his heirs, so long as they maintain a house of prostitution on the premises." Nor should we be surprised to see the courts striking down conditions which are conducive to offenses against traditional sexual morality. Thus, grants "to *A* (a married man) on the condition that he marry *B* (a woman not his current wife)" and "to my illegitimate children hereafter begotten" have been struck down. The most troublesome conditions of this kind have been conditions in restraint of matrimony. General conditions forbidding the grantee to marry (but not those forbidding remarriage) have been held invalid in many cases, but such conditions are rare. Little in the way of legal (as opposed to sociological) sense can be made out of the cases dealing with more particular restraints on marriage: "to *A* so long as she does not marry an actor"; "to *A* [p*433] on the condition that he not marry without his parents' consent." One gets the feeling that the law is most awkward when it intervenes in the most personal of human relationships.

D. NON-FREEHOLD ESTATES

One of the curiosities of the common law is its division of interests in land into freehold and non-freehold. The freeholder has seisin and the protection of the possessory assizes; his interest descends to his heirs as real property. The non-freeholder, on the other hand, is not seised, the protection of his possession must await the development of ejectment,[1] and his interest is personal property (more precisely, a chattel real) which he may bequeath to his legatees by will and which, in the absence of will, will be distributed pursuant to a scheme of intestate succession quite different from the inheritance by primogeniture of the common law. Today the fact that the non-freeholder is not seised has relatively few practical consequences; the fact that his interest is personalty, however, continues to have practical consequences in those jurisdictions which have different schemes of intestate succession or taxation for real and personal property.

The origins of the distinction between freeholds and the non-freeholds is obscured in history. The simplistic view that the denial of seisin to the termor was part of the general scheme of repression of impoverished tenant farmers collapses before the fact that the first termors were not impoverished farmers but wealthy men, frequently landholders themselves, who used the lease as a device to secure the payment of the debts owed by those who were seised in freehold.[2] Further, categorization as chattel real was also applied to many interests, including the feudal incidents of wardship and marriage, which were exclusively in the possession of the wealthy. Some writers have seen the influence of the Roman law in the treatment of terms of years. Be that as it may, the fact is that leaseholds usually involved a much more commercial relationship than the intensely personal feudal relationships involved in freeholds, and this difference may go some of the way to explaining why the law saw a distinction between the two. The development of ejectment (*supra*, p. S70) coincides with the increasing use of leases for agricultural purposes. Because of the procedural advantages of ejectment, leaseholders by this time had no desire to be protected by the seisin-based real actions. Thus, there was no urgent necessity for giving the termor seisin, even though the reason for denying it to him in the first place had ceased.

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[1] Before the development of ejectment (see pp. 55–56 *supra*) the dispossessed leaseholder was confined to an action for damages against an ousting third party, much as if he had suffered the theft or injury of a chattel in his possession. He could, under some circumstances, recover possession if the landlord was the ousting party, but most of the landlord's obligations were enforced by the damage action of covenant.

[2] There is also evidence that leaseholds were used in the early Middle Ages to avoid restrictions on taking interest for loans (usury). *A* would lend money to *B* and take in return a leasehold of *B*'s land, the profits of which would be sufficient to repay the principal and give *A* interest (sometimes at quite high rates) on his loan. Obviously, such leaseholds must be for a fixed period so that the parties know precisely how much is at stake, and it is perhaps for this reason that the leasehold for a fixed term was the first of the types of leaseholds to be developed.

Landlord-tenant law today is enormously complex and changing. We will devote a whole chapter to it, *infra*. What follows is but a sketch of the landlord-tenant relationship. [p*434]

The heart of the landlord-tenant relationship is the granting by the landlord to the tenant of the right to possession for some period less than infinity reserving to himself the right to a payment known as a *rent*. If the rent is expressly reserved (as it is normally), the landlord has retained an interest in the land, also called a rent, and could, at least at common law, enforce that interest by seizing chattels on the land by a process called distress or distraint. *See* DKM3, pp. 697–99. In the absence of a reservation the tenant's liability to pay the rent is probably personal only, but even if no mention is made of rent, the common law gave the landlord an action for the reasonable value of the leasehold known as *assumpsit for use and occupation,* which lay unless it was clear that the leasehold was granted to the tenant gratuitously. *See* p. S142 *supra*.

You will notice that we defined a lease as the conveyance of the right to possession for some period less than infinity. At common law it was possible for *G* to grant *A* a fee reserving a rent in perpetuity, but such a grant did not create a leasehold in *A* but a freehold interest subject to a rent, the whole being known as a *fee farm* (from the Latin *firma* meaning "rent"). Many American jurisdictions recognize such interests, although they are sometimes called by the misleading and confusing term leases in fee. In at least one state, Maryland, such interests are quite common.[3]

Granted that the leasehold is less than infinite in duration there must, by the principle of conservation of estates, be something left over. This something is frequently, though somewhat inaccurately, called the *reversion* of the landlord. Since, however, the landlord has not parted with his seisin, it is more precise to say that he has a *fee subject to a term of years*.

The conveyance of an interest in a fee subject to a term of years was awkward at common law since the grantor could not physically deliver seisin to the grantee if the tenant was already on the land. The law came to recognize, somewhat illogically, the creation of a vested remainder following a term of years: "to *A* for 30 years, remainder to *B* and his heirs," but would not allow the creation of a contingent remainder: "to *A* for 30 years, remainder to *B* if he marries my daughter." After the Statute of Uses it became possible to create a contingent executory interest following a term of years.

The *term* or *estate for years* is probably the most common of the true leaseholds. Despite its alternative name, a term at common law may be for any fixed period of time, and here the common law let the market work out the appropriate lengths. Note that a grant "to *A* for ninety-nine years" does not violate the Rule Against Perpetuities because both the landlord's and the tenant's interests are "vested" from the very start (*see* § 2C4 *supra*). A few states have, however, put statutory limits on the length of leaseholds, but most states permit long leaseholds, and they are quite common in commercial leases and, in a few jurisdictions, residential ones as well. The term of years is freely alienable and may pass to the lessee's legatees or distributees by will or intestacy, but provisions to the contrary are frequent and enforceable, since the Rule Against Direct Restraints on Alienation is generally held not to apply to leaseholds.

At common law there were no conditions implied in a lease against or in favor of either the landlord or the tenant, with one exception: the landlord must not interfere with the tenant's possession of the premises. If he did, [p*435] the tenant could surrender his tenancy to the landlord by quitting the premises and relieve himself from the terms of the lease. The tenant's right to possession was subject to no implied conditions. Even if the tenant failed to pay rent, the landlord's remedy was not forfeiture but distraint. There have been numerous changes in these rules both by private law-making through express covenants and conditions in leases and by statutory and case law developments. *See* Ch. 4 *infra*; *see also* DKM3, Ch. 6.

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[3] See Kaufman, *The Maryland Ground Rent-Mysterious but Beneficial*, 5 MD. L. REV. 1 (1940).

The *periodic tenancy* is like the term of years in all respects but one. The term of the leasehold has no fixed expiration period but runs from period to period, subject to cancellation by either party's giving notice to the other within the time fixed by law. The most common periodic tenancies, although not the only ones permitted by law, are those from week-to-week, month-to-month, and year-to-year. At common law, in the absence of express agreement to the contrary, the notice periods for cancellation were one week, one month, and six months, respectively, prior to the end of the period. These periods have been subject to considerable statutory change. *See* DKM3, pp. 677–79.

The *tenancy at will* is an odd bird. It is a tenancy subject to cancellation by either party at any time. Because of its peculiarly personal character, such tenancies are not alienable. Attempted alienation, the death of either party, or alienation of the underlying fee destroys the tenancy. Tenancies at will are rarely created on purpose; rather they are normally the result of an unsuccessful attempt to create something more. When a tenant enters in good faith under a void lease, the courts frequently call him a tenant at will, so that he will not be liable for trespass unless and until the landlord gives him notice to quit.

Tenancy at sufferance is hardly a tenancy at all. It is never created consciously, but is used by the courts to describe the tenant who holds over after the end of his term. In these situations the landlord may, at his option, treat the tenant as a trespasser and eject him, or hold him for another term. Thus, the tenant at sufferance is one who is a tenant if the landlord allows (suffers) it. See DKM3, pp. 678–82.

E. MARITAL ESTATES

Feudal society was dominated by males, and this domination is reflected in its law. But no body of law, particularly one as complex as the common law of marital estates, reflects a single purpose. Thus, in addition to male dominance the common law also reflects views about the nature of transactions in the family and about protection of the economic interests of the widow or widower after the death of the spouse. It has fallen to the law today to try to sort these elements out in an effort to mollify or eliminate the elements of male dominance. *See* Section 4; DKM3, pp. 564–71.

1. The Rights of the Husband

In speaking of marital estates at common law we must differentiate carefully between real and personal property. As jurisdiction over realty came to center in the king's courts, we can be relatively certain about what the rules were. Personalty, on the other hand, was subject to multiple and conflicting jurisdictions, so that we can be far less certain of what the rules were, much less how they worked.

