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JUDICIAL EXPANSION OF TENANTS' PRIVATE LAW RIGHTS: IMPLIED WARRANTIES OF HABITABILITY AND SAFETY IN RESIDENTIAL URBAN LEASES

In 1966 the National Conference on Legal Rights of Tenants concluded that traditional property laws "often obstruct rather than assist in America's efforts to obtain decent housing for low-income tenants."¹ A major recommendation of the Conference's report was that the law of landlord and tenant be transformed into a flexible and realistic tool to assure justice in housing.² The Conference's finding was by no means surprising. The failure of common law principles to assure justice in modern landlord-tenant relations has long been a focal point of criticism by legal scholars, who assert with obvious validity that the living conditions in urban, industrial America bear little resemblance to those of the rural, agrarian society that spawned the common law.³ Yet it is the common law that is still applied without question by most American courts. A judicial reevaluation of the law of landlord-tenant, to make it compatible with modern social reality, is long overdue.⁴

I

BACKGROUND

A. *The Common Law Rights of the Tenant*

The landlord-tenant relationship has traditionally been governed by property law principles because the common law regarded a lease

¹ NATIONAL CONFERENCE ON LEGAL RIGHTS OF TENANTS, *TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING*, at iii (1967) [hereinafter cited as *TENANTS' RIGHTS*]. The Conference was held on December 9 and 10, 1966, in Washington, D.C., and was co-sponsored by the Department of Justice, the Department of Housing and Urban Development, and the Office of Economic Opportunity.

² *Id.*

³ See, e.g., Dooley & Goldberg, *A Model Tenants' Remedies Act*, 7 HARV. J. LEGIS. 357 (1969); Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695 (1968); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) [hereinafter cited as Quinn & Phillips]; Schosbinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

⁴ A model landlord-tenant code has been published, but it has not yet been proposed for adoption because the drafters believe further discussion and criticism are necessary. AMERICAN BAR FOUNDATION, *MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969)*.

as a conveyance of an estate for a term.⁵ The landlord's duty was to deliver possession of the land,⁶ the quiet enjoyment of which he implicitly warranted would be undisturbed for the term.⁷ In the absence of fraud or an express provision in the lease, the landlord assumed no duty to repair or maintain the leased premises or to put them in order at the beginning of the term.⁸ The tenant's inspection was his only "warranty" that the premises were suitable for their intended use.⁹

The common law focused on possession rather than service.¹⁰ The ideal landlord delivered possession, then did nothing more; the ideal tenant paid his rent and demanded nothing more than possession. The simple possession-rent dichotomy of obligations was probably consistent with both parties' expectations in rural, agrarian England, where the right to possession constituted the essential element of the exchange. But the low-income urban tenant of today is seeking adequate shelter, not mere possession; he is scarcely satisfied with "quiet enjoyment" of a decaying or rat-infested slum apartment. He needs and expects a substantial amount of shelter-related services—heat, light, water, sanitation, and maintenance—in addition to undisturbed possession.¹¹ As a single tenant he cannot reasonably inspect or take responsibility for maintaining the many interdependent parts of the typical multi-unit urban dwelling.¹² Yet, under the no-implied-warranty rule, it is he, not his landlord, who assumes the risk of the premises' habitability.

Even if a landlord made express service promises in the lease, the courts generally treated them as "secondary" obligations in the sense that the tenant's covenant to pay rent was not affected by the

⁵ *Evans v. Faight*, 231 Cal. App. 2d 698, 42 Cal. Rptr. 133 (1965); *Fowler v. Bott*, 6 Mass. 63 (1809); *Royal Oak Wholesale Co. v. Ford*, 1 Mich. App. 463, 136 N.W.2d 765 (1965).

⁶ It has been held that this duty is satisfied by delivery of the legal right to possession rather than by delivery of actual possession. *Tietelbaum v. Direct Realty Co.*, 172 Misc. 48, 13 N.Y.S.2d 886 (Sup. Ct. 1939).

⁷ *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 233 S.W.2d 286 (1950). See *Lewis, Covenant for Quiet Enjoyment in Lease*, 26 LAWYER & BANKER 80 (1933); Annot., 41 A.L.R.2d 1414, 1420-23 (1955).

⁸ *Lawler v. Capital City Life Ins. Co.*, 68 F.2d 438 (D.C. Cir. 1933); *Carney v. Bereault*, 348 Mass. 502, 204 N.E.2d 448 (1965); *Irish v. Rosenbaum Co.*, 348 Pa. 194, 34 A.2d 486 (1943); 2 R. POWELL, REAL PROPERTY § 233 (recomp. ed. 1967); 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

⁹ *Civale v. Meriden Housing Authority*, 150 Conn. 594, 192 A.2d 548 (1963).

¹⁰ See *Quinn & Phillips* 227-39.

¹¹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, — U.S. — (1970); see *Quinn & Phillips* 231-33.

¹² AMERICAN BAR FOUNDATION, *supra* note 4, at 6-7.

landlord's breach.¹³ The duty to pay rent was relieved only if the tenant vacated the demised premises because of a breach of the landlord's obligation to assure quiet enjoyment for the term or when the landlord retook possession of the property.¹⁴ American courts gradually developed the idea of "constructive eviction," which relieved the tenant of his rent obligation if he could show that he had vacated the leased premises due to a severe failure of maintenance services amounting to a breach of the landlord's duty to assure quiet possession.¹⁵ As a practical matter, however, this remedy did not help the tenant to obtain services. It simply gave him the option to abandon the premises and cease paying rent if the failure of services was sufficiently severe. It mitigated the rigors of the common law but, as a strictly possession-oriented remedy, was deeply grounded in its theory.¹⁶ With its absolute requirement of abandonment, it is utterly unsatisfactory for a tenant faced with today's urban housing shortage.¹⁷

It is the low-income urban tenant who suffers most from the persistence of antiquated common law doctrines. Usually a month-to-month tenant,¹⁸ he has no bargaining power to impose express service covenants upon his landlord,¹⁹ nor does he have the resources or ability to make repairs himself. Since the common law imposes no implied service obligations on the landlord, the deplorable result is that maintenance services often are never performed.

