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Passion and Prudence: Rent Withholding under New York's Spiegel Law

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PASSION AND PRUDENCE:[1] RENT WITHHOLDING UNDER NEW YORK'S SPIEGEL LAW

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INTRODUCTION

TO Justice Cardozo it was common sense that ". . . unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone."[2] Forty years later we are still seeking an effective means of compelling landlords to make these repairs. During this interval public concern has not waned, nor has there been a significant change in the popular belief that bad housing is responsible for many of the social and health problems of our urban slums.[3] In fact, there is considerable agreement with Michael Harrington's view that "Housing is probably the basic point of departure" in a meaningful campaign to reduce the impact of poverty in our society.[4] But progress has been slow; recently President Johnson reported that "some four million urban families [are] living in homes of such disrepair as to violate decent housing standards."[5]

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1. "The second most passionate human relationship is that of landlord and tenant." Asch, J., in Fanchild Investors, Inc. v. Cohen, 43 Misc. 2d 39, 40, 250 N.Y.S.2d 446, 447 (Civ. Ct. N.Y.C. 1964).

2. Altz v. Lieberson, 233 N.Y. 16, 19, 134 N.E. 703, 704 (1922). This case established that violation of a statutory duty to repair a building might result in tort liability for injuries caused by the failure to repair. While it is true that this liability may induce an owner, either directly because of fear of an adverse judgment or indirectly because of increased insurance risks, to comply with statutory standards, this approach is outside the scope of this paper.

3. Deteriorated housing is frequently associated with serious hazards to health and well being. In the popular view "disease was prevalent in slum areas, accidents were frequent, psychological and social disturbances were often attributable, or thought to be attributable, to substandard housing." Wilner et al., The Housing Environment and Family Life at v (1962). For an opinion somewhat hesitant about confirming the relationship between physical environment and social disorder, see Dean, *The Myths of Housing Reform*, 14 Amer. Soc. Rev. 281-88 (1949); Wilner & Walkley, *Effects of Housing on Health and Performance* in Duhl (ed.), The Urban Condition 215-28 (1963).

In addition to possible physical and emotional consequences, it has recently been suggested that the way in which the law handles problems of slum housing "instructs the poor about the American legal system" and may be significant in attitude formation. See Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 Colum. L. Rev. 275, 285 (1966).

4. Harrington, The Other America 164 (paperback ed. 1963).

5. Special message to Congress on City Demonstration Programs by President Lyndon B. Johnson, January 26, 1966. 112 Cong. Rec. 1101 (H. Doc. No. 368) (1966), reprinted in U.S. Code Cong. & Ad. News, Feb. 20, 1966, pp. 76-77. Other estimates of the magnitude of the problem are even more alarming. A leading housing analyst has recently stated:

> It is fairly common, but depressing, knowledge that, despite the great wealth of the United States, a large proportion of American families still live in housing that is so substandard as to constitute a serious threat to health and safety. According to the 1960 Census, fully one eighth of the country's urban households occupy dwellings that are dilapidated or lacking in sanitary facilities . . . . As a rough approximation, it appears that at least one sixth of our urban population —over 5,000,000 families—reside in a slum environment.

Grigsby, *Housing and Slum Clearance: Elusive Goals*, The Annals 107, 108 (1964).

While the federal government has demonstrated a new interest in urban housing problems over the past fifteen years, and will probably play an increasingly important role in rehabilitating our cities, it is likely that the states and local communities will continue to exercise the most immediate pressure for the repair and restoration of the existing supply of urban housing.[6] The recent enactment of the Spiegel Law in New York state as section 143-b of the Social Welfare Law is one such attempt to promote safe and decent housing for the poor.[7]

Legislative findings accompanying the novel and highly controversial Spiegel Law state the problem clearly and succinctly:[8] "The legislature hereby finds and declares that certain evils and abuses exist which have caused many tenants, who are welfare recipients, to suffer untold hardships, deprivation of services and deterioration of housing facilities because certain landlords have been exploiting such tenants by failing to make necessary repairs and by neglecting to afford necessary services in violation of the laws of the state."[9] The statute itself does not impose new duties upon landlords for the maintenance of safe and sanitary dwellings; these requirements are set forth in the Multiple Dwelling Law, the Multiple Residence Law and numerous local housing codes. What the Spiegel Law does is provide an additional means of compelling irresponsible landlords to meet existing minimum standands for health and safety. One might hope that property owners would adhere to these minimum standards out of a sense of social responsibility, but as Milton Friedman has put it, "the appeal to 'social responsibility' has little effect unless there is an iron fist in the velvet glove."[10] The Spiegel Law, while not quite an "iron fist," most certainly adds starch to the fabric of social responsibility.