The unity of married persons is recognized for many purposes at common law, but never to the complete exclusion of the separate property [p*436] holding capacity of each spouse. The common law never developed a system of community property. *See* § 2E6; pp. S321–323 *infra*. When, however, the law was looking to the married couple as an entity, the husband clearly dominated that entity. While the husband could perform most legal acts independent of his wife, the wife could not do the same. She could not, without her husband's being a party to the transaction, convey property *inter vivos* or by will or enter into contracts, nor could she sue or be sued without her husband being a party to the action. (Modern research has shown this statement to be considerably overdrawn,[1] but we think it remains a reasonably accurate generalization about

[1] See, e.g., Sheehan, *The Influence of Canon Law on the Property Rights of Married Women in England*, 25 MEDIAEVAL STUDIES 109 (1963).

Chapter 4

THE HOUSING PROBLEM—THE CHANGING LAW OF LANDLORD AND TENANT

Section 1. FITNESS OF THE PREMISES AND DUTY TO REPAIR AND MAINTAIN

[p*749]Nowhere in the landlord-tenant area has the speed and extent of change been greater than in the rules governing responsibility for maintenance of leased residential premises. The materials which follow trace this development, in common law and statutory terms. Judicial change has reflected a blending together of property, contract and tort doctrine, not always in a wholly consistent pattern, as well as a new willingness to utilize housing codes and similar legislation as the measure of liability between landlord and tenant. It is this integration of doctrine and legislation which is the focus of these materials. The materials are organized in terms of two somewhat different concepts, the warranty of fitness and the duty to repair, although, as we shall see, the two have in many jurisdictions become one. Finally, note that examination of the traditional rules is not simply a historical exercise. There are jurisdictions adhering to the traditional view for all leases, and a number more where change has been confined to residential leases.

1. *Javins* and its Progeny

JAVINS v. FIRST NATIONAL REALTY CORP.
United States Court of Appeals for the District of Columbia Circuit
428 F.2d 1071, *cert. denied*, 400 U.S. 925 (1970)

WRIGHT, J. These cases present the question whether housing code violations which arise during the term of a lease have any effect upon the [p*750] tenant's obligation to pay rent. The Landlord and Tenant Branch of the District of Columbia Court of General Sessions ruled proof of such violations inadmissible when proffered as a defense to an eviction action for nonpayment of rent. The District of Columbia Court of Appeals upheld this ruling. Saunders v. First National Realty Corp., 245 A.2d 836 (1968). Because of the importance of the question presented, we granted appellants' petitions for leave to appeal. We now reverse and hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.

I

The facts revealed by the record are simple. By separate written leases, each of the appellants rented an apartment in a three-building apartment complex in Northwest Washington known as Clifton Terrace. The landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions on April 8, 1966, seeking

possession on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. The tenants, appellants here, admitted that they had not paid the landlord any rent for April. However, they alleged numerous violations of the Housing Regulations as "an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim," as provided in the rules of the Court of General Sessions. They offered to prove

> "[t]hat there are approximately 1500 violations of the Housing Regulations of the District of Columbia in the building at Clifton Terrace, where Defendant resides some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a course of conduct of violation of the Housing Regulations to the damage of Defendants * * *."

Settled Statement of Proceedings and Evidence, p. 2 (1966). Appellants conceded at trial, however, that this offer of proof reached only violations which had arisen since the term of the lease had commenced. The Court of General Sessions refused appellants' offer of proof and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, rejecting the argument made by appellants that the landlord was under a contractual duty to maintain the premises in compliance with the Housing Regulations. [Citation omitted.]

II

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. . . .

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. 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 [p*751] not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. . . .

Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases. Proceeding piecemeal has, however, led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead."

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.[1]

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[1] This approach does not deny the possible importance of the fact that land is involved in a transaction. The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.

We also intend no alteration of statutory or case law definitions of the term "real property" for purposes of statutes or decisions on recordation, descent, conveyancing, creditors' rights, etc. We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between

III

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability. . . .

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and services must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of fitness and merchantability in such situations. In most areas product liability law has moved far beyond "mere" implied warranties running between two parties in privity with each other.

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate. Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product. For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness. In other cases courts have held builders of new homes liable for breach of an implied warranty that all local building regulations had been complied with. And following the developments in other areas, very recent decisions and commentary suggest the possible extension of liability to [p*752] parties other than the immediate seller for improper construction of residential real estate.

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal, rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract. However, the Supreme Courts of at least two states, in recent and well reasoned opinions, have held landlords to implied warranties of quality in housing leases. Lemle v. Breeden, S.Ct. Hawaii, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). See also Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961). In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability.[2] In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

IV

A. In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.

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themselves. The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law. *See* 2 M. Planiol, Treatise on the Civil Law § 1663 *et seq*. (1959); 11 La.Stat.Ann., Civil Code, Art. 2669 (1952).

[2] Although the present cases involve written leases, we think there is no particular significance in this fact. The landlord's warranty is implied in oral and written leases for all types of tenancies.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages. Such a rule was perhaps well suited to an agrarian economy; the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself. These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.

Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land was destroyed. Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down. The court simply pointed out that the urban tenant had no interest in the land, only in the attached building.

Another line of cases created an exception to the no-repair rule for short term leases of furnished dwellings. . . .

These as well as other similar cases demonstrate that some courts began some time ago to question the common law's assumptions that the land was [p*753] the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no longterm interest in the property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above. In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).[3]

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[3] Nor should the average tenant be thought capable of "inspecting" plaster, floorboards, roofing, kitchen appliances, etc. To the extent, however, that some defects *are* obvious, the law must take note of the

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases. Since the lessees continue to pay the same rent, they were [sic] entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The [p*754] inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

Thus we are led by our inspection of the relevant legal principles and precedents to the conclusion that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts[4] for urban dwellings.

B. We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers.

. . . [P]revious decisions of this court, however, have held that the Housing Regulations create legal rights and duties enforceable in tort by private parties. [*E.g.*,] Whetzel v. Jess Fisher Management Co., 108 U.S.App. D.C. 385, 282 F.2d 943 (1960) . . . .

The District of Columbia Court of Appeals gave further effect to the Housing Regulations in Brown v. Southall Realty Co., 237 A.2d 834 (1968). . . . The *Brown* court relied particularly upon Section 2501 of the Regulations which provides:

> "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

By its terms, this section applies to maintenance and repair during the lease term. Under the *Brown* holding, serious failure to comply with this section before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after

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present housing shortage. Tenants may have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.

[4] We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded. *See* Henningsen v. Bloomfield Motors, Inc., *supra* . . . .

it has been signed. To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

This principle of implied warranty is well established. Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct. In a case closely analogous to the present ones, the Illinois Supreme Court held that a builder who constructed a house in violation of the Chicago building code had breached his contract with the buyer: [p*755]

> " * * * [T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it. * * *
>
> "The rationale for this rule is that the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it.' * * * Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties."

We follow the Illinois court in holding that the housing code must be read into housing contracts—a holding also required by the purposes and the structure of the code itself.[5] The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.[6] . . .

We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

V

In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles,[7] however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.[8]

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[5] Schiro v. W.E. Gould & Co., . . . 18 Ill.2d [538], 544, 165 N.E.2d [286], 290 [(1960)]. As a general proposition, it is undoubtedly true that parties to a contract intend that applicable law will be complied with by both sides. We recognize, however, that reading statutory provisions into private contracts may have little factual support in the intentions of the particular parties now before us. But, for reasons of public policy, warranties are often implied into contracts by operation of law in order to meet generally prevailing standards of honesty and fair dealing. When the public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people. [Citation omitted.]

[6] Any private agreement to shift the duties would be illegal and unenforceable. The precedents dealing with industrial safety statutes are directly in point . . . .

[7] In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability.

[8] To be relevant, of course, the violations must affect the tenant's apartment or common areas which the tenant uses. Moreover, the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action. However, violations resulting from inadequate repairs or materials which disintegrate under normal use would not be assignable to the tenant. Also we agree with the District of Columbia Court of Appeals that the tenant's private rights do not depend on official inspection or official finding of violation by the city government. Diamond Housing Corp. v. Robinson, 257 A.2d 492, 494 (1969).

At trial, the finder of fact must make two findings: (1) whether the alleged violations[9] existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's [p*756] total breach, then the action for possession on the ground of nonpayment must fail.[10]

The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord. In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.

The judgment of the District of Columbia Court of Appeals is reversed and the cases are remanded for further proceedings consistent with this opinion.[11]

So ordered.

CIRCUIT JUDGE ROBB concurs in the result and in Parts IV-B and V of the opinion.

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[9] The jury should be instructed that one or two minor violations standing alone which do not affect habitability are de minimis and would not entitle the tenant to a reduction in rent.

[10] As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.

[11] Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective procedure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only factual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid.

