tenant relations and to assist parties in settling such disputes. The Board is authorized to delegate any or all of the powers which it may itself exercise to any regional members or staff of the Board.*
>
> (b) *The Board shall maintain lists of arbitrators and mediators who may be called upon to arbitrate or to mediate controversies arising out of landlord-tenant union matters and collective bargaining agreements. The Board shall furnish such lists or recommend arbitrators or mediators when requested by any party to the controversy or by any court.*
>
> (c) *The Board shall investigate landlord-tenant controversies and make reports when requested by any party or by any court. The Board may offer its services to the parties to a controversy upon its own motion whenever in its judgment such controversies are exceptional in nature.*
>
> (d) *Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing landlord-tenant union collective bargaining agreement. The Landlord-Tenant Relation Board is directed to make its arbitration and mediation services available in the settlement of such disputes and in other controversies only when requested by both parties or any court.*
>
> (e) *No party shall be required to seek resolution of any dispute through the Board before maintaining an action in court.*

The proposed statute is modelled upon the federal legislation establishing a National Labor Relations Board[113] and Federal Mediation and

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CAL. LABOR CODE § 65 (West 1955); N.Y. LABOR LAW §§ 753, 754 (McKinney Supp. 1969); PA. STAT. ANN. tit. 43, § 211.36 (1964).

[112] *See* note 111 *supra*.

[113] 29 U.S.C. § 159 (1964).

Conciliation Service[114] and the California mediation statute.[115] The Landlord-Tenant Relations Board has as its primary purpose the assisting of the parties in the settling of their disputes. As discussed above,[116] the best approach would be to allow the parties themselves to determine how to resolve their difficulties. Accordingly, no enforcement powers are given to the Board. As a consequence of this, the Board is not made an administrative hurdle to be overcome before the parties may seek resolution through the courts. As long as the Board remains a noncompulsory agency, no exhaustion of remedies is required.[117]

The Board should be composed of representatives of landlords and of tenants. Representatives of landlords should present the views of the owner-occupant landlord (the one who lives in his building), the absentee-amateur landlord (the one who does not live in his building but owns only a few buildings), and the absentee-professional landlord (the landlord who owns many buildings and may be a wealthy individual, a corporation or a syndicate of investors). Tenant representatives should include exponents of the views of middle and upper income tenants as well as lower income slum tenants. Some legislators may also wish to include as Board members economists knowledgeable in the various cost factors involved in maintaining apartment buildings in different neighborhoods by landlords with varying financial assets. The number of members on the Board and the term of years each is to serve has been left open. Presumably, the legislators can best determine the most efficient procedure in their state.

Subsection (c) authorizes the Board to offer its services when requested by one party to the dispute or upon its own motion whenever in its judgment the controversy is "exceptional" in nature. Though members of the Board will soon be able to distinguish those disputes which need particular attention, some guidelines for determining an exceptional situation should be suggested. Such a situation may arise (1) where the media have given substantial publicity to the dispute and the public is becoming increasingly concerned; (2) where a tenant union is organizing in a number of the landlord's buildings and the problems in each building are different; (3) where a tenant union is organizing on a block-wide basis and the buildings are owned by different landlords; or (4) where the landlord is still a well-known figure in the community.

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114 *Id.* §§ 172, 173.

115 CAL. LABOR CODE § 65 (West 1955).

116 *See* § III-5(a) of the proposed statute.

117 *See* § III-5(e) of the proposed statute.

ARTICLE IV CEMENTING TENANT UNION STRENGTH

RETALIATORY ACTIONS AFTER REPORTING HOUSING CODE VIOLATIONS

Protection from landlord harassment is crucial in the development of the tenant union. A statute prohibiting retaliatory action against union organizers has been proposed earlier.[118] In that section, reference was made to the problem of landlord reprisals against tenants who report housing code or health law violations to the local enforcing agency.[119] This section will propose a statute protecting tenants and tenant unions from landlord retaliation for reporting violations of the law.

Such a provision is needed. Low-income tenants often live in buildings which are in a substandard condition. Landlords are often aware of housing code violations which lead to these conditions, but they will not spend the money necessary to make the repairs. Tenants may, therefore, wish to obtain assistance from city and county health and housing inspection departments. They will be hesitant to request such assistance, however, if they fear that the landlord will retaliate.

Retaliation not only hurts the tenant, it also tends to defeat the intent of the legislative bodies which established the code enforcement agencies.[120] Retaliation is usually in the form of an eviction action, but it may also be in the form of a substantial increase in rent which the tenant will obviously not be able to afford. Since most tenants in slum housing have month-to-month tenancies, the landlord will have little difficulty in terminating the tenancy or changing its terms. A 30-day notice to that effect is sufficient. He need not even state a reason. Where the vacancy rate is low, the usual case in most urban communities, the tenant who anticipates landlord reprisal is discouraged from reporting violations.

Several states have recently adopted statutes designed to protect the tenant who reports housing code violations from retaliatory eviction. Illinois,[121] Michigan,[122] Massachusetts,[123] and Rhode Island[124] permit the tenant to raise the defense of retaliatory eviction. New Jersey makes it a criminal offense to take reprisals against a tenant who reports a housing

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[118] *See* § II-3(a) of the proposed statute.

[119] *See* pp. 1028-29 *supra.*

[120] *See* Edwards v. Habib, 130 U.S. App. D.C. 126, 139-40, 397 F.2d 687, 700-01 (1968), *cert. denied*, 393 U.S. 1016 (1969).