Rent withholding by the welfare department is authorized under the Spiegel Law whenever that agency discovers that a recipient of public assistance

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6. For a discussion of current Federal programs which are available to assist local communities enforce housing codes, see Note, *Federal Aids for Enforcement of Housing Codes*, 40 N.Y.U.L. Rev. 948 (1965). Earlier Federal efforts are described in Foard & Fefferman, *Federal Urban Renewal Legislation*, 25 Law & Contemp. Prob. 635 (1960) and in Beyer, Housing and Society, Chapter 14, "History of the Government's Role in Housing," pp. 448-84 (1965).

7. N.Y. Sess. Laws 1962, ch. 997, effective July 1, 1962, as amended by N.Y. Sess. Laws 1965, ch. 701, effective July 2, 1965.

8. The Spiegel Law is believed to be the first statute authorizing rent withholding by welfare departments. In signing the law, Governor Rockefeller commented that the "bill . . . parallels a system now successfully operating in Chicago." Messages of the Governor, McKinney's 1962 Sess. Laws of New York 3678. But the bill's author reported that in drafting the law "there was no detailed information of Chicago practices . . . . The idea for this law crystallized within me and my search revealed this procedure being followed in Chicago without any force or effect of law." Letter From Hon. Samuel A. Spiegel, Judge of the Civil Court of the City of New York, November 24, 1964. (This and all letters hereinafter cited are addressed to the author and are on file in his office.)

The Director of the Cook County Department of Public Aid has explained the Chicago practice as follows: ". . . this agency does not refuse to pay a shelter allowance where recipients are living in sub-standard housing. Welfare rents are not withheld until such time as the Court issues a Mandatory Injunction against the landlord." Letter of January 8, 1965.

9. N.Y. Sess. Laws 1962, ch. 997, § 1.

10. *Social Responsibility: A Subversive Doctrine*, National Review, Aug. 24, 1965, p. 721.

is occupying housing accommodations in a building in which there are violations of law deemed to be "dangerous, hazardous or detrimental to life or health."[11] As long as these serious conditions continue, a welfare recipient is given a statutory defense to any action or summary proceeding for non-payment of rent; he need merely show "existing violations in the building" in which he lives in order to stave off a judgment or an order of eviction for non-payment of rent.[12] It is expected that a landlord will act out of self-interest and rectify the hazardous conditions which thus prevent him from collecting rent as it falls due. When the landlord makes the necessary repairs and removes the hazardous condition, he is entitled to apply to the welfare department for the rent which was withheld, and the department is then able to pay it to him.[13]

The "club of continued occupancy without rent payments"[14] wielded by the Spiegel Law is not entirely new to New York state. Rent withholding has been authorized, under appropriate circumstances, in New York City under section 302 of the Multiple Dwelling Law and under the present section 755 of the Real Property Actions and Proceedings Law[15] for the past thirty years. But now, for the first time, a rent withholding statute has been given statewide applicability, albeit for a limited class of tenants. In addition to this accomplishment, enactment of the Spiegel Law has important symbolic significance in two respects: first, it represents at least tacit recognition of the failure or inadequacy of the traditional methods employed for enforcing housing standards; and second, it is an implied acknowledgment of the inability or unwillingness

11. N.Y. Soc. Welfare Law § 143-b(2). New York is divided into public welfare districts, either by county or city each under the jurisdiction of a local welfare department. N.Y. Soc. Welfare Law § 61. The mechanics of rent withholding are quite simple: in the unusual circumstance where the Department has been paying the relief recipient's rent directly to the landlord, the Department ceases such payments and notifies the landlord of the reason; more commonly, the Department instructs the client to stop paying rent and it reduces the client's stipend by the amount of the usual rent allowance.

12. N.Y. Soc. Welfare Law § 143-b(5).

13. N.Y. Soc. Welfare Law § 143-b(5). Additionally § 143-b(6) provides that "Where rents were reduced by order of the appropriate rent commission, the public welfare department may make provision for payment of the reduced rent in conformity with such order." This is undoubtedly a reference to the authority of the Administration of the New York City Residential Rent Control Law to reduce rents where there has been a reduction in essential services which the landlord is required to provide the tenant. The reduction in rent is also authorized where code violations exist. In practice these reductions are scaled to reflect the seriousness of the adverse conditions. See N.Y.C. Ad. Code §§ Y 51-5.0(h)(2) and (3). For example, in 1963 the Department of Buildings of New York City certified 1529 buildings to the Rent and Rehabilitation Administration for rent reductions. Griebetz, *New York City's Receivership Law*, 21 J. Housing 297, 298 (1964). The view that rent control is one of the causes of deteriorating housing is argued by Gale Johnson in *Rent Control and the Distribution of Income*, Papers and Proceedings of the American Economic Association, May, 1951, pp. 569-82; and for a popular treatment of this same question, see Siekman, *The Rent Control Trap*, Fortune, Feb. 1960, p. 123.