As a general rule, the escrowed money should be apportioned between the landlord and the tenant after trial on the basis of the finding of rent actually due for the period at issue in the suit. To insure fair apportionment, however, we think either party should be permitted to amend its complaint or answer at any time before trial, to allege a change in the condition of the apartment. In this event, the finder of fact should make a separate finding as to the condition of the apartment at the time at which the amendment was filed. This new finding will have no effect upon the original action; it will only affect the distribution of the escrowed rent paid after the filing of the amendment.

Notes and Questions

1. Rarely do we have an indication of the personal motivations of a judge other than what appears on the face of the opinion. Judge Wright, however, in a letter dated October 14, 1982, broke the normal rule of judicial silence and shared with a law professor who was writing an article about Wright's opinions in the landlord-tenant area his thoughts on what he was he was trying to accomplish:

Dear Professor Rabin:

Why the revolution in landlord-tenant law is largely traceable to the 1960's rather than decades before I really cannot say with any degree of certainty. Unquestionably the Vietnam War and the civil rights movement of the 1960's did cause people to question existing institutions and authorities. And perhaps this inquisition reached the judiciary itself. Obviously, judges cannot be unaware of what all people know and feel.

> With reference to your specific question, I was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these [p*757] conditions played a subconscious role in influencing my landlord and tenant decisions.
>
> I came to Washington in April 1962 after being born and raised in New Orleans, Louisiana for 51 years. I had never been exposed, either as a judge or as a lawyer, to the local practice of law which, of course, included landlord and tenant cases. I was Assistant U.S. Attorney, U.S. Attorney, and then U.S. District Court judge in New Orleans before I joined the U.S. Court of Appeals in Washington. It was my first exposure to landlord and tenant cases, the U.S. Court of Appeals here being a writ court to the local court system at the time. I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital.
>
> I offer no apology for not following more closely the legal precedents that had cooperated in creating the conditions that I found unjust.
>
> Sincerely,
>
> s/J. Skelly Wright

Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L.REV. 517, 549 (1984). In July of 1970, by act of Congress, the United States Court of Appeals for the District of Columbia Circuit ceased to be the "writ court" to the local court system in the District. D.C.CODE ANN. §§ 11–101 to 11–202 (1981).

2. Is Judge Wright doing anything more than extending the reasoning of *Brown v. Southall Realty*, *supra*, p. S225, to defects existing after commencement of the lease term? If your answer to that question is "yes" (and most of those who have studied the case have answered "yes"), what more is he doing? The following notes attempt to test the limits of the concepts employed in *Javins*, making use of the numerous cases and statutes that have followed, or have been influenced by, *Javins*. Note 9 summarizes where we are today.

3. To what types of property does the rationale of *Javins* apply? Would it apply to the lease of grazing land? A factory? A shop? A single family dwelling? Only dwellings subject to a housing code? Most recent statutes imposing a warranty of habitability are applicable to all residential leases, but only to residential leases. There is greater variation in judicial decisions. A subsequent court decision in the District of Columbia has confined *Javins* itself to property subject to the local housing code, a category that in many jurisdictions is narrower than all residential housing. Winchester Management Corp. v. Staten, 361 A.2d 187 (D.C.App.1976). In Illinois, the initial decision following *Javins* confined the warranty to multiple-unit dwellings. Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972). Subsequent Illinois decisions, however, have extended the warranty to single-family residences and to units not subject to a housing or building code. *See* Glasoe v. Trinkle, 107 Ill.2d 1, 479 N.E.2d 915 (1985). In Zimmerman v. Moore, 441 N.E.2d 690 (Ind.Ct.App.1982), on the other hand, a tort case, the court refused to extend the warranty to a "single-family, used dwelling." There has even been a suggestion that the warranty is confined to urban residential property. *See* Steele v. Latimer, 214 Kan. 329, 521 P.2d 160 (1973). Can you perceive a rationale for such distinctions? For a good piece on a part of the problem, see Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 DUQ.L.REV. 637 (1984). [p*758]

Could *Javins* be used to impose a duty to repair commercial property, or, going beyond that, to impose an implied warranty that such property is fit for the specific use proposed by the tenant? Many courts confronted with the issue have held that no such implied warranties or covenants

exist in commercial leases. *See, e.g.*, McArdle v. Courson, 82 Ill.App.3d 123, 402 N.E.2d 292 (1980); *cf.* Knapp v. Simmons, 345 N.W.2d 118 (Iowa 1984) (no warranty of suitability for particular purpose in oral lease of agricultural land for grazing purposes). Several courts, moreover, have concluded that the doctrine of dependence of covenants is inapplicable to commercial leases, thus leaving the tenant liable for rent even if an express covenant is breached. *See McArdle v. Courson, supra*; Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108 (D.C.App.1973). *But cf.* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Four Seas Investment Corp. v. International Hotel Tenants' Association, 81 Cal.App.3d 604, 146 Cal.Rptr. 531 (1978), both suggesting that a warranty of habitability might be extended to leases where the tenants are *small* business enterprises. Why should the warranty be so confined? And does it make sense to deny the warranty to tenants leasing small parts of larger buildings simply because their use is commercial? *See generally* Comment, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative Approach*, 41 VAND.L.REV. 1057 (1988); Greenfield & Margolies, *An Implied Warranty of Fitness in Non-Residential Leases*, 45 ALB.L.REV. 855 (1981). The Supreme Court of Texas has recently held the warranty applicable to a doctor's office space. Davidow v. Inwood North Professional Group, 747 S.W.2d 373 (Tex.1988).[1]

In Suarez v. Rivercross Tenants' Corp., 107 Misc.2d 135, 438 N.Y.S.2d 164 (App.Term 1981), New York's statutory warranty was held applicable to tenants in cooperative housing. The plaintiff-tenant was a cooperator in the defendant; so he was, in some sense, suing himself. *See* Ch. 3, § 2F7 *supra*.

For the applicability of the warranty to government-owned housing, see DKM3, pp. 828–29.

4. It is clear that the implied warranty in *Javins* extends to latent defects. Nor is there any doubt about the applicability of the continuing obligation to repair—which is part of the "warranty" as defined in *Javins* and its progeny—to defects arising after the beginning of the period of the lease. But what of the situation where a tenant, seeking to rent an apartment, inspects the premises offered by landlord, observes a number of obvious defects, and leases the apartment anyway without any express provision in the lease requiring that they be corrected? Does the implied warranty of *Javins* require the landlord to correct them anyway? None of the modern statutes requiring the landlord to provide and maintain habitable dwellings draws any distinction between latent and patent defects. There are decisions where the courts have suggested that a simple warranty representing that the premises are habitable does not extend to defects which are obvious upon inspection. *E.g.*, Kamarth v. Bennett, 568 S.W. 658 (Tex.1978); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972). There is, however, a division of authority on the point (*see, e.g.*, Boston Hous. Auth. v. [p*759] Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973)), and it is not clear that the same result would follow where the warranty includes a continuing obligation to repair and maintain. Where the warranty does include such a duty, the mere fact that the tenant knew or should have known of the defects at the time of entry has not been determinative. *See, e.g.*, Knight v. Hallsthammar, 29 Cal.3d 46, 623 P.2d 268, 171 Cal.Rptr. 707 (1981); Foisy v. Wyman, 83 Wash.2d 22, 515 P.2d 160 (1973). *See infra*, p. S350, note 8.

This is probably a result of the fact that most of the decisions following *Javins* have agreed that the implied warranty cannot be waived, directly or indirectly. *See, e.g.*, Teller v. McCoy, 253 S.E.2d 114 (W.Va.1978); *Foisy v. Wyman, supra*. Other courts have said that the warranty at least

[1] To say that *Javins* has had relatively little effect on the law involving commercial leases is not to say that the "revolution" in landlord-tenant law has not affected the law of commercial leases. DKM3, p. 729, notes that there are some quite old decisions that treat the covenants in commercial leases as dependent. This tendency has become more noticeable, perhaps as a result of the ferment in residential landlord-tenant law. *See, e.g.*, Hindquarter Corp. v. Property Dev. Corp., 95 Wash.2d 809, 631 P.2d 923 (1981).

cannot be waived as to code violations. *See, e.g., Boston Hous. Auth. v. Hemingway, supra*. *Accord* RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977). The *Restatement* then suggests the use of an unconscionability standard to determine the validity of waivers of breaches not involving code violations. *See id*., comment *e*. For a somewhat similar suggestion *see Mease v. Fox, supra*, at 797. *Compare* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104 (c), (d). In *Knight v. Hallsthammar, supra*, the court concluded that the warranty could not be expressly waived in the lease and that waiver should not be found even where the tenant knew of the defects at the time the lease was entered into and it was apparent that the landlord did not contemplate repairing them.

5. What defects constitute a breach of the implied or statutory warranty? Must the defects be in violation of the housing code? Is any violation of the code a breach of the warranty? In many cases these questions may not seem relevant. If tenant is in an apartment infested with rats, where the wiring is defective, the plaster broken and the toilets inoperative, it may be reasonably clear that the premises are not habitable, whether habitability is defined in terms of code violations, only those code violations which are substantial or affect health and safety, or some external standard. But in many instances the precise standard may be critical.