B. *The Rights of the Tenant Under Modern Statutes*

The legislative response to the changing social and physical context of the landlord-tenant relationship has been more commendable than that of the courts. As of 1968, over 4,900 municipalities²⁰ and

¹³ Quinn & Phillips 233-34; see *Stone v. Sullivan*, 300 Mass. 450, 15 N.E.2d 476 (1938); *Stewart v. Childs Co.*, 86 N.J.L. 648, 92 A. 392 (Ct. Err. & App. 1914); *Edwards v. Ward Associates, Inc.*, 367 S.W.2d 390 (Tex. Civ. App. 1963); RESTATEMENT OF CONTRACTS § 290 (1932); 1 AMERICAN LAW OF PROPERTY, *supra* note 8, at § 3.79.

¹⁴ See *Royce v. Guggenheim*, 106 Mass. 201 (1870); *Fifth Ave. Bldg. Corp. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917); 1 AMERICAN LAW OF PROPERTY, *supra* note 8, at §§ 3.49-.50.

¹⁵ See, e.g., *Overstreet v. Rhodes*, 212 Ga. 521, 93 S.E.2d 715 (1956); *Nesson v. Adams*, 212 Mass. 429, 99 N.E. 93 (1912); *Sewell v. Hukill*, 138 Mont. 242, 356 P.2d 39 (1960).

¹⁶ Quinn & Phillips 235-39.

¹⁷ Schoshinski, *supra* note 3, at 530; Comment, *Tenants' Remedies in the District of Columbia: New Hope for Reform*, 18 CATHOLIC U.L. REV. 80, 83 (1968).

¹⁸ Quinn & Phillips 243; Schoshinski, *supra* note 3, at 541-42.

¹⁹ TENANTS' RIGHTS 5.

²⁰ F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 112 (National Comm'n on Urban Problems Research Rep. No. 14, 1968) [hereinafter cited as GRAD].

many states had enacted housing codes that set minimum standards of sanitation and safety which landlords are obligated to maintain in leased dwellings.²¹ Although these codes have greatly increased tenants' protection and represent governmental recognition of the common law's failure,²² they have not substantially affected the tenant's private law rights.²³

Housing code provisions are usually enforceable only by municipal authorities, not by the individual tenant.²⁴ In 1939 the New York Court of Appeals held that a housing code vested no private contractual rights in the tenant and that the statutory duty to maintain leased premises was owed only to the municipality.²⁵ This decision has been widely followed,²⁶ with the result that a tenant has to rely on a municipal agency to seek correction of code violations. The agency, through lack of manpower, inefficiency, corruption, or mere indifference, may never act effectively on his complaint.²⁷ Even if it does act, the resulting penalty may be so small²⁸ that in reality it constitutes only an extra cost of doing business rather than any real incentive to actual compliance.²⁹ Criminal penalties for code violations are rare³⁰ and likewise do not generally result in actual correction of the violation.³¹ The National Advisory Commission on Civil Disorders reported that in spite of the existence of municipal enforcement agencies, thousands of landlords in disadvantaged areas were able to violate the codes with impunity.³²

The indigent urban tenant has few private rights and little real power, either under antiquated common law rules or under modern housing codes, to force his landlord to make needed repairs or to

²¹ *E.g.*, CONN. GEN. STAT. REV. §§ 19-342 to -375 (1968); MASS. ANN. LAWS ch. 144, §§ 1-98 (1965); N.J. STAT. ANN. §§ 55:13-A-1 to -A-28 (Supp. 1970).

²² See Quinn & Phillips 239.

²³ GRAD 112.

²⁴ *Id.* at 113; TENANTS' RIGHTS 5.

²⁵ Davar Holdings, Inc. v. Cohen, 280 N.Y. 828, 21 N.E.2d 882 (1939), *aff'g* 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938).

²⁶ See GRAD 113.

²⁷ See *id.* at 7-33; Quinn & Phillips 239-42. For an analysis of enforcement problems in Denver, see Comment, *Housing for the Poor: A Study of the Landlord-Tenant Relationship*, 41 U. COLO. L. REV. 541, 542-50 (1969).

²⁸ The average fine per case in New York City in 1965 was estimated to be \$16. P. WALD, LAW AND POVERTY: 1965, at 15 (1965). It has been remarked that these fines carry all the moral opprobrium of a traffic ticket. Quinn & Phillips 241.

²⁹ "In many states, fines levied for housing code violations are so small that they may properly be considered as establishing a system of licensing rather than as constituting an effective deterrent." Levi, *supra* note 3, at 278.

³⁰ Quinn & Phillips 240.

³¹ GRAD 29.

³² REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 472 (Bantam ed. 1968). See Levi, *supra* note 3, at 276.

provide minimum services. Imaginative legislation expanding tenants' rights, as has been passed recently in some states,³³ is perhaps the best way to rectify this situation. It is, however, the absence of judicial, rather than legislative, innovation in this area that is so startling. Most courts have refused the implied invitation provided by statutory reform and housing codes, and indeed, by the obvious conditions of life in urban America, to discard outmoded precedents and adjust the law of landlord and tenant to fit modern social reality.³⁴

II

JUDICIAL EXPANSION OF TENANTS' RIGHTS

Some courts, of course, have sought to bring landlord-tenant law into the twentieth century. But their efforts, though commendable, have generally failed to reexamine comprehensively the nature of the modern landlord-tenant relationship or to provide a unified theoretical justification for change.