[121] ILL. REV. STAT. ch. 80, § 71 (1966).

[122] MICH. COMP. LAWS ANN. § 600.5646(4) (Supp. 1970).

[123] MASS. GEN. LAWS ANN. ch. 186, § 18, ch. 239, § 2A (Supp. 1970).

[124] R.I. GEN. LAWS ANN. § 34-20-10 (1970).

code violation.[125] There also have been judicial decisions establishing such protection for the tenant.[126]

> § IV-1. (a) *No owner, or officer or employee of the owner, shall threaten to take or shall take reprisals against any tenant for reporting to, or complaining to, a public agency concerning the existence or belief of existence of any health or building code violation or violation of any municipal ordinance or state law or regulation thereunder which has as its objective the protection of the health, safety, or comfort of occupants of dwelling units. Nor shall such a person threaten to take or take reprisals against any tenant for the tenant's justified attempt to secure or enforce rights under his lease or contract, or under the laws of the state or its governmental subdivisions, or of the United States, or for any other justified lawful act of the tenant.*
>
> (b) *The receipt of any notice to quit premises inhabited by the tenant or any substantial alteration of the terms of such tenancy within ninety days after making a report or complaint or within ninety days after any inspection or proceeding resulting from such a report or complaint shall create a rebuttable presumption affecting the burden of proof that such notice or alteration is a reprisal against the tenant.*
>
> (c) *No action for possession of real property shall be maintained if the dominant purpose of the person bringing such action is reprisal. Also, no such action shall be maintained if the plaintiff attempted to increase the tenant's obligations under the lease or contract as a reprisal and the tenant's failure to perform such additional obligations is a material reason for such action. Also, no such action shall be maintained on the ground of refusal to pay rent if the plaintiff threatened to or did decrease his obligations under the lease or contract as such a reprisal, and the tenant refused to pay rent because of such reprisal.*

The proposed statute is taken largely from the Michigan and Rhode Island legislation, which includes protection against retaliation for engaging in any lawful conduct as well as for reporting code violations. Subsection (b), which creates a 90-day rebuttable presumption, is based upon the New Jersey statute.

The statute is a comprehensive one, intending to protect tenants not only in situations where the landlord brings an eviction action as a re-

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[125] N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

[126] *See, e.g.*, Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687, *cert. denied*, 393 U.S. 1016 (1969); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (City Ct. 1968).

sult of the tenant union's activity, but also where the tenant's rent is raised or in any instance where the plaintiff increases the tenant's obligations or decreases his own obligations in reprisal. The problem of establishing the retailatory motive of the landlord and the kinds of evidence which should be introduced in doing so are discussed in the section on retaliatory actions against union organizing activity.[127]

RENT-WITHHOLDING

Rent-withholding should be justified whenever conditions on the premises are such that the health, safety or comfort of the tenants is substantially impaired or endangered and the landlord fails to make repairs. Several states have adopted provisions authorizing rent-withholding in these situations.[128]

The traditional remedies used to pressure the landlord into maintaining his building up to code standard have proven ineffective.[129] Housing code enforcement agencies have not been able to significantly halt or reverse the deterioration of urban buildings.[130] Though tenants may be given protection by the codes, the fact that they are generally not given the right to enforce the codes through direct action undermines their effectiveness.[131] A city's administrative enforcement machinery may be a protracted affair ,providing the recalcitrant landlord with an opportunity for long delays before compliance,[132] Criminal penalties are lax, fines very low,[133] and jail sentences are almost never imposed.[134] Judges are often unsympathetic to housing code prosecutions. They are unwilling to recognize code violations as true "crimes." [135] Courts will also postpone or continue many cases until the defendant has repaired the violation.[136]

Repair programs have been established only by a few cities. Municipalities lack the administrative machinery and procedures either for mak-

[127] *See* § II-3 of the proposed statute; Moskovitz, *Retaliatory Evictions—The Law and the Facts*, CLEARINGHOUSE L. REV., May 1969 at 4.

[128] *See* notes 142-47 *infra* and accompanying text.

[129] *See* notes 6-13 *supra* and accompanying text.

[130] *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255-56 (1966); Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 316 (1965).

[131] *See* F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 113 (1968).

[132] *See id.* at 18.

[133] The average fine per violation is said to be about 50 cents. *See* Gribetz & Grad, *supra* note 130, at 1276.

[134] *See* F. GRAD, *supra* note 131, at 26; Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 824 (1965).

[135] Gribetz & Grad, *supra* note 130, at 1279.

[136] *See* Note, *supra* note 134, at 819.

ing repairs on their own or for letting out contracts for such repair.[137] Agency repair funds are small or nonexistent. The money collected does not replenish the funds. A city's liens are often secondary, and where substantial repairs are undertaken even a prior lien might be of questionable value.[138] Moreover, agencies feel that repair programs involve them too deeply in real estate management.[139]

The usefulness of an agency order to vacate a building, enjoining further use until the violations are corrected, though at times an effective remedy, in reality depends upon the existence of an adequate vacancy ratio in low-rent housing. Since the housing shortage in most urban communities is acute, the repercussions on the tenant when this remedy is employed are severe. The slum tenant is simply cast out and forced to accept conditions equal to or worse than those from which he has been evicted.[140] City demolition of slum property creates the same problems.[141]

A self-help rent-withholding remedy will provide the tenant with a means of obtaining clean, safe and sanitary dwellings as defined by the housing codes. It brings direct and immediate pressure to bear upon the landlord. Only the most prosperous landlords and real estate companies can afford to make payments on mortgages, pay property taxes, and meet other non-deferrable expenses from sources other than rents for any appreciable period of time, and even these landlords may find it more profitable to obey the law than to go without rents. If the landlord finds himself in such a financial squeeze, he will be much more receptive to the tenant's demands for the correction of unhealthy and unsafe conditions on the premises.