How does the court in *Javins* formulate the standard? *Compare* RESTATEMENT (SECOND) OF PROPERTY §§ 5.1, 5.5 (1977). The *Restatement* provides that at the time of leasing the landlord's duty is breached if the property is "not suitable for residential use," and that the landlord has the obligation to keep the premises in compliance with "governing health, safety, and housing codes." Tenant may take remedial action if the landlord's breach of the latter obligation renders the premises "unsuitable for the use contemplated," and the landlord has not corrected the problem after being requested to do so. While formulations of the standards contained in judicial decisions vary somewhat, most are agreed that insignificant code violations are not violations of the warranty of habitability. *See, e.g., Green v. Superior Court, supra*, note 2; *but cf. Steele v. Latimer, supra*, note 2. Most decisions have formulated the standard in more generalized terms, namely, that the defects must render the premises unfit for habitation in terms of health, safety or otherwise and that violations of the code are simply evidence going to the ultimate issue of lack of habitability. *See, e.g.*, Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310, *cert. denied*, 444 U.S. 992 (1979).

May a breach of the warranty be found when the specific defects alleged do not violate the housing code? Although there is some authority to the contrary, most courts passing on the question have concluded that a violation may occur [p*760] whenever the premises become uninhabitable, whether or not the code is violated. *See, e.g., Park West Management Corp. v. Mitchell, supra*; *Boston Hous. Auth. v. Hemingway, supra*, note 2; *but see Winchester Management Corp. v. Staten, supra*, note 2 (limiting *Javins* to code violations). For specific examples, see Park Hill Terrace Assocs. v. Glennon, 146 N.J.Super. 271, 369 A.2d 938 (1977) (air conditioning failure deemed breach of warranty); Bay Park One Co. v. Crosby, 101 Misc.2d 586, 421 N.Y.S.2d 529 (Civ.Ct.1979) (failure to provide elevator service for seven days to tenant on twenty-first floor of twenty-two story building held a breach of implied warranty).

The legislative pattern is somewhat similar to the judicial standards described above. Older statutes may speak simply in terms of habitability or fitness, while more recent statutes require that the landlord maintain fitness and comply with housing codes which materially affect health and safety. *See* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104. The statutory standards are discussed in detail in Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URBAN L.ANN. 3, 59–69 (1979).

6. May the tenant assert a breach of the warranty of habitability without a showing of any fault by the landlord? More specifically, must the tenant give landlord notice of the alleged defects and

a reasonable time to repair them before the landlord can be in breach of the warranty? *Compare Pugh v. Holmes*, *supra*, note 4, at 290, 405 A.2d at 906 ("tenant must prove he or she gave notice to the landlord of the defect or condition, that he (the landlord) had a reasonable opportunity to make the necessary repairs, and that he failed to do so") *with* Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 396 N.E.2d 981 (1979) *and Knight v. Hallsthammar*, *supra*, note 3, which conclude that the breach occurs without regard to the landlord's opportunity to repair. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.104 requires that landlord be given notice and the opportunity to repair.

7. Assuming that the landlord has breached the warranty of habitability, what remedies does the tenant have? Because the courts following *Javins* all speak the language of contract, the tenant may undoubtedly maintain a contractual action for damages, or seek specific performance. The amount of damages recoverable is discussed below. Moreover, if the warranty and obligation to pay rent are dependent covenants, the tenant can presumably vacate the premises and terminate the lease. Is this the same as constructive eviction? In such a case the tenant, in a subsequent action for continuing rent due, may have to defend the correctness of his judgment that the landlord breached the warranty. The tenant, upon termination, may also maintain an action for restitution or damages based upon breach while he or she was in possession, claiming that because of the breach all that was owing during the period tenant was in possession was reasonable rental value. *See*, *e.g.*, Roeder v. Nolan, 321 N.W.2d 1 (Iowa 1982); Lane v. Kelley, 57 Or.App. 197, 643 P.2d 1375 (1982); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

Most tenants have attempted to use breach of the warranty as a defense, either to an action for rent or, more often, to a summary eviction action based upon nonpayment of rent. Virtually all the decisions following *Javins* have agreed that the tenant may remain in possession, withhold rent and obtain, in a summary eviction action, a determination of the amount to be abated because of the breach. The adjusted amount is then paid, and the summary eviction action is dismissed. A number of summary eviction statutes have been amended to [p*761] permit this procedure, but the same result generally has been reached without such amendment. How does the court in *Javins* reach this conclusion? *See also Green v. Superior Court*, *supra*, note 2; *Foisy v. Wyman*, *supra*, note 3. *But see Boston Hous. Auth. v. Hemingway*, *supra*, note 2.

How much is the rent to be abated? Is *Javins* instructive on the question? Several different approaches have been utilized in determining the amount of rent abatement (or damages). One approach has recognized the measure of damages (or amount of abatement) as "the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach." Park West Management Corp. v. Mitchell, *supra*, note 3, at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317. *See* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

A second measure is "the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition." Green v. Superior Court, 10 Cal.3d 616, 638, 517 P.2d 1168, 1183, 111 Cal.Rptr. 704, 719 (1974); *Teller v. McCoy*, *supra*, note 3. Do you see a difference between these two formulations?

One court has indicated that the second formula is to be used for the period while the tenant remained in possession, but that if the tenant vacates and seeks to recover for the value of the unexpired term he gets the value of his bargain. For this measurement the court suggested a third formulation: the "difference between the fair rental value of the premises if they had been as warranted and the promised rent, computed for that period." *Mease* v. *Fox*, *supra*, note 3, at 797. Does this make sense? The court suggested that it does because "when tenant vacates he is then

unaffected by the condition of the premises, and that factor loses relevance in the damage equation." *Id.*

A fourth approach to damages (and abatement) has been to reduce the agreed rental by a percentage equal to the percentage of use which the tenant lost because of the breach. *See, e.g.*, Cazares v. Ortiz, 109 Cal.App.3d Supp. 23, 168 Cal.Rptr. 108 (1980); *Pugh v. Holmes*, *supra*, note 4; Academy Spires, Inc. v. Brown, 111 N.J.Super. 477, 268 A.2d 556 (Dist.Ct.1970). The *Restatement* also uses a percentage approach, abating rent based upon a ratio of fair rental value after the conditions occurred to the fair rental before, RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1979), an approach the court in *Cazares* dismissed as "mind boggling." 109 Cal.App.3d Supp. at 32, 168 Cal.Rptr. at 112. [p*762]

None of these approaches to abatement authorizes full rent withholding, i.e., remaining in possession with no obligation to pay any rent, unless the damages as calculated above exceed the rent due. Can you imagine such a case?

The four approaches to damages discussed above all measure loss of value related to the premises leased. It is generally agreed that the tenant may also recover foreseeable incidental and consequential contract damages. *See Mease v. Fox*, *supra*, note 3, at 797. May the tenant, in addition, recover tort damages, based upon breach of the implied warranty, for emotional distress, or punitive damages? For arguments supporting such an approach, *see* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF.L.REV. 1444 (1974); Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH.L.REV. 869 (1967). A few decisions have suggested that such damages for emotional distress might be appropriate in egregious cases. One case that takes such an approach is Simon v. Solomon, 385 Mass. 91, 431 N.E.2d 556 (1982), DKM3, p. 783.

The tenant may not desire to withhold all or part of the rent due, to seek other equitable relief, or bring damage actions. Suppose the simple case of the defective toilet. All the tenant wants to do is repair the toilet, and deduct what the repairs cost from the rent due. Assuming that the condition of the toilet is a violation of the implied warranty of habitability, may the tenant simply "repair and deduct"? A number of states authorize the remedy by statute (DKM3, pp. 777–79). But what if the state does not? *See* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), discussed DKM3, p. 779.

Remedies conferred by statutes creating a warranty of habitability vary. Examine the provisions of the Uniform Residential Landlord and Tenant Act. What remedies does the Act provide? Other statutes less comprehensive than those patterned after the Uniform Act may be silent as to remedy, leaving the issues discussed above to be resolved by the courts.

8. Note the last footnote in Judge Wright's opinion. When may the tenant, as defendant in an eviction action, be required to pay rent into the court registry? The District of Columbia courts have continued to have difficulties with protective orders, particularly in connection with stays of eviction judgments pending appeal. *See* Note, *Protective Orders to Provide Rent Collection, Loophole for Landlords?*, 31 CATH.U.L.REV. 615 (1981). For other cases requiring or approving the use of such protective orders, see *Teller v. McCoy*, *supra*, note 3; Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo.Ct.App.1973); *Green v. Superior Court*, *supra*, note 6.