In 1961 the Wisconsin Supreme Court, in *Pines v. Perssion*,³⁵ held that there was an implied warranty that leased premises were habitable at the beginning of the term. In *Brown v. Southall Realty Co.*,³⁶ the District of Columbia Court of Appeals held that a lease of premises by a landlord with knowledge that they are in violation of the housing code is an illegal, unenforceable contract. In both cases, however, the tenant who was relieved of his rent obligation had already vacated, which gives rise to the suspicion that the courts may simply have been using new language to justify what was essentially the old defense of constructive eviction.³⁷ The *Pines* case, since it involved furnished

³³ New York City has been by far the most progressive in expanding tenants' rights to enforce housing codes. See HOUSING FOR THE POOR: RIGHTS AND REMEDIES 95-97 (N. Dorsen & S. Zimmerman eds. 1967). Massachusetts has passed legislation permitting rent withholding, rent receivership, and rent escrow in tenant-initiated attempts at housing code enforcement. MASS. ANN. LAWS ch. 111, §§ 127C-27J (1967); *id.* ch. 239, § 8A (Supp. 1969). For a list of states that have enacted rent abatement and "repair and deduct" laws, see notes 71-72 *infra*. The Conference on Tenants' Rights stressed legislation as the most effective way to give tenants greater power. TENANTS' RIGHTS 19.

³⁴ See Garrity, *supra* note 3, at 698.

³⁵ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

³⁶ 237 A.2d 834 (D.C. Ct. App. 1968).

³⁷ See *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969), where the court denied a landlord's action for rent on the ground of constructive eviction, but said it was immaterial whether the tenant's right to vacate is expressed in terms of breach of covenant of quiet possession, material failure of consideration, or material breach of an implied warranty against defects.

premises, arguably may have been merely another example of the traditional "furnished house" exception to the no-implied-warranty rule.³⁸ In any event, it did not deal with the problem of housing code violations that develop after the lease has begun. The *Brown* case provided only a specious advantage to the tenant as it did not state what the tenant's rights under the illegal contract would have been had he elected to stay.³⁹ The tenant needs a means to compel his landlord to maintain and repair, not a means to avoid the lease. At best, both *Brown* and *Pines* constitute only partial advancements. That they have been regarded as judicial milestones⁴⁰ is a measure of the remaining distance to a modernized law of landlord and tenant.

Another partial advancement was the 1968 case of *Edwards v. Habib*,⁴¹ in which the court held that evictions in retaliation for tenant complaints to housing code officials were implicitly prohibited by the code itself, and that proof of a landlord's retaliatory motive constituted a good defense to such an action.⁴² Again, however, the tenant's advantage under this holding is questionable. Since most slum tenancies are month-to-month,⁴³ the landlord is fully within his common law rights to evict or raise the rent without reason thirty days after notice is given.⁴⁴ Even if a landlord's action of eviction is denied as retaliatory, he still has the right to bring another action thirty days later, in which case the tenant will again have to prove retaliatory motive. Proving the real motive of the landlord, needless to say, may be a very difficult task.⁴⁵

What is needed is not a partial advancement within the old common law framework but a wholesale judicial reexamination of the landlord-tenant relationship in the light of modern social patterns and housing conditions. The law and the rightful expectations of today's tenants must be brought into better harmony. Both to complement legislative reform and to provide needed flexibility in an area

³⁸ *Smith v. Marrable*, 152 Eng. Rep. 693 (Ex. 1843), first held that there was an implied warranty of habitability in a short-term lease of furnished premises. See *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892).

³⁹ See *Schoshinski*, *supra* note 3, at 538; 21 BAYLOR L. REV. 372 (1969).

⁴⁰ See GRAD 121-23.

⁴¹ 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

⁴² 397 F.2d at 700-03.

⁴³ Text accompanying note 18 *supra*.

⁴⁴ 1 AMERICAN LAW OF PROPERTY, *supra* note 8, at § 3.90. This rule has been incorporated by statute in the District of Columbia. D.C. CODE ANN. §§ 45-902, 45-910 (1967).

⁴⁵ Massachusetts, however, provides that if the tenant can show he made code violation complaints in a six-month period prior to an eviction action, a rebuttable presumption arises that the eviction is retaliatory. See MASS. ANN. LAWS ch. 239, § 2A (Supp. 1969).

where mechanical application of outmoded precedents has been the practice, the traditional reluctance of the courts to deal with landlord-tenant problems in honest and innovative ways should yield to a new approach. There are recent hopeful signs that it may.

A. *Judicially Implied Warranties of Habitability*

In *Javins v. First National Realty Corp.*,⁴⁶ the District of Columbia Circuit denied relief in a landlord's action for possession based upon nonpayment of rent on the ground that a warranty of housing code compliance was implied by law into all leases of urban dwelling units covered by the District of Columbia's housing code.⁴⁷ Several tenants had refused to pay rent, alleging that there were 1,500 violations of the code in their building.⁴⁸ Noting its duty to "reappraise old doctrines in the light of the facts and values of contemporary life," the court concluded that the "old rules of property law governing leases are inappropriate for today's transactions."⁴⁹ Both the common law, as properly construed and expanded, and the implicit mandate of the housing code itself compelled judicial recognition of implied warranties of habitability in urban leases.

The court specified three considerations militating toward common law recognition of implied lease warranties. First, the factual assumptions underlying the old no-repair rule are obsolete in today's urban setting, and without them the rule cannot be justified.⁵⁰ The modern urban tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter-related services, not land.⁵¹ He usually possesses a single specialized skill and is not competent to perform maintenance chores even if he is able to gain access to the necessary equipment and to areas within the landlord's control.⁵² The landlord has ultimate control of the building, and he should have the corresponding duty to maintain it. As well suited as the traditional law of

⁴⁶ 428 F.2d 1071 (D.C. Cir.), *cert. denied*, — U.S. — (1970).