This remedy, however, has a significant impact on slum neighborhoods only if it is used in an organized way by tenant unions. Where scattered, individual tenants in large buildings withhold rents to compel repairs, landlords may make minimal short-term repairs to those apartments, without getting at some of the more basic problems with the building. If all the tenants in the building withhold rent, serious problems still may arise. If it is not economical to make all the repairs required or demanded, the landlord may simply abandon the building. When this happens, if the tenants are not sufficiently well organized to take on the responsibilities of managing the building (collecting rents, making repairs,

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137 F. GRAD, *supra* note 131, at 68.

138 *See* Note, *supra* note 134, at 835.

139 *Id.*

140 *See* Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 280 (1966).

141 *See* Note, *supra* note 134, at 832.

etc.), the building will go downhill very quickly. If people move out, the building may be vandalized and become totally uninhabitable. In this way, abandonments can remove badly needed, if barely livable, units from the city's housing stock.

Tenant unions can bring some order into what might otherwise be a chaotic struggle. Using rent-withholding to maintain pressure on recalcitrant landlords, they can bargain with such landlords and enter into agreements for certain repairs and services. These repairs and services might not be all that is needed to bring the building "up to code," but at least will include those which will make the premises more livable at a cost which does not force the landlord to abandon the building. The tenant union will be in a position to see that the landlord then complies with the terms of an agreement. Individual tenants or poorly organized groups of tenants often are unable to "watchdog" the landlord's obligations and see that they are enforced.

Where, for any of a number of reasons, the landlord cannot or will not maintain the building properly although economically capable of doing so, a tenant union can use rent-withholding to force the landlord out of the picture. This kind of "takeover" may be useful in improving certain buildings, if the tenant union is sufficiently strong and able to carry out the responsibilities of ownership.

Several states have adopted legislation providing that where a landlord is in substantial violation of the housing or health codes, the tenant may withhold his rent until the code violations are corrected. Pennsylvania provides that where a local public health or inspection department certifies a dwelling as unfit for human habitation, the tenant may withhold his rent and deposit it into an escrow account. If after six months the building has not been certified as habitable, the money in the escrow account is returned to the tenant. During the time the rent is in escrow, the tenant cannot be evicted for any reason.[142] Massachusetts,[143] Michigan,[144] New York [145] and Connecticut[146] have enacted similar statutes. Illinois, Michigan and New York have adopted legislation providing that welfare agencies may withhold rent payments where the recipient's dwelling does not comply with code standards or where conditions exist which are a danger to health and safety.[147]

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142 PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).

143 MASS. GEN. LAWS ANN. ch. 111, § 127F, (Supp. 1970).

144 MICH. COMP. LAWS ANN. §§ 125.530, .534 (Supp. 1970).

145 N.Y. REAL PROP. ACTIONS LAW § 755, 769-82 (McKinney Supp. 1969).

146 No. 728, [1969] Conn. Pub. Acts.

147 ILL. ANN. STAT. ch. 23, § 11-23 (Supp. 1970); MICH. COMP. LAWS ANN. § 400.14(c) (Supp. 1970); N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966).

"Repair and deduct" statutes were enacted in five western states decades ago.[148] These acts allow a tenant to apply his rent[149] toward the repair of the premises when the landlord refuses to maintain them in a habitable condition. These statutes provide that the parties may waive its provision. Accordingly, since almost every written lease or rental is a form prepared by and for landlords, the statutory right is often waived.

Some case law dealing with these questions has developed. The leading decision is *Brown v. Southall Realty Co.*[150] In *Brown,* the court held that because there were substantial code violations when the lease was made, the lease was an illegal contract and the tenant owed no rent under it.[151] In *Pines v. Perssion,*[152] the Wisconsin Supreme Court held that the landlord's failure to maintain the premises up to code standards resulted in a failure of consideration. The legislature, in adopting the housing codes, had implied a covenant of habitability into every lease. It was breached when the landlord refused to make repairs. The parties' obligations under the lease were held to be mutually dependent and, consequently, a failure of consideration was found.

Certain other theories have been advanced as bases for non-payment of rent when the premises are in violation of the codes.[153] These include the clean hands doctrine and constructive eviction. The clean hands theory may apply whenever the landlord attempts to use the courts to enforce the rental agreement. He should be denied access to the courts as long as he stands in substantial violation of the housing code. The standard requirement of abandonment might not be imposed in applying the constructive eviction doctrine because in today's urban communities the housing market is tight and there is no place to move.

> § IV-2. (a) *Notwithstanding any agreement to the contrary no action for possession or rent shall be maintained in regard to any premises rented or leased for dwelling purposes if such premises are in substantial violation of the standards of fitness for human habitation established under any state law or regulation thereunder or any county or municipal ordinance or regulation, and if such*

148 CAL. CIV. CODE § 1942 (West 1954); MONT. REV. CODES ANN. § 42-202 (1961); N.D. CENT. CODE § 47-16-13(1) (1960); OKLA. STAT. ANN. tit. 41, § 32 (1954); S.D. COMP. LAWS ANN. § 43-32-9 (1969).

149 California and Montana limit the tenant to the use of one month's rent.

150 237 A.2d 834 (D.C. Ct. App. 1968).