9. *Javins* has been followed, in whole or in part, by a large number of state courts. Many other states now have legislation generally requiring the landlord of residential premises to maintain the property in habitable condition. By 1979, some 40 states had a form of warranty of habitability. *See Pugh v. Holmes*, *supra*, note 4, at 281 n.2, 405 A.2d 897, 901 n. 2 (1979), where the authority for each state is meticulously listed. A form of such warranty is set out in RESTATEMENT (SECOND) OF PROPERTY §§ 5.1, 5.4, 5.5 (1977). There are wide variations in these decisions,

some of which have been examined in the preceding notes. State courts in Alabama, Colorado, Florida, Idaho, Kentucky, Oregon, North Carolina and South Carolina have gone against the tide, refusing to extend an implied warranty to any residential leases. *See, e.g.*, Blackwell v. Del Bosco, 191 Colo. 334, 558 P.2d 563 (1976) (such a change in the law is a legislative function); Martin v. Springdale Stores, Inc., 354 So.2d 1144 (Ala.Civ.App.), *cert. denied*, 354 So.2d 1146 (Ala.1978). Of these states only Alabama and Colorado have no form of legislation imposing a warranty or repair obligation on the landlord. *See* FLA.STAT. §§ 83.51, 83.60 (1987 & Supp.1991); IDAHO CODE § 6–320 (1990); KY.REV.STAT.ANN. § 383.595 (Michie/Bobbs Merrill 1972 & Supp.1990); N.C.GEN.STAT. § 42–42 (1984); OR.REV.STAT. 90.320 (1990); S.C.CODE ANN. § 27–40–440 (Law.Co-op.1976 & Supp.1989).

Over half the states now have legislation imposing duties of maintenance on landlords leasing residential property. A significant number are patterned after the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, § 2.104. Other statutes are not as comprehensive, or vary significantly from the Uniform Act in some other fashion. *See, e.g.*, MICH.COMP.LAWS ANN. § 554.139. The statutes are classified and discussed in R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 3.30–3.45 (1980 & Supp.1990). In some states, comprehensive legislation imposing a warranty of habitability was enacted after the state courts [p*763] had already recognized the implied warranty, thus to a degree superseding these decisions. *See, e.g.*, WASH.REV.CODE ANN. § 59.18.010 *et seq.* (1990).

There is a large body of literature dealing with the implied warranty of habitability. Two of the most useful comprehensive treatments of the subject are Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB.L.ANN. 3 (1979); Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L.REV. 1 (1976), extracts from which appear in DKM3, pp. 763, 765, 859. *See also* Chase & Taylor, *Landlord and Tenant: A Study in Property and Contract*, 30 VILL.L.REV. 571 (1985).

10. Suppose the tenant, acting pursuant to *Javins*, withholds his rent. After one month, the landlord terminates his month-to-month tenancy and brings an action to recover possession. Does the court in *Javins* indicate that this is permissible? Might a retaliatory eviction defense be available to the tenant? Would a typical reataliatory eviction statute, *e.g.*, MICH. COMP. LAWS ANN. § 6005720 (West 1987), cover this situation?

11. A number of courts have allowed tenants (and in some cases others) to recover damages for personal injuries proximately caused by breach of a landlord's express covenant to repair. Does it follow that breach of an implied warranty of habitability can also result in such tort liability? *See* DKM3, pp. 792–800.

12. *Javins* authorizes one form of rent "withholding." A number of states have specific rent withholding (or rent escrow) statutes which, in many cases, predate the development of the implied warranty of habitability. Consider PA. STAT. ANN. tit 35, § 1700–1 (Purdon 1977). [p*770]

2. The Concept of Warranty

As *Javins* indicates, the general rule of the older authorities is:

> There is no implied covenant or warranty that at the time the term commences the premises are in tenantable condition or that they are adapted to the purpose for which leased. . . . The reason assigned for this rule is that the tenant is a purchaser of an estate in land, subject to the doctrine of caveat emptor. He may inspect the premises and determine for himself their suitability or he may secure an express warranty. . . .

1 A.L.P. § 3.45, at 267. As the following case indicates, many courts, even before *Javins*, were finding this reasoning unpersuasive. Although the general rule remains as stated above in some states, it is subject to exceptions, and what remains is being put into doubt by legal developments on a number of other fronts. [p*771]

LEMLE v. BREEDEN

Supreme Court of Hawaii

51 Hawaii 426, 462 P.2d 470, 40 A.L.R.3d 637 (1969)

LEVINSON, J. This case of first impression in Hawaii involves the doctrine of implied warranty of habitability and fitness for use of a leased dwelling. The plaintiff-lessee (Lemle) sued to recover the deposit and rent payment totalling $1,190.00. Constructive eviction and breach of an implied warranty of habitability and fitness for use were alleged as the basis for recovery. The defendant-lessor (Mrs. Breeden) counterclaimed for damages for breach of the rental agreement. The trial court, sitting without a jury, held for the plaintiff and the case comes to us on appeal from that judgment.

The facts in this case are relatively simple and without substantial conflict. The rented premises involved are owned by the defendant, Mrs. Breeden, and are located in the Diamond Head area of Honolulu. The house fronts on the water with the surrounding grounds attractively landscaped with lauhala trees and other shrubbery. The dwelling consists of several structures containing six bedrooms, six baths, a living room, kitchen, dining room, garage, and salt water swimming pool. The main dwelling house is constructed in "Tahitian" style with a corrugated metal roof over which coconut leaves have been woven together to give it a "grass shack" effect. The house is relatively open without screening on windows or doorways.

The defendant herself occupied the premises until sometime between September 14 and September 17, 1964, when she returned to the continental United States, having authorized a local realtor to rent the house for her. On September 21, 1964 during the daylight hours, the realtor showed the home to the plaintiff and his wife, newcomers to Hawaii from New York City, and told them that it was available for immediate occupancy. The plaintiff saw no evidence of rodent infestation during the one-half hour inspection.

That evening the rental agreement was executed. It was for the periods September 22, 1964 to March 20, 1965, and April 17, 1965 to June 12, 1965. The rental was $800.00 per month fully furnished. Mrs. Breeden reserved the right to occupy the premises between March 20 and April 17, 1965. The plaintiff tendered a check to the defendant's agent for $1,190.00 at that time.

The very next day, September 22, 1964, the plaintiff, his wife and their four children, who had been staying in a Waikiki hotel, took possession of the premises. That evening it became abundantly evident to the plaintiff that there were rats within the main dwelling and on the corrugated iron roof. It was not clear whether the rats came from within the house or from the rocky area next to the water. During that night and for the next two nights the plaintiff and his family were sufficiently apprehensive of the rats that they slept together in the downstairs living room of the main house, thereby vacating their individual bedrooms. Rats were seen and heard during those three nights.

On September 23, 1964, the day after occupancy, the defendant's agent was informed of the rats' presence and she procured extermination services from a local firm. The plaintiff himself also bought traps to supplement the traps and bait set by the exterminators. These attempts to alleviate the rat problem were only partially successful and the succeeding two nights were equally sleepless and uncomfortable for the family. [p*772]

On September 25, 1964, three days after occupying the dwelling, the plaintiff and his family vacated the premises after notifying the defendant's agent of his intention to do so and demanding the return of the money which he had previously paid. Subsequently this suit was brought.

The trial judge ruled that there was an implied warranty of habitability and fitness in the lease of a dwelling house, that there was a breach of warranty, that the plaintiff was constructively evicted, and that the plaintiff was entitled to recover $1,110.00 plus interest.

We affirm. . . .

It is important in a case of this type to separate carefully two very distinct doctrines: (1) that of implied warranty of habitability and fitness for the use intended, and (2) that of constructive eviction. The origin, history, and theoretical justification for these legal doctrines are quite different and are not to be confused.

At common law when land was leased to a tenant, the law of property regarded the lease as equivalent to a sale of the premises for a term. The lessee acquired an estate in land and became both owner and occupier for that term subject to the ancient doctrine of *caveat emptor*. Since rules of property law solidified before the development of mutually dependent covenants in contract law, theoretically once an estate was leased, there were no further unexecuted acts to be performed by the landlord and there could be no failure of consideration. 6 Williston, *Contracts* § 890 (3d ed. 1962). Predictably enough, this concept of the lessee's interest has led to many troublesome rules of law which have endured far beyond their historical justifications. *See* Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L.Rev. 1279 (1960).

Given the finality of a lease transaction and the legal effect of *caveat emptor* which placed the burden of inspection on the tenant, the actual moment of the conveyance was subject to an untoward amount of legal focus. Only if there were fraud or mistake in the initial transaction would the lessee have a remedy. "[F]raud apart, there is no law against letting a tumble-down house." *Robbins* v. *Jones*, 15 C.B.N.S. 221, 240, 143 Engl.Rep. 768, 776 (1863). In the absence of statute it was generally held that there was no implied warranty of habitability and fitness. [Citations omitted.]

The rule of *caveat emptor* in lease transactions at one time may have had some basis in social practice as well as in historical doctrine. At common law leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both landlord and tenant. The land itself would often yield the rents and the buildings were constructed simply, without modern conveniences like wiring or plumbing. Yet in an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes, often signing standardized leases as in this case, common law conceptions of a lease and the tenant's liability for rent are no longer viable. . . .