⁴⁷ 428 F.2d at 1072-73.

⁴⁸ *Id.* at 1073. All the violations arose after the term of the lease had commenced. *Id.*

⁴⁹ *Id.* at 1074-75.

⁵⁰ *Id.* at 1078.

⁵¹ When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.

Id. at 1074 (footnote omitted). See Quinn & Phillips 231-33.

⁵² 428 F.2d at 1078. Even if the tenant possessed the necessary competence and had access to the necessary areas, the length of his tenure might not justify any efforts at repair. The court noted the increasing mobility of the present-day tenant. *Id.*

leaseholds, including the no-repair rule, may have been to an agrarian economy where tenants were "jack-of-all-trades" farmers, it is conceptually incompatible with urban life styles.⁵³ Because the social and historical facts that were its basis no longer prevail, courts should recognize that the old law lacks validity when applied to urban housing.⁵⁴

Secondly, the court reasoned that implied warranties should be imposed in leases because they have increasingly been imposed in related areas of the law. The court noted the wide acceptance of implied warranties of quality in the law of sales,⁵⁵ and that such warranties have been judicially implied in transactions involving the lease of a chattel⁵⁶ and the sale of real property.⁵⁷ Since the modern lease is essentially a purchase of shelter and services rather than a conveyance of an estate, the contract law of sales, with its implied warranty of quality, is better suited to determine the respective obligations of the landlord and tenant than the outdated law of property. The landlord, as a merchant in housing, has greater "opportunity, incentive and capacity to inspect and maintain the condition of his building"⁵⁸ than the tenant, and it is only logical to impose upon him the obligation to do so as well. The modern tenant must rely upon his landlord's skill and honesty as much as the purchaser of a chattel must rely upon that of his supplier.⁵⁹ The protection that the law of sales affords purchasers should not disappear when the purchase involves shelter.

The third rationale for common law recognition of implied warranties of habitability in leases involves the power inequities in the landlord-tenant relationship itself. The court noted that the chronic

⁵³ *Id.*

⁵⁴ The court in a footnote stated that the modern tenant, because of his primary interest in shelter, resembles the guest at an inn more than the agrarian tenant, and that substantial obligations were placed upon innkeepers at common law. *Id.* at 1077 n.33. The court thus presaged its holding in *Kline v. 1500 Mass. Ave. Apartment Corp.*, No. 23,401 (D.C. Cir. Aug. 6, 1970), discussed at text accompanying notes 84-114 *infra*.

⁵⁵ 428 F.2d at 1075. See UNIFORM COMMERCIAL CODE §§ 2-314 to -315; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97 (3d ed. 1964); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

⁵⁶ *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

⁵⁷ See *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 165 N.E.2d 286 (1960); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

⁵⁸ 428 F.2d at 1079.

⁵⁹ The court compared the tenant to the purchaser of a car. *Id.*

urban housing shortage has given the landlord vastly superior bargaining power and deprived the tenant of any private leverage with which to compel maintenance services. Because he does not face the economic threat of vacant apartments, the landlord has little incentive to voluntarily make repairs. The court seemed to recognize that since social and economic conditions in urban America do not compel landlords to make repairs, the law must.⁶⁰

An alternative ground for the court's holding was that the housing code itself requires an implied lease warranty of code compliance. Although the code is silent on the question of private remedies,⁶¹ the court reasoned that by entering into the lease the landlord undertakes to maintain the premises in accord with all applicable law. Since official enforcement of the code has been "far from uniformly effective,"⁶² the tenant should be able privately to compel the landlord to perform his undertaking. Such a private right is compatible with the spirit if not the letter of the code. The court stated that "the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability."⁶³ Whether it is ultimately the housing code itself or a just application of the common law that requires the lease warranty, it is clear that code compliance is the only standard of performance that will satisfy the warranty.⁶⁴

Following its own dictate that leases should be interpreted and construed like any other contract, the court held that the tenant's duty to pay rent is dependent upon the landlord's satisfactory performance of his duty to comply with the code. If the trier of fact finds that the landlord has breached his code service obligations in such a way as to constitute total breach, then the entire rental obligation for the period during which the violations persisted is extinguished, and the landlord's action for possession fails. If the trier finds that only a partial breach has occurred, then a proportionate part of the rent is extinguished until repairs are made, and by paying the remainder, the tenant defeats the landlord's action for possession.⁶⁵

In this one opinion some of the most firmly entrenched principles

⁶⁰ *Id.* at 1079-80.

⁶¹ *Id.* at 1080-81. The court noted, however, that some cases have held that the housing code creates a standard of care that is relevant in tort actions by a tenant. *See, e.g., Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (D.C. Cir. 1960).

⁶² 428 F.2d at 1082 (footnote omitted).

⁶³ *Id.* at 1076-77 (footnotes omitted).

⁶⁴ *Id.* at 1077.

⁶⁵ *Id.* at 1082-83.

of the common law have been uprooted. The court discarded the traditional ideas that a lease is a conveyance of land rather than a contract for services, that there is no implied warranty of habitability or duty to repair, and that lease covenants are independent.⁶⁶ But the long-range significance of the case may lie not in its specific rejection of these antiquated doctrines but in the way it rejected them. The court justified its holding largely by reference to the realities of life in urban America, and without apology or hesitation it adopted an entirely new framework within which to resolve landlord-tenant disputes—that of the law of sales. It has thus provided a solid theoretical basis for future reform and a precedent for radical judicial shifts away from moribund common law doctrines.