151 *Cf.* Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960).

152 14 Wisc. 2d 590, 111 N.W.2d 409 (1961).

153 For a thorough discussion of the various theories used to support rent-withholding when the landlord violates the housing codes, see NATIONAL HOUSING & DEVELOPMENT LAW PROJECT, *supra* note 103.

violation may endanger or materially impair the health, safety or comfort of persons occupying the premises provided that the following conditions are present: (1) the person occupying the premises, while not in arrears in his rent, gave notice in writing to the person to whom he customarily paid his rent that he would, because of such violation, withhold all rent thereafter becoming due until the conditions constituting such violations were remedied; (2) the violation was not caused by the person occupying the premises or any other person acting under his control.

(b) *In any action in which a defense under this section is raised, the court may, in its discretion, order the action continued for a reasonable time to enable the plaintiff to cure the violations At the time such continuance is ordered, the court may require the person claiming a defense under this section to pay all or any portion of the rent becoming due thereafter into court. Such rent may be paid over to the plaintiff after the violations have been cured if such violations have been cured within six months, whereupon the action shall be dismissed. If such violations have not been cured within six months, the court shall enter judgment for the defendant and either refund to the defendant all monies deposited or use the monies for the purpose of making such dwelling fit for human habitation.*

(c) *If the court finds that the repairs cannot be made unless the tenant vacates the dwelling, the court may order the tenant to vacate his dwelling, provided, however, that the tenant shall be reinstated in his dwelling upon completion of the repair work.*

(d) *No owner shall in any way take reprisals against a tenant for exercising his rights under this section.*

(e) *No waiver of any rights provided by this section in any lease or rental agreement, oral or written, shall be valid, provided, however, that any of such rights may be waived in a collective bargaining agreement entered into between any landlord and tenant union.*

(f) *This section shall not apply to any lease entered into prior to the effective date of this Act, provided, however, that thirty days after the effective date of this Act, this section shall apply to any month-to-month tenancy which commenced prior to the effective date of this Act.*

This proposed statute was adopted mainly from the Pennsylvania and Massachusetts legislation. The six-month period within which the landlord must act to correct the violations is found in the Pennsylvania provision.

Rent-withholding is authorized under the proposed statute whenever the premises are in substantial violation of the housing codes and the vio-

lating conditions endanger the health, safety or comfort of the persons occupying the premises. These requirements protect the landlord from attempts by tenants to avoid paying rent whenever the landlord commits any infraction of the codes, no matter how minor or how immaterial to the tenant's health or welfare. Thus, a leaking faucet would not warrant rent-withholding. Nor would a foundation which is set only eleven inches above the ground rather than twelve.

Subsection (a) contains a provision specifying further conditions which must be met before a tenant may withhold his rent. The first condition requires advance notice to the landlord in writing, thus protecting the landlord from a tenant who does not pay his rent for reasons other than those articulated under the statute and subsequently attempts to defend an eviction action by claiming that he withheld his rent pursuant to this statute. The second provision prevents the tenant who damages the property from shifting responsibility for repair onto the landlord so that the tenant may discontinue paying rent.

Subsection (b) allows the court to continue the action in order that the landlord may have an opportunity to cure the violation. The court may also require that the tenant pay the rents becoming due thereafter into court. Rents which were withheld by the tenant after proper notice to the landlord but *before* the date of this proceeding are retained by the tenant if the defense is sustained. The landlord, by substantially failing to comply with the codes after written notice from the tenant of the violation, has lost *this* rental income forever. The possibility of this penalty—which would usually not exceed one or two months' rent—may tend to deter code violations from occurring in the first place. It likewise tends to compensate the tenant and his family for having to endure substandard conditions. If, however, legislators feel it is too harsh, they may provide that the court may require both withheld and future rents to be paid into court.

If the landlord cures the violation within six months after the date of the proceedings, the court may pay the rents deposited with it over to the landlord. If the violation is not cured within this period, the court may either refund the money to the tenant or use it for the repair and rehabilitation of the premises.[154] Presumably the landlord will either repair the building or abandon it by the end of the six-month period. In the unlikely event he does neither, the tenant could again withhold his rent pursuant to this Act. If the landlord brings another action for rent

[154] The last sentence of subsection IV-2(b), directing the distribution of the rent money if the violation is not cured, is based upon the Pennsylvania rent withholding statute. *See* note 42 *supra*.

or for possession, the tenant could defend against it in the same manner as before.

Under the proposed statute, if the landlord proves that he cannot complete repairs unless the tenant vacates the premises, the court may order the tenant to temporarily vacate his dwelling. The tenant is entitled to be reinstated, however, upon completion of the repair work.

Subsection (d) prohibits the landlord from taking reprisals against a tenant who withholds rent under this section. Barred is retaliation in the form of an eviction action, an increase in the tenant's obligations, or a decrease in the landlord's own obligations. The problems of establishing the landlord's motives is discussed elsewhere.[155]

Subsection (e) prevents a landlord from compelling a tenant to waive his rights under this statute in order to get the dwelling. It provides, however, that these rights can be waived in a collective bargaining agreement. This permits the tenant union to give the landlord some type of "no strike clause" in exchange for the landlord's agreement to make repairs, perhaps with some rent escrow provision if he fails to comply.

Since the proposed statute provides substantial new rights to the tenant, it may interfere with the contractual rights and duties of a tenant and landlord under an existing lease agreement. To avoid any conflict between leases entered into prior to the effective date of the act and the act itself, the last subsection was inserted. The provision will, however, apply to month-to-month tenancies entered into prior to the effective date of the act after a period of 30 days, for the terms of a month-to-month lease may always be altered if a 30 day notice is given.