The influential Committee on Housing and Urban Development of the Association of the Bar of the City of New York was unable to come to agreement on the effects of continued rent control on housing conditions. For the Committee's Report, see 17 Record of N.Y.C.B.A. 88 (1962).

14. This vivid phrase is from Dunham, *Private Enforcement of City Planning*, 20 Law & Contemp. Prob. 463, 465 (1955).

15. Formerly N.Y. C.P.A. § 1446a.

of the common law to develop suitable remedies on a case-by-case approach. Before proceeding to a detailed consideration of the workings of the Spiegel Law, brief comment upon both the common law background of the problem and previous statutory efforts to promote repair of substandard dwellings is appropriate.

COMMON LAW

Tradition

Courts have been diverted from making any sustained effort to alleviate the oppressive conditions of slum housing by the persistence of two anachronistic fictions. The first of these fictions, that a lease operates as a conveyance of an estate in land, derives from the medieval heritage of our land law.[16] When land was used primarily for agricultural purposes it was not unreasonable for courts to conclude that what the lessee sought and obtained as the benefit of his lease was the right to use and possess a given area of land for a stipulated period of time. The presence of any buildings on the land, and even more so their condition, was irrelevant to the transaction in the eyes of the law, and this probably reflected the understanding of the parties. It thereby became established doctrine that the lessor was under no duty to put any buildings which might be on the land, including a dwelling place, into a habitable condition for the lessee, and the lessor was not obligated to repair any dilapidations which occurred while the lessee was in possession.[17] Moreover, the fiction that a lessee acquires only an estate in land has been so influential that even when the landlord is under a recognized duty to make repairs —because he covenants to do so, either expressly or impliedly, or because a statute compels him to do so—his failure to make necessary repairs will not excuse the tenant from paying rent. Unlike the ordinary bilateral contract in which covenants are treated as dependent, and a material breach by one party will normally excuse the other party from performing, covenants in a lease are treated as independent; so long as the tenant acquires the mere right to possession from the landlord, he must perform all of his covenants, including the covenant to pay rent.[18] It mattered not, at common law, that property leased for dwelling purposes became totally uninhabitable; the tenant remained bound to pay rent so long as he still had the right to possess the premises.[19]

The second fiction which has tended to restrain courts from making a substantial contribution to the problem of housing standards stems from *laissez-*

16. For a brief history of this development see Holdsworth, An Historical Introduction to the Land Law 70-73, 230-55 (1927); Simpson, An Introduction to the History of the Land Law 87-88, 229-38 (1961).

17. 1 American Law of Property § 3.78 (Casner ed. 1952); 2 Powell, The Law of Real Property ¶ 233 (Recomp. ed. 1966).

18. Bennett, *The Modern Lease*, 16 Texas L. Rev. 47 (1937); Lloyd, *The Disturbed Tenant: A Phase of Constructive Eviction*, 79 U. Pa. L. Rev. 707 (1931).

19. 1 American Law of Property § 3.78 (Casner ed. 1952); 2 Powell, The Law of Real Property ¶ 230[3] (Recomp. ed. 1966).

faire economic doctrines of the nineteenth century. According to this fiction, courts are not called upon to perform any necessary social function in reforming landlord and tenant law because the parties to a lease are fully able to protect their own interests and to secure the terms and conditions which they wish. If a tenant lives in an unsafe or unhealthy dwelling it must be because he wishes to do so; if the tenant did not approve the condition of the premises he would have bargained with the landlord for desirable repairs and improvements before he agreed to the tenancy. Both landlord and tenant are free men and both "stand upon equal terms [and] either may equally well accept or refuse to enter into the relationship."[20] Quite clearly this self-regulating view of the housing market overlooks entirely the question of the social costs of deteriorated housing; there may be adequate reasons for denying to those who "enjoy" unsafe living quarters the pleasure of their preference.[21] But apart from consideration of any possible social costs, it is quite clear that the supply of decent low cost housing has not kept up with demand in our large cities[22] and the competition for this housing is distorted by problems of racial discrimination.[23] However inaccurate it may be, the myth of the free market in housing has long cast its shadow over the law of landlord and tenant, producing a state of inertia if not one of indifference.[24]

Innovation

This is not to deny that there has been some judicial creativity in the domain of landlord and tenant law.[25] For example, the doctrine of constructive

20. Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 495, 180 N.E. 245, 247 (1932).