The implied warranty of housing code compliance gives the tenant a private contractual remedy against the violating landlord;⁶⁷ instead of relying on inept or ineffectual municipal authorities, he can sue the landlord directly. What was a violation has become a breach, and what was paternalistic protection has been translated into a private right to decent living quarters. The opportunity to seek direct judicial redress of the dangers and discomforts of substandard housing may eliminate the frustration and sense of impotence that has so often been the only reward of a tenant's recourse to municipal enforcement.⁶⁸ The measure of damages in a direct suit may be the cost of repairs,⁶⁹ but it could con-

⁶⁶ Two other recent cases, although not approaching the breadth of the *Javins* holding, have evidenced a similar judicial willingness to discard the underlying principles of the common law. See *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). The *Lemle* case involved a "Tahitian"-style beach house, which arguably reduces its value as precedent to urban tenants. In addition, the cause of the uninhabitability of the premises (rats) existed at the time the lease was made. In *Javins* it was stipulated that the premises complied with the code at the beginning of the term. Note 48 *supra*. In *Marini* the degree to which the court relied upon the specific lease terms themselves and the intention of the parties is uncertain. In any event, neither *Lemle* nor *Marini* keyed the duty to repair to the requirements of a housing code. See also *Lund v. MacArthur*, 462 P.2d 482 (Hawaii 1969).

⁶⁷ Although the court only considered the tenant's defensive rights—*i.e.*, his right to deduct rent in proportion to the landlord's breach—an affirmative right of enforcement can be inferred from the court's recognition that the modern lease is essentially a contract and from the existence of an affirmative right to enforce implied covenants of quiet enjoyment at common law. See *Winchester v. O'Brien*, 266 Mass. 33, 37-38, 164 N.E. 807, 809 (1929).

⁶⁸ Text accompanying note 27 *supra*; see Note, *Private Enforcement of Municipal Housing Regulations*, 54 IOWA L. REV. 580, 582-84 (1969).

⁶⁹ See, *e.g.*, *Childress v. Tyson*, 200 Ark. 1129, 143 S.W.2d 45 (1940); *Mills v. Ruppert*, 167 Cal. App. 2d 58, 333 P.2d 818 (1959); *Schoshinski*, *supra* note 3, at 527; Comment, *supra* note 27, at 565.

ceivably include compensation for the period the tenant had to live with the violation.⁷⁰

By applying the contractual doctrine of dependent covenants, the *Javins* court has given the tenant an even more effective means than direct judicial action to enforce the landlord's implied warranty obligations. The "proportionate rent impairment" theory of *Javins* is similar to the rent abatement⁷¹ and "repair and deduct"⁷² statutes a few states have enacted. With each of these remedies the landlord suffers an immediate financial loss by not maintaining leased premises according to code standards; this clearly provides a greater incentive to make repairs than the "traffic ticket" system of code enforcement in some municipalities.⁷³ As the court in *Javins* suggested, a judicial determination of the severity of the violation and the amount of rent thereby extinguished may be necessary to prevent tenant abuse of the privilege, but the burden of awaiting that judicial determination must be borne by the offending landlord rather than the tenant.⁷⁴

Application of the contractual doctrine of dependent covenants to leases should also obviate the doctrine of constructive eviction. Essentially a mitigation of the severity of the independent covenant rule,⁷⁵ it has no role to play when the rule itself is overturned. Although the tenant would, of course, still have the option to vacate, the relevant judicial inquiry should be whether the landlord's code violation constituted a material breach justifying rescission of the lease contract, not whether it so interfered with quiet enjoyment that it amounted to eviction.

The implied warranty of code compliance may also affect the tort liability of the landlord. Under the traditional view that housing codes impose only a civic duty, there has been a split of authority as to what

⁷⁰ See TENANTS' RIGHTS 2, 12; Quinn & Phillips 256. It has even been suggested that punitive damages be assessed against the landlord because his failure to repair constitutes intentional infliction of mental distress. Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

⁷¹ E.g., MASS. ANN. LAWS ch. 239, § 8A (Supp. 1969); N.Y. MULT. DWELL. LAW § 302-A (McKinney Supp. 1970); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).

⁷² See, e.g., CAL. CIV. CODE §§ 1941-42 (West 1954); MONT. REV. CODES ANN. §§ 42-201 to -202 (1947); N.D. CENT. CODE §§ 47-16-12 to -13 (1960); OKLA. STAT. ANN. tit. 41, §§ 31-32 (1954).

⁷³ Note 28 *supra*.

⁷⁴ 428 F.2d at 1082-83.

⁷⁵ Lemle v. Breeden, 462 P.2d 470, 475 (Hawaii 1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 460, 251 A.2d 268, 276 (1969); see 1 AMERICAN LAW OF PROPERTY, *supra* note 8, at § 3.51.

role the code should play in determining the landlord's negligence when the tenant sustains injuries due to a violation. One judicial interpretation is that a code violation constitutes negligence per se,⁷⁶ a second that it is merely relevant evidence of negligence that may be considered by the jury,⁷⁷ and a third that it is irrelevant to the determination of negligence.⁷⁸ The imposition of a duty owed directly to the tenant arguably militates toward adoption of the per se rule. In addition, there are several cases imposing liability for negligence on the landlord for breach of an express contractual covenant to repair or maintain⁷⁹ which could supply valuable precedents for the tenant seeking to prove negligence in the breach of an implied covenant. There is no reason why housing code standards, once they are recognized as the measure of the landlord's contractual duty to the tenant, cannot also be recognized as the measure of reasonable care in determining negligence.