STAY OF EVICTION

Providing defenses to a tenant, whether by statute or by judicial decision, is often insufficient. Tenants will be discouraged from asserting their rights if they reasonably fear that the landlord will respond with an eviction action, even though defenses will be avaliable to them in law. Even when the tenant believes he is right, there is always a possibility that the court will decide otherwise on the facts or law. Where the vacancy rate is low, as in most urban communities, a tenant cannot afford to risk even slightly the chance that he will be evicted and forced to go through the depressing task of finding another dwelling with rents he can afford.

A statute providing a tenant with the right to remain in his apartment after a summary eviction action is adjudicated against him, so long as he pays the rent owed and the landlord's costs, is desirable. The tenant

[155] *See* notes 71-73 and accompanying text; Moskovitz, *supra* note 127.

then would be more willing to take advantage of the rights he has under the law. He would be less likely to fear having himself and his family put out on the street with no place to go. Moreover, the landlord would not be injured. He would suffer no financial loss. The rent due would be paid and his costs would be reimbursed.

In some cases, a landlord will *still* want the tenant out for legitimate reasons, perhaps because the tenant consistently fails to pay his rent on time. In this situation, if the tenancy is month-to-month, the landlord can legitimately terminate the tenancy by giving a 30 day notice. If the tenancy is for a longer period, the landlord can elect to terminate the lease and then bring a common law action for ejectment or quiet title.

Several states have adopted such statutes.[156] Pennsylvania provides that the tenant may tender the rent and costs owed to the sheriff at any time before the writ of possession is actually executed. The tenant can then continue his possession of the premises.[157]

> § IV-3. *At any time before any writ of possession or eviction or any writ for restitution of premises is actually executed, the tenant may, in any unlawful detainer action for failure to pay rent, supersede and render the writ of no effect by paying to the sheriff or his deputy the amount of the judgment plus costs.*

The proposed statute is modelled upon the Pennsylvania legislation. If the tenant pays the sheriff the rent he owes and the landlord's costs at any time before the execution of the writ of possession, his eviction is abated.

RECEIVERSHIP

Another tool which should be made available to the tenant union is the ability to initiate receivership proceedings and be appointed receiver for the building. Where a landlord fails or refuses to make repairs and allows the premises to fall substantially below code standard, a tenant or tenant group should be provided with the means to petition a court to appoint a receiver. The receiver would take over the management of the building. He would be authorized to collect the rents and use them to try to bring the property up to a habitable condition. Loans from municipal funds and private fundations might be made available to supplement the rental income. Until unsafe and unsanitary conditions are corrected, the receiver would remain in control of the premises.

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156 *See* N.J. STAT. ANN. § 2A:18-55 (1952); N.Y. REAL PROP. ACTIONS LAW § 751 (McKinney 1963); PA. STAT. ANN. tit. 68, § 250.504 (1965); VT. STAT. ANN. tit. 12, § 4773 (1958).

157 PA. STAT. ANN. tit. 68, § 250.504 (1965).

The receiver would have as his primary purpose the rehabilitation of the building. Provided notice was given to all mortgagees and lienors of record, the receiver would have the use of all income from the property to expend in furtherance of that purpose. Though a public agency or a private individual or organization could qualify as a receiver, provision should be made to permit a tenant union to serve as receiver. In those instances where a well established, soundly-structured tenant union is operating on the premises, the court should be allowed to appoint the union. This would provide tenant control over the building and enable the tenants themselves to decide which conditions on the premises are the most serious hazards to the tenants' health and safety.

Several states have adopted receivership programs for uninhabitable dwellings.[158] These provisions may be invoked either when a nuisance is found to exist in the building[159] or when a condition exists which seriously violates the health or housing codes.[160]

In two states the proceeding may be initiated by the tenant.[161] Connecticut recently adopted a provision allowing for a "tenants' representative" who, upon receipt of a petition filed by tenants, may commence an action in the circuit court, wherein the court may render judgment directing that the rents to become due be deposited with a receiver appointed by the court.[162] Other states limit this initiation function to a public official.

Most statutes either prescribe that the receiver be a private party[163] or make no mention of who is to be appointed receiver, thereby pre-

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158 *See* CONN. GEN. STAT. ANN. §§ 19-347(b), (c) (1968); ILL. ANN. STAT. ch. 24, § 11-32-2 (Supp. 1970); IND. ANN. STAT. § 48-6144 (Supp. 1969); MASS. GEN. LAWS ANN. ch. 111, § 127H(d), I, J (1967); MICH. COMP. LAWS ANN. § 125.535 (Supp. 1970); N.J. STAT. ANN. §§ 40:48-2.12h, i (1967); N.Y. MULT. DWELL. LAW § 309(5) (McKinney Supp. 1969).

159 *See* N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1969).

160 *See* MASS. GEN. LAWS ANN. ch. 111, § 127H (1967).

161 Massachusetts provides that a tenant may file a petition to enforce the state sanitary code leading to a hearing in which the court may appoint a receiver. MASS. GEN. LAWS ANN. ch. 111, § 127H (1967). Michigan indicates that either the enforcing agency, the owner or the occupant may bring an action to enforce the provisions of an act requiring owners to maintain their premises up to code standards during the period when a receiver may be appointed. MICH. COMP. LAWS ANN. §§ 125.534(1), .534(2), .535 (Supp. 1970).