American and English courts have attempted to circumvent this historical rigidity by the use of the doctrine of constructive eviction which serves as a substitute for the dependency of covenants in a large class of cases involving the enjoyment of the premises. Furthermore, limited exceptions to the general rule of no implied warranty of habitability and fitness are also widely recognized. The exception raised in this case applies when a furnished dwelling is rented for a short period of time. [Citations omitted.] [p*773] This exception has been justified on the ground that there is no opportunity to inspect, therefore the rule of *caveat emptor* does not apply. Nevertheless, some courts have strictly construed this exception limiting it to only "temporary" rentals, defects existing at the time of rental, and defects in furnishings. [Citations omitted.]

While the inability to inspect is the avowed justification for the exception, it is more soundly supported by the obvious fact that the tenant is implicitly or expressly bargaining for immediate possession of the premises in a suitable condition. The fact that a home or apartment is furnished

merely demonstrates the desire for immediate inhabitability as does the brevity of the lease. The exception was plainly a method of keeping the rule of *caveat emptor* from working an injustice in those special circumstances.

Yet it is clear that if the expectations of the tenant were the operative test, the exception would soon swallow up the general rule. "It is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation." *Bowles* v. *Mahoney*, 202 F.2d 320, 326 (D.C.Cir.1952) (Bazelon, J., dissenting). We think that the exception itself is artificial and that it is the general rule of *caveat emptor* which must be reexamined.

In the law of sales of chattels, the trend is markedly in favor of implying warranties of fitness and merchantability. *See* W. Prosser, *Torts* §§ 95, 97 (3d ed. 1964). The reasoning has been (1) that the public interest in safety and consumer protection requires it, and (2) that the burden ought to be shifted to the manufacturer who, by placing the goods on the market, represents their suitability and fitness. Prosser, *supra*, § 97. The manufacturer is also the one who knows more about the product and is in a better position to alleviate any problems or bear the brunt of any losses. *See Escola* v. *Coca Cola Bottling Co*., 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). This reasoning has also been accepted by a growing number of courts in cases involving sales of new homes. [Citations omitted.] The same reasoning is equally persuasive in leases of real property.

The Supreme Court of New Jersey recently re-examined the doctrine of *caveat emptor* in a case involving a tenant who vacated leased business premises after being consistently flooded during every rain. In assessing the relative positions of the parties, that court said:

> It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee. These factors have produced persuasive arguments for re-evaluation of the *caveat emptor* doctrine and, for imposition of an implied warranty that the premises are suitable for the leased purposes and conform to local codes and zoning laws. *Reste Realty Corporation* v. *Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).

The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and [p*774] is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.

Here the facts demonstrate the uninhabitability and unfitness of the premises for residential purposes. For three sleepless nights the plaintiff and his family literally camped in the living room. They were unable to sleep in the proper quarters or make use of the other facilities in the house due to natural apprehension of the rats which made noise scurrying about on the roof and invaded the house through the unscreened openings.

The defendant makes much of the point that the source of the rats was the beach rocks and surrounding foliage. She contends that this exonerated her from the duty to keep the house free of rats. While it is not clear where the rats came from, assuming that they did originate from outside of the premises, the defendant had it within her power to keep them out by proper and timely screening and extermination procedures. Indeed this was done before the next tenant moved in. But to begin such procedures after the plaintiff had occupied the dwelling and to expect that he have the requisite patience and fortitude in the face of trial and error methods of extermination was too much to ask.

We need not consider the ruling of the trial court that the plaintiff was constructively evicted in light of the decision of this court that there was an implied warranty of habitability in this case. The doctrine of constructive eviction, as an admitted judicial fiction designed to operate as though there were a substantial breach of a material covenant in a bilateral contract, no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available. . . .

It is a decided advantage of the implied warranty doctrine that there are a number of remedies available. The doctrine of constructive eviction, on the other hand, requires that the tenant abandon the premises within a reasonable time after giving notice that the premises are uninhabitable or unfit for his purposes. 2 R. Powell, *The Law of Real Property* § 225[3] at 239 (Rohan ed. 1967). This is based on the absurd proposition, contrary to modern urban realities, that "[a] tenant cannot claim uninhabitability, and at the same time continue to inhabit." *Two Rector Street Corp.* v. *Bein*, 226 App.Div. 73, 76, 234 N.Y.S. 409, 412 (1929). Abandonment is always at the risk of establishing sufficient facts to constitute constructive eviction or the tenant will be liable for breach of the rental agreement. Also the tenant is forced to gamble on the time factor as he must abandon within a "reasonable" time or be deemed to have "waived" the defects. [Citations omitted.]

Some courts have creatively allowed for alternatives to the abandonment requirement by allowing for a declaration of constructive eviction in equity without forcing abandonment. *Charles E. Burt, Inc.* v. *Seven Grand Corporation*, [340 Mass. 124, 163 N.E.2d 4 (1959)]. Other courts have found partial constructive eviction where alternative housing was scarce, thus allowing the tenant to remain in at least part of the premises. [Citations omitted.] In spite of such imaginative remedies, it appears to us that to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of [p*775] the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist. We do not agree with Blackstone that "[t]he law of real property . . . is formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole." *Perrin* v. *Blake*, 1 W.Bl. 672, 96 Engl.Rep. 392 (K.B.1772), *quoted in* W.B. Leach, *Property Law Indicted!* 2 (1967). The law of landlord-tenant relations cannot be so frail as to shatter when confronted with modern urban realities and a frank appraisal of the underlying issues.

By adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation, and rescission. These remedies would give the tenant a wide range of alternatives in seeking to resolve his alleged grievance.

In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. Each case must turn on its own facts. Here there was sufficient evidence for the trier of fact to conclude that the breach was material and that the plaintiff's action in rescinding the rental agreement was justifiable. The plaintiff gave notice of rescission and vacated the premises after the landlord's early attempts to

get rid of the rats failed. When the premises were vacated, they were not fit for use as a residence. Nor was there any assurance that the residence would become habitable within a reasonable time. We affirm the judgment for the plaintiff on the ground that there was a material breach of the implied warranty of habitability and fitness for the use intended which justified the plaintiff's rescinding the rental agreement and vacating the premises.

Affirmed.

Notes and Questions

1. *Lemle* bears an obvious resemblance to *Javins* and is cited with approval in *Javins*. How does it differ from *Javins*? Consider (a) the difference in the facts, (b) the difference in theory, and (c) the difference in remedy.

2. *Lemle* was not the first case to hold that a warranty of habitability and fitness is implied in residential leases. Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961), has generally been interpreted as so holding, although some language in the opinion suggests that the court was extending the short-term, furnished-home exception to the common-law rule. *Cf.* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969), referred to in the principal case.

3. Could the court in *Lemle* have reached the same result under a theory of fraud or misrepresentation, assuming that it could have been shown that the landlord was aware of the rat problem? Would the remedies available to the tenant have been any different? What difficulties might the court have had in treating *Lemle* as a constructive eviction case?

4. Suppose there had been no rats present at the time the tenant took possession, but that they had appeared for the first time months later. Would the tenant have had the same defense available? The court states that common law doctrine placed an undue emphasis on the moment the leasehold was conveyed. Has not the court in *Lemle* done the same thing? Traditionally, a warranty of fitness refers to the condition of property at the time of conveyance. [p*776] *See* 1 A.L.P. § 3.45. Is *Lemle* so limited? If so, how does it differ from the approach taken in *Brown v. Southall Realty Co.*, *supra*, p. S336? Which approach is more advantageous to the tenant? Could the tenant in *Lemle* have won his case using the *Brown* illegality theory?

5. The court in *Lemle* states that the tenant has available a variety of remedies, including damages, reformation and rescission. Because vacating the premises was held to have rescinded the lease, tenant was no longer liable for rent. Suppose the tenant had not vacated the premises, and had not paid rent after making complaint to the landlord about the condition of the premises. Does the tenant have a defense under *Lemle* in the landlord's action to recover rent? In *Pines v. Perssion*, discussed *supra*, note 2, the tenants sued to recover a rent deposit. The court concluded that the implied warranty and covenant to pay rent were mutually dependent, that the tenants were absolved from the rent obligation, and that they were liable only for the reasonable rental value of the property during the period of actual occupancy. Does this differ in any significant way from the results arrived at in *Brown v. Southall Realty*? Would you advise a tenant that under *Lemle* he could now withhold rent, while remaining in possession, if the premises were unfit at the time of leasing?

6. The court in *Pines* asserts that the warranty of fitness and obligation to pay rent are mutually dependent. Does *Lemle* reflect the same view in permitting rescission? Suppose a state recognizes a warranty of fitness but adheres to the common law rule that lease covenants are independent. Of what value is the covenant to a tenant who vacates the premises and is sued for rent?

7. What standards does the court in *Lemle* look to in concluding that the premises "were not fit for use as a residence," and that the breach was "material"? Suppose that the tenant alleges that the premises were in violation of the housing code at the time of leasing. Would this fact alone

establish a breach of the warranty? In a subsequent decision extending the warranty of habitability to unfurnished dwellings, the Supreme Court of Hawaii concluded that it was for the factfinder to determine whether a building code violation was a "material" breach of the implied warranty. Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969). How would an implied warranty that the premises comply with code standards differ?