There is a possibility, however, that the question of negligence may never arise. In *Javins* the court stressed that the modern tenant lacks the ability and expertise adequately to evaluate the premises' suitability, and that he must rely largely upon the skill and good faith of his landlord.⁸⁰ In relating the law of landlord and tenant to the law of sales, the court noted the similarity between the individual's roles as tenant and consumer.⁸¹ If a housing code violation can reasonably be postulated as constituting a "defect" in the product being sold—*i.e.*, habitable living space—it is possible that the landlord may be liable without a showing of negligence for tenant injuries due to violations. Products liability is a consistent and logical extension of the court's conclusion that the modern lease is essentially a sale of shelter.⁸² There is really no logical reason to subject an individual to greater risks as

⁷⁶ *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); *Oglesby v. Rutledge*, 67 Ga. App. 656, 21 S.E.2d 497 (1942); *Morningstar v. Strich*, 326 Mich. 541, 40 N.W.2d 719 (1950); *McLain v. Haley*, 53 N.M. 327, 207 P.2d 1013 (1949).

⁷⁷ *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943 (D.C. Cir. 1960).

⁷⁸ *Stapleton v. Cohen*, 353 Mass. 53, 228 N.E.2d 64 (1967); *Ellis v. Caprice*, 96 N.J. Super. 539, 233 A.2d 654 (1967); *Newman v. Sears, Roebuck & Co.*, 77 N.D. 466, 43 N.W.2d 411 (1950); *Alfe v. New York Life Ins. Co.*, 180 Okla. 87, 67 P.2d 947 (1937).

⁷⁹ *See, e.g.*, *Collison v. Curtner*, 141 Ark. 122, 216 S.W. 1059 (1919); *Dean v. Hershowitz*, 119 Conn. 398, 177 A. 262 (1935); *Lommori v. Milner Hotels, Inc.*, 63 N.M. 342, 319 P.2d 949 (1957); *Rampone v. Wanskuck Bldgs., Inc.*, 102 R.I. 30, 227 A.2d 586 (1967); RESTATEMENT (SECOND) OF TORTS § 357 (1965).

⁸⁰ 428 F.2d at 1078-79.

⁸¹ *Id.* at 1074-76, 1078-79.

⁸² If strict liability is imposed, neither the landlord's lack of notice of the violation nor the tenant's contributory negligence will defeat recovery.

a tenant than he faces as a consumer by distinguishing between injuries caused by defective chattels and those caused by defective realty.⁸³

B. *Implied Duty of Protection*

In *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,⁸⁴ decided only three months after *Javins*, the District of Columbia Circuit again expanded the scope of the landlord's duty, holding that he is obliged to take reasonable precautions to protect his tenants from the foreseeable criminal acts of third persons. In 1966 a female tenant was assaulted and robbed by an intruder⁸⁵ in a common hallway of a combined office and apartment building. In reversing the district court's decision in favor of the landlord and remanding on the issue of damages, the court noted that prior to the assault in question the apartment building had experienced a "rising wave of crime";⁸⁶ that the landlord had both actual and constructive notice of this fact;⁸⁷ and that the security measures existing in 1959, when the tenant first moved into the building, had been discontinued.⁸⁸ The court reiterated the general rule that a private person has no obligation to protect another from the criminal acts of third persons,⁸⁹ and noted that it had previously applied the rule in landlord-tenant disputes.⁹⁰ But, according to the court, the rule faltered in light of the conditions of contemporary urban apartment living: "The landlord is no insurer of his tenants' safety, but he certainly is no bystander."⁹¹ The risk of predictable criminal intrusion could, for the most part, be guarded against only by the landlord. There is no unfairness in imposing a duty to protect upon

⁸³ Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458, 458-59 (1970). Strict liability has already invaded the law of real property in the sale of housing. E.g., *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

⁸⁴ No. 23,401 (D.C. Cir. Aug. 6, 1970).

⁸⁵ The court consistently assumed that the assailant was an intruder. It stated that it was "unlikely" that he was a patron of one of the lower floor businesses, and hinted that the foreseeability of the attack, not the nature of the attacker, made the landlord liable. *Id.* at 18-20 & n.24. Judge MacKinnon, dissenting, argued that since it had not been proven that the attacker was an intruder, plaintiff had not shown proximate cause. *Id.* at 24.

⁸⁶ *Id.* at 11.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2-3.

⁸⁹ *Id.* at 6. See RESTATEMENT (SECOND) OF TORTS §§ 314-15 (1965); W. PROSSER, *supra* note 55, § 54, at 334-39.

⁹⁰ *Appelbaum v. Kidwell*, 12 F.2d 846 (D.C. Cir. 1926). See *Goldberg v. Housing Authority*, 38 N.J. 578, 186 A.2d 291 (1962); *DeKoven v. 780 West End Realty Co.*, 48 Misc. 2d 951, 266 N.Y.S.2d 463 (N.Y.C. Civ. Ct. 1965).

⁹¹ No. 23,401, at 7 (D.C. Cir. Aug. 6, 1970).

him when he has notice of repeated crimes committed against tenants, has every reason to expect them to continue, and possesses the "exclusive power to take preventive action."⁹²

The court likened the modern landlord-tenant relationship to that of innkeeper and guest. At common law an innkeeper has the duty to exercise reasonable care to protect his guests from abuse or assaults by third persons.⁹³ The rationale behind the imposition of the duty, according to the court, seemed to be that the party having control of the premises, and the corresponding power to take security precautions, should bear legal responsibility for doing so.⁹⁴ The court, recalling that it had relied upon a similar rationale in imposing the duty to maintain and repair upon the landlord in *Javins*, concluded that the landlord's control obliged him, as it does an innkeeper, to take reasonable precautions to prevent tenant injuries due to predictable criminal acts.⁹⁵

It is immediately apparent that *Kline* is a valuable analogue of *Javins*, expanding the tenant's protection in a different direction and, partially at least, within a different theoretical framework, but with a similar concern for his welfare. *Javins* gives the tenant an implied contractual right to habitable living quarters, while *Kline* gives him an implied contractual right to reasonable security from the criminal acts of third persons. In both cases the court emphasized the modern tenant's lack of capacity to act effectively on his own, whether it be to make repairs or to provide protective measures, and reasoned that "the

⁹² *Id.*

⁹³ *Kingen v. Weyant*, 148 Cal. App. 2d 656, 307 P.2d 369 (1957); *Priewe v. Bartz*, 249 Minn. 488, 83 N.W.2d 116 (1957); RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965); Annot., 70 A.L.R.2d 628, 645 (1960).