162 No. 728, § 5(b) (1) [1969] CONN. PUB. ACTS.

163 *See, e.g.*, IND. ANN. STAT. § 48-6144 (Supp. 1969) ("receiver may be a not-for-profit corporation whose primary purpose is the improvement of housing and housing conditions in the city in which the real estate is located"); MASS. GEN. LAWS ANN. ch. 111, § 127I (1967) ("receiver may be a person, partnership, or corporation"); MICH. COMP. LAWS ANN. § 125.535 (Supp. 1970) (court appoints "the municipality or a proper local agency or officer, or any competent person, as receiver").

sumably leaving it to the discretion of the court.[164] Two states require that the receiver be a public official.[165]

Receivership acts usually provide that a lien upon the property be given to the receiver, for his expenses or money he loans for the property, or to the party which lends funds to the receiver for those expenses not covered by the income derived from the rents. The provisions vary. Some allow for a first lien upon the property; others do not.[166] In some states, notice of the receivership action must be given to the owner and the mortgagees and lienors of record. In other states, notice need only be given to these parties when the hearing is one in which the receiver might be given permission to borrow money and impose a superior lien on the property. In most instances, liens obtained by creditors of the receiver must be recorded after the loan is made.[167] Three states[168] provide in addition that the receiver may use the rents of the property toward rehabilitation prior to and despite any assignments of rents. No state gives the receiver or the creditor of the receiver a lien which has priority over taxes and assessments.

New York, in addition to its receivership statutes, has adopted legislation providing for an "administrator" to manage rent moneys and remove or remedy conditions dangerous to life, health or safety. The

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164 *See, e.g.*, CONN. GEN. STAT. ANN. §§ 19-347(b), (c) (1968); ILL. ANN. STAT. ch. 24, § 11-31-2 (Supp. 1970).

165 *See* N.Y. MULT. DWELL. LAW § 309(5)(c)(1) (McKinney Supp. 1969) ("commissioner or chief executive of the bureau or department of real estate"); N.J. STAT. ANN. § 40:48-2.12h (1967) ("the municipal officer designated by the governing body of the municipality"). However, New Jersey further provides that the receiver shall appoint the first mortgagee of the property, if the mortgagee is a "proper person" and willing to accept the appointment, as the receiver's agent to collect the rents and income and to manage the building, and in all other instances the receiver "may designate the person in charge of management of such real property or some other competent person" as the receiver's agent. *Id.* § 40:48-2.12i.

166 New York, Connecticut, Illinois and Indiana provide that the receiver or the receiver's creditor shall be given a first lien on the property which shall be superior to all prior existing mortgages, liens, and encumbrances.

In New York, the only lender is the Department of Real Estate, and in Connecticut the only lender is the municipality. Illinois and Indiana, however, permit the receiver to seek funds from other sources, public and private. Michigan provides that the court may enter an order approving the expenses of the receiver and provides that there shall be a lien on the property which may be senior to all other liens. However, a first mortgagee is entitled to retain his first priority if at the time of recording or subsequent thereto a certificate of compliance with the housing codes was in effect on the property. Finally, Massachusetts merely gives the state a lien on the property for the amount that it lends a receiver, but makes no provision as to its priority. Presumably, this means that the state's lien does not receive priority.

167 *See* ILL. ANN. STAT. ch. 24, § 11-32-2 (Supp. 1970) (recording required within 60 days).

168 Illinois, Indiana and Michigan.

provision is predicated upon the initiation by one-third of the tenants in the building of a special proceeding directing the deposit of rents into court.[169] The administrator must be an attorney, an accountant, or a real estate broker. In effect, he is a receiver, responsible for the managing and maintenance of the tenement.[170]

The appointment of a receiver of rents and profits to manage a building and make repairs in the dwelling, and the providing of a lien to the receiver giving him priority to the rents over an existing mortgagee or lienor, when notice has been given to the owner and any mortgagees and lienors, has been upheld in New York as a valid exercise of the police power of the state.[171] There does not seem to be any case law in the other states adopting receivership statutes reviewing the constitutionality of such legislation, though the provisions have been in existence for some time.

§ IV-4. (a) *Any tenant or group of tenants occupying a residential building may file a verified petition against the owner of the building in any court of competent jurisdiction alleging that there exists a condition or conditions in substantial violation of the standards of fitness for human habitation established under the state or local housing or health codes or regulations, which conditions may endanger or materially impair the health or well being of a tenant or of the public, or that there exists any other condition dangerous to life, health or safety.*

(b) *Such petition shall set forth the alleged condition(s), that said condition(s) was not substantially caused by such tenant or tenants or any other persons acting under his or their control, and that no occupant has refused entry to the owner or his agent for the purpose of preventing the curing of said condition(s). A copy of the petition and notice of the date of hearing shall be served upon the owner of the dwelling, the local municipality, and on any mortgagee, beneficiary of deed of trust, or lienor of record at least ten (10) days before the date of the hearing. Any such party shall have the right to appear in said action. If it is shown by verified petition or affidavit that the condition may constitute an imminent danger to the occupants of the building or to the public, then the court may order that a hearing be set as soon as possible, said hearing to have priority over all other civil cases.*

169 N.Y. REAL PROP. ACTIONS LAW §§ 769-82 (McKinney Supp. 1969).

170 *Id.*

171 *See In re* Dep't of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964). New York changed its statute in 1965 by deleting language which made the receiver's lien upon the premises secondary to "mortgages recorded previously to the existence of such lien."