8. Would the court reach the same result in *Lemle* if the landlord had told the tenant about the rat problem, and the tenant leased the premises anyway? To what extent, in other words, is an implied warranty of fitness simply a duty to disclose? Suppose the landlord does not tell the tenant of the defect, but the tenant discovers it while making an inspection and leases the property anyway? Or, to carry the question further, what if the landlord does not disclose and the tenant does not in fact discover, but the defect is obvious? Several courts recognizing the implied warranty have confined its application to latent defects, i.e., those not apparent. *See*, *e.g.*, Kamarath v. Bennett, 568 S.W.2d 658 (Tex.1978);[1] Mease v. Fox, 200 N.W.2d 791 (Iowa 1972). But in Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973), the court went out of its way to assert that the warranty covered patent defects as well. *Compare* Foisy v. [p*777] Wyman, 83 Wash.2d 22, 515 P.2d 160 (1973), holding that there was breach of an implied warranty even though the lessee was aware of the defects and had negotiated a rent reduction because of them. The issue may of course be of little consequence if the landlord expressly or impliedly also covenants to repair, unless acceptance of the property with obvious defects is deemed a waiver.

These questions relate in turn to another. Many form leases contain a clause stating that the tenant has inspected the premises, has found the premises to be in satisfactory condition, and leases them "as is." Or the lease could be more specific, expressly waiving or negating any implied warranty of fitness. Would either or both of these clauses be valid in a state like Hawaii? The validity of such waivers is considered in conjunction with *Javins v. First Nat'l Realty Corp.*, *supra*, p. S332 and in the following notes at S340.

9. A large number of states have legislation providing for an implied warranty of fitness in residential leases. Louisiana imposed such an obligation as early as 1804. LA.CIV.CODE ANN. art.2693 (West 1952). During the late nineteenth century, a number of western states enacted legislation requiring that, unless the parties agreed otherwise, lessors must put property leased for residential purposes into a fit condition, and maintain it in such condition thereafter. Some of these western statutes were silent with respect to remedy, while others authorized the tenant to make repairs and deduct the amounts expended from rent, a remedy common in much of the more recent legislation and discussed in DKM3, p. 778. Most of these statutes, like the Uniform Act contain a blanket prohibition against waiver. Others allow waiver in limited circumstances. *See*, *e.g.*, MASS.GEN.LAWS ANN. ch.111, § 127L (1983 & Supp.1991) (tenant may covenant in lease of at least two years duration to make certain defined repairs in consideration for a substantially lower rent); *see generally* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3.33 (1980 & Supp.1990).

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[1] The warranty recognized in *Kamarath* was changed by legislation. TEX.PROP.CODE.ANN. § 92.052 (Vernon 1984 & Supp.1991) substitutes a duty to repair for the warranty recognized in *Kamarath*. The duty applies only to those conditions that materially affect the physical health or safety of an ordinary tenant. It would seem, however, that it applies to both patent and latent conditions. *See* McSwain & Butler, *The Landlord's Statutory Duty to Repair—Article 5236f: The Legislative Response to Kamarath v. Bennett*, 32 BAYLOR L.REV. 1 (1980).

Arguments and Counterarguments on Compulsory Contract Terms

in J. SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES §8.4.2.2, at 826–33 (2002)[†]

Compulsory contract terms are nonwaivable rights implied in certain kinds of contractual relationships. Important arguments and counterarguments recur in legal discussions of the advisability and legitimacy of making particular contract terms nondisclaimable. Scholarly debates about the wisdom of the implied warranty of habitability have spawned a rich variety of policy considerations relevant to this question. Many of these arguments have been identified and categorized by Professor Duncan Kennedy. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

The following summary should serve as a sort of tool kit for use in advocacy settings.

I. Rights Arguments

Rights arguments focus on the justice or fairness of alternative ways of regulating social relationships.

A. Freedom of Contract Arguments

1. Enforce Voluntary Contracts: Freedom of Action

   a. People should be free to enter into whatever agreements they wish; making particular terms nonwaivable prevents tenants from agreeing to waive the right to withhold rent in return for lower rent, even if they wish to do so; compulsory terms interfere with contractual freedom by preventing individuals from doing the best they can, given their circumstances.

   b. Because of competition among landlords for tenants, landlords do not have the power to dictate terms to tenants; so long as a relatively competitive market for rental housing exists, landlords cannot as a class have disproportionate bargaining power over tenants as a class.[1]

2. Unequal Bargaining Power: Coerced Contracts Entered Into Under Duress Are Not Voluntary

   a. Tenants and landlords have unequal bargaining power because housing is a *necessity* and because of *structural* disparities between landlords and tenants associated with the fact that landlords own real property and tenants do not; in addition, landlords often *collude* by using form leases drafted by real estate associations and including terms favorable to landlords.

   b. No one would voluntarily agree to rent an apartment that did not comply with minimum standards of habitability; the fact that people agree to do so is evidence not that they affirmatively wanted to agree: but that they were forced to agree because they had no legally available alternatives.

   c. Courts should enforce the agreement the parties would have made if they had relatively equal bargaining power; only such contracts can be rightfully deemed voluntary.

B. Distributive Considerations

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1 See Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 Harv. J.L. & Pub. Po1'y 107 (1986).

1. Unfair Burden

   a. So long as a competitive market for rental property exists, the only source of unequal bargaining power between landlords and tenants is that landlords, as a class, may be richer than tenants as a class; tenants cannot afford to pay landlords enough to induce them to offer better housing; if tenants could do so, landlords would provide it because it would be profitable to do so.

   b. Making the implied warranty of habitability nondisclaimable imposes new costs on the landlord since it exposes the landlord to the possibility that the tenant will stop paying rent; the landlord will therefore attempt to raise the rent to compensate for this new vulnerability. However, landlords will not be able to pass the entire cost on to tenants because if tenants were able to afford the true cost of the new duty, it would have been profitable for landlords to provide the term to begin with. Landlords will provide even luxury housing to tenants who can afford it; thus, when landlords try to raise the rent, some tenants will be unable or unwilling to pay a higher rent and will either double up with friends or family, move to a cheaper location, or become homeless. Because some tenants will exit the market when landlords try to raise the rent, landlords as a group will be unable to raise the rent sufficiently to pass on the entire cost of the new duty to the tenants; the result is that some wealth is redistributed between landlords as a class to tenants as a class.

   c. This redistribution is unfair because it places the burden of dealing with poverty on a small subset of the population (that is, landlords) when the obligation to care for poor people should be shared by all taxpayers through rental subsidies or welfare programs; it amounts to a tax on landlords to help tenants. If tenants are too poor to be able to afford habitable housing, the proper remedy is to use the tax system to raise money to provide welfare payments for poor tenants, spreading the cost of providing essential housing services to all taxpayers rather than just the class of landlords. Landlords are not responsible for the poverty of tenants and should not unfairly have to bear the burden of rectifying it by themselves.

2. Justice in Ongoing Social Relationships

   a. It is not unfair to require landlords to bear some of the costs of providing habitable housing; on the contrary, it would be unfair for landlords to make a living by providing substandard housing. Just as product manufacturers have obligation' to provide safe products and employers have duties to-provide safe workplaces, landlords have obligations to provide safe and habitable housing.

   b. Landlords are engaged in the business of earning a living by renting property. In so doing, they create an ongoing relationship with their tenants. It is fair to require them to conduct those relationships in accordance with minimum standards of decency. No one has a right to earn a living from someone else's misery. Just as it is unlawful to enter a contract of slavery, it is unlawful to enter a contract by which one agrees to allow someone else to live in deplorable conditions. Tenants do not have economic incentives to invest in maintenance, since only the owner will recoup the value of the increased value of the property. It is therefore fair to place the burden on the landlord to provide premises consistent with contemporary standards and values.[2]

   c. The failure to comply with the implied warranty of habitability imposes costs on third parties who must deal with the social consequences of substandard housing; the

[2] See Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*: *Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 Yale L.J. 1093 (1971).

community at large should not have to subsidize the landlord by protecting the landlord from liability for the social costs of substandard housing.

C. Paternalism

1. Self-determination

a. Individual citizens are the best judges of their own interests; the state should not prevent people from entering into voluntary agreements on the grounds that it is not in their best interest to enter into such agreements.

b. If tenants are willing to waive rights in exchange for other contractual benefits, such as lower rent, they should be allowed to do so since they are entitled to self-determination; their choice should not be constrained by government on the ground that the choice is mistaken.