Innkeeper-guest is one of several "special" relationships in which this duty has been imposed. The other relationships include landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient, and carrier-passenger. See RESTATEMENT (SECOND) OF TORTS § 314A (1965).

⁹⁴ No. 23,401, at 10 (D.C. Cir. Aug. 6, 1970).

⁹⁵ Two previous cases have imposed a somewhat similar duty in different fact situations. See *Ramsay v. Morrissette*, 252 A.2d 509 (D.C. Ct. App. 1969) (allegations of tenant assaulted by intruder in apartment that landlord negligently failed to provide reasonable protection sufficient to preclude summary judgment); *Mayer v. Housing Authority*, 84 N.J. Super. 411, 202 A.2d 439 (1964) (public housing authority liable for not providing sufficient supervisory personnel so as to render children's playground safe). See generally *Kendall v. Gore Properties, Inc.*, 236 F.2d 673 (D.C. Cir. 1956) (landlord liable for negligence in hiring painter who murdered tenant); *Bass v. City of New York*, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969) (public housing authority liable for failing to provide sufficient police protection after it had freely assumed the duty to provide some protection). In *New York City Housing Authority v. Medlin*, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (Sup. Ct. 1968), however, the court held that there was no affirmative tenant right to compel better police protection in a public housing project.

logic of the situation itself" required imposing the duty on the landlord.⁹⁶ *Javins* would place the landlord-tenant relationship within the legal purview of the law of sales, while *Kline* would place it within that of the common law of innkeeper and guest. This double-gauged theoretical approach is a strength rather than a weakness because it supplies a broader base for future innovation and growth. The court has not been inconsistent, but rather has shown a consistent disdain for the traditional common law of landlord and tenant.

The factual context of the *Kline* case, however, partially obscures the scope of the holding. It appeared that when Miss Kline first moved into the building in 1959, at least one clerk and a doorman were on duty in the main lobby at all times, and that the side entrances to the building were guarded or locked. Miss Kline testified at the trial that the security precautions the landlord had taken had at least partially motivated her to enter the lease. At the time of the assault, however, there were no doormen, no attendants watching the side entrances, and a desk clerk was on duty only sporadically.⁹⁷ The question arises as to whether the duty to protect had its roots in the specific factual undertaking of the landlord—*i.e.*, in the 1959 precautions taken and negligently abandoned—or was inherent in the lease relationship itself. In other words, did the *Kline* court intend to impose the duty to protect upon all District of Columbia landlords, or just upon those who have taken some initial protective measures upon which the tenant relies?

If the duty to protect, and the corresponding liability for violation of the duty, arose by virtue of the specific security measures taken and later abandoned by the landlord, then the *Kline* court has not really imposed any substantial new obligations on landlords, and the case easily fits within the traditional legal categories. While it is true that one ordinarily does not have an affirmative duty to protect others from criminal attacks, it is also true that any undertaking, once assumed, must be performed with reasonable care or the actor will be liable in tort for resulting injuries.⁹⁸ The distinction is the common one between nonfeasance and misfeasance. *Kline* could arguably constitute merely another imposition of misfeasance liability. It could also be argued that the 1959 security measures, since they at least partially induced Miss Kline to enter the lease, were an implicit part of the con-

⁹⁶ No. 23,401, at 12 (D.C. Cir. Aug. 6, 1970); 428 F.2d at 1077-80.

⁹⁷ No. 23,401, at 2 (D.C. Cir. Aug. 6, 1970).

⁹⁸ See *Bass v. City of New York*, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969); *W. PROSSER, supra* note 55, at § 54; cf. *Bailey v. Zlotnick*, 149 F.2d 505 (D.C. Cir. 1945).

sideration of the original contract;⁹⁹ or, alternatively, constituted the entire consideration from the landlord in a separate implied-in-fact contract,¹⁰⁰ with Miss Kline's reliance constituting her consideration.¹⁰¹ Under all three possibilities, grounded as they are in factual considerations, the landlord could avoid liability simply by failing to provide initial security measures. Rather than making protective measures mandatory on pain of liability, the court would have fashioned an effective deterrent to initial voluntary implementation of such measures.

It seems certain, however, that the *Kline* court intended to impose the duty to protect as an incident of the lease relationship itself,¹⁰² and that the holding is not to be narrowed to its facts. The court attempted, perhaps unsuccessfully, to outline the general contours of the duty it imposed and what standard of performance in various situations would satisfy it¹⁰³—clearly an unnecessary effort if the decision only reaches those landlords guilty of misfeasance. In addition, the duty to repair in *Javins* was imposed by virtue of the lease relationship itself;¹⁰⁴ *Kline* would be less than full brother to that decision if its holding is viewed as based in fact. Both decisions relied upon the "logic of the situation itself" as requiring the imposition of their respective duties, which in context clearly refers to the general landlord-tenant relationship rather than a specific factual situation. It seems fair to conclude that where *Javins* imposed an "implied warranty of housing code compliance," *Kline* imposed an "implied warranty of reasonable safety from criminal attacks," and that all landlords in the District of Columbia make both warranties by merely entering the lease. The tenant will presumably

⁹⁹ At the time of the assault the term of the original lease had expired, and Miss Kline was a month-to-month tenant. The majority concluded that this fact did not alter the original lease obligations. No. 23,401, at 14-15 (D.C. Cir. Aug. 6, 1970). Judge MacKinnon, dissenting, argued that plaintiff could recover for breach only if there had been a lessening of the protective measures during the current month. *Id.* at 29.