(c) *If the court finds that the facts are as alleged in the petition it shall appoint a receiver of the dwelling and direct that all rental payments then due or thereafter becoming due be delivered to the receiver.*

(d) *The receiver may manage and let rental units, issue notes or certificates for money borrowed, contract for all construction and rehabilitation as needed, and exercise such other powers and duties which the court deems proper to effective administration of the receivership. The court may in its discretion require a bond to be posted by the receiver. The receiver may be a person, association or corporation. A reliable and competent tenant union may be appointed receiver. The receivership shall terminate at the discretion of the court.*

(e) *The receiver may use the rents of such property toward maintenance, repair and rehabilitation and for the repayment of all funds borrowed by the receiver, and interest thereon, in accordance with a court order authorizing a receiver to borrow such funds. If a surplus exists, the receiver shall apply such surplus to unpaid taxes and assessments, then to sums due to any assignees of rents, mortgagees, or lienors, and then to the owner.*

(f) *No prior existing mortgagee, beneficiary of deed of trust, or lienor, including any tax lienor, shall commence foreclosure proceedings on the property on the grounds that payments pursuant to a mortgage, deed of trust, or lien contract have not been made as long as the property remains in receivership and the receiver is acting in accordance with this Act in applying the rents of the property.*

(g) *When the repair and rehabilitation duties of the receiver cannot be met from the rents of the building, the court may hold a hearing to determine whether to enter an order authorizing the receiver to borrow funds from state or local government agencies or from private sources and to issue notes or certificates thereupon. Notice of the hearing shall be served upon the local municipality and the owner and mortgagees and lienors of record. If the court enters such an order, loans made to the receiver in accordance with the order shall be a first lien upon the property and the rents thereof, and shall be superior to all prior assignments of rents and all prior existing liens and encumbrances, including taxes and assessments, provided that notice of such lien is recorded in the proper registry within sixty days after the debt is assumed by the receiver.*

(h) *No person shall maintain an action for rent or for possession against a tenant who at the time is paying his rent to the receiver in accordance with the terms of a judgment or order issued pursuant to this Act.*

The proposed statute adopts language from the Massachusetts, Michigan, New York and Illinois receivership acts[172] and the New York Article 7-A proceeding.[173] The legislation proposed permits a tenant or group of tenants to file a verified petition against the landlord to place the property in receivership when there exists on the premises conditions which are in substantial violation of the codes and which endanger or materially impair the health or well being of a tenant or of the public. A petition can also be submitted to the court even though the conditions do not violate specific statutes or ordinances, as where the codes are inadequate or specific provisions have not been enacted, where the conditions in themselves are dangerous to the life, health or safety of a tenant or the public.

A conscientious landlord is protected by subsection (b). It requires that the tenant allege in his petition that the condition was not substantially caused by him or a person acting under his control and that the landlord was not denied access to the premises in order to make repairs.

Service of the petition and notice of the hearing must be made not only upon the owner, but also upon the mortgagees and lienors of record. Under subsections (c), (d), and (e) if the court appoints a receiver, all rental payments then due or thereafter becoming due shall be delivered to the receiver, who shall first use the income to maintain, repair and rehabilitate the premises. Since, under subsection (f), payments on existing liens may be suspended, the mortgagee or lienor is given the opportunity to defend against the placing of a building in receivership. This provision for a hearing to the mortgagees and lienors in this situation comports with the various state receivership acts described above,[174] to which no constitutional challenge has seemingly been made, and with the New York case upholding that state's receivership provision.[175]

While subsection (f) permits the receiver to suspend mortgage payments during the receivership, these unpaid amounts will build up, enabling the mortgagee to foreclose as soon as the receivership ends. If it is desirable to prevent this, the receiver and the court can probably do so by negotiating with the mortgagee. Leverage for such negotiation exists since the receivership will not end until the court so orders.

Some legislators may not approve of the portions of subsections (f) and (g) in the proposed statute which provide the receiver or his creditors with a lien superior to that of prior existing mortgagees and lienors and which suspends payments on these debts during the period of the

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[172] *See* note 158 *supra.*

[173] *See* note 169 *supra.*

[174] *See* notes 158-71 *supra* and accompanying text.

[175] *See In re* Dep't of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964).

receivership. An alternative approach might be to give the earlier creditors a prior lien only to the extent of the interest payments due them, and require only interest payments to be made during the receivership. This approach, however, may make it quite difficult to rehabilitate property which was recently financed, as the interest payments will tend to be quite high.

Subsection (g) further provides that if the receiver cannot repair and rehabilitate the building with the income he receives from the rents, he may request the court to hold a hearing to determine whether he may borrow funds from public or private sources and give these creditors a first lien upon the property and the rents. This lien would be made superior to all prior assignments of rents and to all prior existing liens and encumbrances. Notice of this hearing must be served upon the mortgagees and lienors of record. Here they are given an opportunity to question the reasonableness and the amount of the funds which the receiver wishes to borrow to pay for repairs and rehabilitation. New York, Connecticut, Illinois and Indiana allow the receiver or his creditors to obtain a first lien on the property, superior to that of existing mortgagees and lienors.[176] No cases have been found challenging the constitutionality of these provisions.[177] Procedural due process of law is protected by this proposed legislation, for in no instance may a receiver borrow money without a prior hearing and court approval. The provision is even more exacting in its language than the similar borrowing provisions in the four states mentioned above.