2. Real Assent to Contract Terms and Limits to Assent

a. Actual Intent of the Parties

i. A contract by which tenants waive basic rights to habitability is unlikely to represent the actual intent of the parties; tenants may not read or understand what they are agreeing to when they sign form leases that may incorporate terms favorable to the landlord.

ii. The only way to ascertain whether the tenant actually agreed to unfavorable terms is to have the landlord read a disclosure statement to the tenant-a sort of Miranda warning-explaining exactly what the tenant was giving up by waiving his rights, for example, that he was agree" to continue to pay rent even though the landlord was violating her obligations under the contract and that tenant had the legal right to withhold rent.

b. Cognitive Distortion[3]

i. Even if tenants understand what rights they are waiving we should protect people from mistakes they are likely to regret later; people often underestimate the possibility that bad things can happen (for example, that, landlord will fail to provide basic services in the apartment); they may also fail to understand the utility of withholding rent in inducing the landlord's compliance with the building code.

ii. Making particular claims compulsory protects people from the short-run temptation to give up entitlements that they know are in their long-term best interests, as forced saving in the form of Social Security payments, example, protects people from failing to save for retirement or disability

iii. Some preferences are the result of legal rules; people, do not value what they feel they are not entitled to; making an entitlement nondisclaimable may cause people value it more highly and therefore reflect their newly formed preferences; rather than preventing people from satisfying their wishes, compulsory terms may act help people become conscious of what they really value.

c. Real Paternalism

i. *Minimum terms or unconscionability*. Some contractual agreements are so fundamentally unfair or unconscionaable that they should not be enforced even if

[3] See Cass Sunstein, *Legal Interference with Private Preferences*, 52 U Chi. L. Rev. 1129 (1986).

the parties have voluntarily agreed to them; it violates common decency and individual dignity for courts to enforce to that are outrageously unfair.

ii. *Anti-paternalism*. So long as the parties voluntarily agree to the terms of an agreement, the state should not interfere, but rather should let the parties do the best they can for themselves, given their circumstances; it violates individual dignity for the courts to be policing the terms of voluntary agreements.

II. Economic Arguments

Economic arguments focus on the behavioral effects of, or incentives created by, alternative legal rules; the ultimate goal is to choose rules., promote social welfare.

A. Incentives to Invest in Safety and Maintenance

1. Available Income to Pay for Repairs

a. Requiring the tenant to pay rent ensures a steady source of income from which the landlord can pay for needed repairs; allowing the tenant to withhold rent means the landlord may have no resources to make needed repairs.

b. Enforcement of the housing code obligations is sufficiently ensured through administrative enforcement by the housing inspector.

2. Only Effective Sanction for Failing to Comply with the Housing Code

a. Rent withholding is not only an extremely effective way to prevent landlords from violating the housing code but may be the only effective remedy in an era of government cutbacks and a shortage of housing inspectors.

b. Landlords can easily save some of their rental payments in a maintenance fund to prepare for any needed expenses.

B. Effects on Allocative Efficiency in the Housing Market

1. Pareto Optimality

Compulsory contract terms are necessarily inefficient because they interfere with the parties' ability to bargain for mutually beneficial terms. If the tenant is willing to live in a less well-maintained apartment, she should be able to enter into a contract for lower rent and then have money available to use for other things such as food and clothing. Moreover, the landlord is obligated to maintain the apartment under any existing housing code; all the implied warranty adds is the ability to get out of the lease or stop paying rent or obtain a rent reduction if the landlord fails to maintain the premises adequately. The tenant may well believe that the housing code constitutes a sufficient guarantee of performance and be willing to give up other enforcement mechanisms like the right to withhold rent. Preventing the tenant from making such an arrangement prevents both parties from maximizing their utility, thereby reducing social. wealth. Third-party effects are minimal in this situation and are sufficiently addressed by zoning laws and the housing code.

2. Market Imperfections

a. *Externalities*. There are significant third-party effects of substandard housing. It is harmful to children and other inhabitants and produces medical problems that society ultimately must pay for; blighted areas have difficulty attracting new residents and business investment; even if the parties wish to agree to waive particular rights, others are negatively affected by housing contracts that do not give landlords sufficient incentives to comply with the housing code. Allowing waiver therefore decreases social welfare.

b. *Imperfect information*. Tenants may not understand the significance of waiving the implied warranty of habitability even when they do understand, they may incorrectly judge both the likelihood that a violation will occur and the utility of withholding rent if it does; if they had perfect information they would refuse to waive the protections afforded by the warranty. Courts should enforce the results to which the par:, ties would have agreed if they had possessed perfect information.

C. Effects on Distribution

1. Landlords Will Raise the Rent and Decrease the Supply Housing

a. Landlords will respond to the implied warranty by raising the rent. The tenant has the right to withhold rent or break the lease if problems arise; if the landlord is not able to fix the problems quickly, the landlord faces a greater possibility of loss of income than in a legal regime without the implied warranty. To compensate for this additional legal and economic exposure, the landlord will respond by raising the rent, hurting tenants—the very people the reformers intended to help.

b. In a competitive market, any significant increase in rent will cause some tenants to leave the market. Because demand sensitive to price (higher rents may reduce the quantity:, housing demanded as some tenants double up or becoming homeless), landlords are unlikely to pass on to their tenant; the full cost of the implied warranty. Marginal landlords who are barely making it will not be able to cover the full costs of the new regulation, and some of them will leave the rental housing market altogether. Thus, since the costs of doing business have gone up, the supply of housing will go down, as some landlords shift to more profitable investments: With a decreased supply of housing, even more competition for the housing remains, further raising the price and subject tenants to even higher rents, again hurting the very people the regulation was intended to benefit.

2. Effect of the Implied Warranty Will Depend on Existing Conditions in the Market

a. It is impossible to predict, *a priori*, what effects the implied warranty will have on the market. The result depends on a host of factors affecting both demand and supply. For example, if demand is elastic, that is, extremely price-sensitive and the price of housing services goes up even a little, quantity demanded falls precipitously. This may happen because tenants are already paying rents that are high relative to their incomes and simply cannot afford higher housing costs; it may be that tenants prefer not to pay any more and are willing to double up with roommates or family members or even move out of town to limit their housing expenses. If demand is highly elastic, landlords may simply be unable to pass the cost along to tenants. Any landlord who tries to do so will find no takers for her apartment and will be forced to lower the rent in order to stay in business.

b. Imposition of the implied warranty may not decrease the supply of housing if landlords are earning economic rents, which exceed the minimum required to keep the investment in its current use. This could happen if land is scarce but demand is high because of both the necessity and the limited availability of housing. Landlords may be able to raise rents substantially, making housing far more profitable than equally risky investments. In a perfectly competitive market, more housing providers would enter the market, increasing the supply of housing and thereby lowering the price as tenants have more places available. If, however, the supply of housing cannot rise either because land is scarce or because zoning laws prohibit owners from increasing the size of their buildings or constructing rental housing in nonresidential areas, then rents will remain high for a long time. If landlords are earning economic

rents with high profits, a reduction in those profits may allow them to stay in business and still earn more than they could in other businesses. The implied warranty would simply redistribute wealth between landlords and tenants but would not result in a decrease in the supply of housing.

c. Even if one landlord cannot afford to stay in the rental housing business, another could still operate the building profitably. A landlord who cannot afford to repair an apartment and is prevented from evicting a particular tenant until the apartment is brought up to housing code standards may not be able to pay her monthly mortgage payments or property taxes if the tenant stops paying rent. If the landlord sells the building, or the bank forecloses on it for failure to pay the mortgage, or the city forecloses for failure to pay taxes, someone else may purchase the property at a much lower price than that paid by the original owner because of the repairs needed to continue operating the business. If the new owner's down payment and monthly mortgage payments are sufficiently low, she may be able to use rent receipts not only to make repairs but also to pay her mortgage, taxes, and insurance. Her initial costs are less; therefore the implied warranty is less burdensome since rental payments are sufficient to pay for current maintenance costs. If this happens, the property can still be used for rental housing purposes and will not be taken out of the rental housing market. [p*802]

Section 2. DIRECT GOVERNMENT INVERVENTION IN THE HOUSING MARKET

It is clear from the preceding materials that America has a housing problem. The precise nature and extent of the problem are matters of some controversy. But however you choose to define the problem, there are undeniably a great many people, most of whom are either in a low income bracket or are members of minority groups, or both, who live in substandard housing as defined by a local housing code or by the Federal Government. There are also a great many people who have no housing at all.

While there is considerable disagreement about the figures, most recent studies suggest that over the course of the last generation American housing [p*803] stock has improved: There are fewer substandard housing units now than there were in the past. *See*, *e.g.*, PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 7 (1988) (reduction in "substandard" housing stock since World War II from more than 40% to less than 5%; others would put the number between 10 and 15 percent[1]). Not surprisingly, this improvement in the housing stock has led to an increase in its cost for the poor, and the increasing unaffordability of housing for the poor is one of the causes of the complex phenomenon of homelessness. *See generally Symposium on Homelessness*, 4 NOTRE DAME J.L.ETHICS & PUB.POL'Y 223–383 (1989).

[1] I Lowry, *Housing Policy for the 1990s: A Planners Guide*, 55 J. AM. PLAN. A. 93 (1989), citing JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 1988 (1988).