¹⁰⁰ See RESTATEMENT OF CONTRACTS § 5 (1932); 1 A. CORBIN, CONTRACTS § 18 (1952).

¹⁰¹ "The tenant was led to expect that she could rely upon this degree of protection." No. 23,401, at 17 (D.C. Cir. Aug. 6, 1970). See *Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968), where plaintiff tenants' reasonable reliance upon an oral promise to repair a patently defective porch constituted consideration, and where a tort claim against the landlord for negligent failure to perform a contractual duty was upheld. See generally RESTATEMENT OF CONTRACTS § 90 (1932); Seavy, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951).

¹⁰² The court spoke in terms of "a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling." No. 23,401, at 12 (D.C. Cir. Aug. 6, 1970).

¹⁰³ *Id.* at 15-18, 20.

¹⁰⁴ 428 F.2d at 1077-80.

have affirmative enforcement rights under this second warranty as he did under the first, thereby increasing his chances to avoid injury due to criminal attacks, if he can prove that his landlord is not providing "reasonable" security.

What constitutes "reasonable" security measures is a major gray area in the court's decision. Giving a standard tort definition of "reasonable care in all the circumstances,"¹⁰⁵ the court concluded that had the defendant continued the security measures in effect in 1959, he would have satisfied his duty to protect, but that different standards of care may be required in different factual contexts.¹⁰⁶ The court, by delineating the standard of care in very general language, obviously did not approach the exactitude it achieved in the *Javins* holding. There, the duty was to maintain the premises' "habitability," and the housing regulations provided a ready statutory definition of the term. There is no corresponding statutory reference by which to define the *Kline* standard of care.

In *Kline* the court considered three factors that may be weighed in determining the standard of care: (1) the customary care taken in similar buildings,¹⁰⁷ (2) the degree of control the tenant has over the premises,¹⁰⁸ and (3) the extent to which the landlord has had notice that crimes were frequently committed in the building.¹⁰⁹ The only factor analyzed in depth by the court is the last, and it was the subject of dispute, with the dissenting judge contending that the notice requirement was not met.¹¹⁰ It appeared that the record, although evidencing twenty thefts in the building in a brief period prior to the assault in question, showed only one other assault.¹¹¹ If this constituted notice to a landlord, argued the dissent, then the majority indeed fashioned a broad rule of landlord liability.¹¹²

The court's failure to supply an intelligible standard of care, though perhaps unavoidable, works a hardship on landlords. Criminal acts are by their nature unpredictable;¹¹³ to impose liability for failure to reasonably guard against "predictable" criminal acts is something of a contradiction in terms. After *Kline* the District of Columbia landlord has

¹⁰⁵ No. 23,401, at 15 (D.C. Cir. Aug. 6, 1970).

¹⁰⁶ *Id.* at 17, 20.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ *Id.* at 15-16 n.21.

¹⁰⁹ *Id.* at 3-5, 7, 11, 18.

¹¹⁰ *Id.* at 23-24 (MacKinnon, J., dissenting).

¹¹¹ *Id.* at 23.

¹¹² "One swallow just does not make a summer." *Id.*

¹¹³ RESTATEMENT (SECOND) OF TORTS § 302B, comment *d* at 89 (1965); W. PROSSER, *supra* note 55, § 33, at 176.

little doubt about the fact of his duty, but has little certainty as to what will satisfy it. Lacking this certainty, he may institute more stringent security measures than would otherwise be necessary in an effort to avoid liability. Despite the court's protestations of a contrary intent, he may then become an insurer of his tenants' safety.¹¹⁴

CONCLUSION

The court in *Javins* and *Kline* has dramatically expanded the implied service obligations of the modern urban landlord. In the District of Columbia at least, by entering a lease the landlord now undertakes not only to deliver possession and to assure quiet enjoyment, but to comply with the housing code and to provide reasonable security measures as well. The tenant has been given no small measure of relief from the psychic assaults and physical hazards of building decay and rising crime.¹¹⁵ In addition, the court has adopted two new decisional frameworks, the developed laws of sales and innkeeper-guest, within which to resolve landlord-tenant disputes, thus providing a flexible basis for future legal growth in the area.

Perhaps the ultimate significance of *Javins* and *Kline*, however, will not be that they gave the tenant greater protection in two important areas, but that they did so largely upon a reasoned analysis of the requirements of justice in the modern urban setting. In resolving both cases the court did not look to precedent but to the realities of contemporary urban life.¹¹⁶ The implicit holding of the cases is that the modern lease creates a continuing dependency relationship in which the landlord has certain inherent service duties. The common law of landlord and tenant, which gave minimal attention to service duties, therefore must be modernized to reflect this dependency relationship. For seeking to do this the *Javins* and *Kline* court is to be commended; hopefully, it will also be emulated.

John L. Zenor

¹¹⁴ The court explicitly stated that the landlord is justified in passing on the cost of protective measures to his tenants. The increased rent may in a sense constitute a "premium" for the protection. The court also hinted that landlords may not be permitted to avoid their duty through exculpatory clauses, thus in a sense making the "coverage" mandatory. No. 23,401, at 15 n.20, 20-21 (D.C. Cir. Aug. 6, 1970).

¹¹⁵ See *id.* at 25 n.4, 29 (MacKinnon, J., dissenting), where Washington's high crime rate is noted.

¹¹⁶ See, e.g., *id.* at 12.