The lien which is given to the receiver or his creditors is also made superior to the payment of taxes and assessments.[178] The welfare of the municipality depends upon its providing decent dwelling space to its citizens. Suspending the assessment of taxes under subsections (e), (f) and (g) is a progressive step in this direction. It will increase tax revenues in the longer run, for rehabilitation will increase both the assessed valuation and the life of the building, and it may tend to raise the value

176 *See* note 166 *supra* and accompanying text.

177 Moratorium legislation, providing for permissive delays in discharge of legal obligations, usually mortgages, was passed during periods of war or depression. Such legislation has been upheld as constitutional and not impairing the obligation of contract, if the public purposes were legitimate and the procedures reasonable. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). *Cf. In re* Dep't of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964) In upholding the state's receivership act, the New York Court of Appeals held that the state could enact laws aimed at protecting the public from the danger of unfit dwellings even though such legislation might impair the mortgagee's contractual obligations to the mortgagor. 14 N.Y.2d at 297-98, 200 N.E.2d at 436-37, 251 N.Y.S.2d at 446-47.

178 State receivership acts presently do not provide this priority over taxes and assessments. *See* note 158 *supra*.

of neighboring properties as well. The city may also consider cancelling payment of taxes altogether on the building throughout the period it stays in receivership. The owner or new owner would, therefore, not be burdened by a heavy tax bill when he assumes control of the building after the receiver is discharged. The owner would be less likely to abandon the building if these tax payments are abrogated.

The proposed statute, in subsection (d), authorizes the court to select any person or group of persons, incorporated or not, to be receivers. The receiver could be a public agency or a private individual or association. Public-spirited foundations interested in improving the condition of housing could thus qualify. Provision is also made for a tenant union to be appointed as a receiver. As discussed earlier,[179] it would often be advantageous to designate a well-established, well-structured, responsible tenant union as receiver.

Subsection (h) of the statute protects the tenant from an eviction action or an action for rent brought by a landlord. Where the tenant has paid his rent to the receiver pursuant to court order, he cannot be sued for the money or for possession.

LOANS FOR REHABILITATION

Tenant unions serve a valuable social function aside from any impact they might make on the physical habitability of the dwellings of their members. The collective process of protest, where peaceful, is a useful and constructive outlet for people's frustrations and avoids the alternative possibility of violent outlets. Similarly, many other gains can be made, such as the halting of particularly irritating and unreasonable management practices, such as inspections without prior notice or permission, and the development of workable grievance procedures.

Hopefully the tenant union will also prove to be helpful in the effort to rehabilitate substandard dwellings. In some cases, tenant unions might procure funds for certain repairs from owners themselves, without looking to outside sources. Where an owner is making profits from the building well above the usual return for investors in such property, the tenant union may be able to obtain a collective bargaining agreement under which the owner agrees to disgorge excessive profits and put them into repairs.

In many instances, however, this resource will not be sufficient to permit significant rehabilitation. Outside funds must be brought in. While some federal programs provide funds for rehabilitation,[180] these pro-

[179] *See* p. 1054 *supra*.

[180] The basic programs under these acts are Public Housing, Urban Renewal,

grams are inadequately funded.[181] Additional state programs in the shape of grants, loans, guarantees and other forms are needed.

Where states decide to institute such programs, tenant unions and landlords who deal with tenant unions should be given priority in obtaining such funds. This is true for two reasons. First, such priority would further the development of tenant unions by giving tenants an incentive to organize and by giving landlords an incentive to enter into collective bargaining agreements providing for rehabilitation. Secondly, it is likely that investment of such funds in buildings in which tenant unions are involved will simply be better investments. If the tenant union is able to uplift tenant morale and responsibility regarding the building, as is hoped, and if the landlord is obliged by the collective bargaining agreement to properly maintain the property, then the effects of rehabilitation in improving the physical soundness and life of the building should be greater than it would be absent these factors. Priority should also be given to receivers appointed under the receivership statute discussed above.[182] There is presently no law on this subject.

> § IV-5. *The Adminstrator of any state program providing assistance in rehabilitating substandard dwelling units, whether through grants, loans, loan guarantees, interest subsidies, or otherwise, shall, in rendering such assistance, grant priority 1) to applicants who have entered into collective bargaining agreements with tenant unions requiring that such rehabilitation be made, 2) to applicants which are reliable and responsible tenant unions who have gained substantial ownership or control of those buildings sought to be rehabilitated, and 3) to receivers appointed by court order pursuant to section IV-4.*

This provision could be extended to include programs funded by cities and counties, but the imposition of these priority requirements by the state may inhibit the development of such local programs. It is better to leave the matter to local discretion, hoping that local governments will follow the lead of the state.

CONCLUSION

This proposal is a novel one. Rough edges will have to be smoothed out in the process of adapting these statutes to the existing law of any

Neighborhood Development Program, Federally Assisted Code Enforcement and the Certified Area Program. *See* 42 U.S.C. §§ 1401-69c (Supp. V, 1970). In addition, the National Housing Act provides for F.H.A. housing. 12 U.S.C. § 1701-03 (Supp. V, 1970).

[181] *See* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1968).

[182] *See* § IV-4(d) of the proposed statute.

particular state and in making them consistent with the needs of certain interest groups not considered here.

Some may feel that the proposal constitutes too dramatic a change in the present law, giving tenants and tenant unions too much power at landlords' expense. Others may feel that, in view of the gross imbalance of bargaining power between landlords and tenants and the well-entrenched bias of existing law in favor of landlords, the proposed statute does not go far enough to protect tenants and nurture tenant unions.

The need for such legislation will become greater in the next few years. Responsible action will be demanded. Discussion and consideration of such a proposal should begin now.