21. "Social costs are those borne, not by the one who incurs them, but by others. Thus an individual creates social costs if the house he builds creates a drainage problem for which his neighbors or the town must pay." Banfield & Grodzins, Government Housing in Metropolitan Areas 78 (1958). That the "social costs" argument may be used to serve selfish and ignoble ends, see Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U. Chi. L. Rev. 180 (1963); Haar, *Zoning and Minimum Standards—The Wayne Township Case*, 66 Harv. L. Rev. 1051 (1953).

22. Grigsby, Housing Markets and Public Policy 22-26 (1963).

23. According to a report of a University of Chicago study Negroes pay a 15% "color tax" in obtaining housing accommodations. Benedict, *Civil Rights and Racial Unrest—A Lawyer's Problem*, 45 Chicago Bar Rec. 225 (1964); see Ferguson, *A Brief Commentary on Urban Redevelopment and Civil Rights*, 9 Howard L.J. 101 (1963).

24. How the market actually functions, and its consequences, are described by Catherine Bauer Wuster: "A severe shortage of homes is a many-sided evil. It harms family life, restricts freedom and mobility, puts people at the mercy of exploitive landlords and builders, hits low income families the hardest and those with children hardest of all, prevents the enforcement of standards, and necessitates controls that disrupt the economy and are almost impossible to administer justly." *Redevelopment: A Misfit in the Fifties*, The Future of Cities and Urban Development 18 (Woodbury ed. 1953).

25. See LeBlanc, *Landlord-Tenant Problems*, in Conference Proceedings, The Extension of Legal Services to the Poor 51-60 (U.S. Dep't Health, Ed. & Welfare, 1964) for the observation that most "landlord-tenant law has been made by the lowest courts of the state with very little guidance from the appellate courts." *Id.* at 54. Levi suggests that if tenants were more often plaintiffs they would then be in a better position to persuade trial courts to develop "new ways of grappling with old problems" and this would cause appellate courts to become more involved in lawmaking because landlords would certainly appeal

eviction, essentially an attempt to introduce contract principles of mutuality by indirection, is a judicial invention.[26] It has tended to make the law more consistent with the fact that today most leases involve commercial or living space and not agricultural land. Even at common law there was one situation in which a tenant might be freed from his promise to pay rent: when the lessor actually ousted the tenant from the leasehold estate. Conduct less extreme than an actual ouster by the lessor may give rise to a defense in an action for rent under the modern doctrine of constructive eviction. It is clear that a tenant in an apartment building can be forced to abandon the premises by conduct on the landlord's part which does not amount to an actual ouster. Failure to provide essential utilities, misuse of other portions of the building, or continued refusal to repair an elevator, may make the tenant's position virtually untenable. In such a circumstance, the doctrine of constructive eviction permits a tenant to treat a serious interference with his use of the premises as if it were an actual ouster by the landlord. The tenant may then vacate the premises and he will be excused from making any further rent payments.[27] Where a tenant is obligated under a long term lease, or where there has been a significant shift in the rental market or in business conditions, constructive eviction might offer a tenant valuable relief from an otherwise unfavorable situation. Slum tenants, though, are unlikely to find meaningful protection in this doctrine;[28] long term residential leases are uncommon, and the requirement that the tenant must vacate the premises offers little more than the alternative of quitting one substandard unit for another.

Another judicial innovation in landlord and tenant law is the doctrine of partial eviction.[29] There is a partial eviction whenever the lessor excludes the lessee from some portion of the leased premises. This may occur either as a refusal to permit the lessee to enter into possession of part of the leased property when the lessee first seeks to occupy the premises, or as an actual ouster from possession of a portion of the premises which the lessee has previously occupied. Following a partial eviction the tenant is freed from all obligation to pay rent in spite of the fact that he is entitled to remain in possession of any portion of the premises from which he has not been ousted. This somewhat anomalous result is explained as a corollary of the previously mentioned common law rule that following an actual ouster by the lessor, the lessee is excused from all responsi-

adverse decisions. Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 Colum. L. Rev. 275, 284 (1966).

26. See the suggestion of a student author that courts use the doctrine of "constructive eviction" in order to avoid the open admission that "they are dealing with the problem in terms of contract principles . . . ." Note, 31 Calif. L. Rev. 338, 341 (1943).

27. Dyett v. Pendleton, 8 Cow. (N.Y.) 727 (1826); Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DePaul L. Rev. 69 (1951).

28. Even middle income tenants may not be able to benefit. See, for example, Powell's comment: "It has been recently suggested that the utility of the doctrine of constructive eviction as a weapon in the hands of lessees to compel lessors to do as they have agreed has been eliminated by the housing shortage, which practically prevents a tenant from removing when treated badly." 2 Powell, The Law of Real Property ¶ 230[3] (Recomp. ed. 1966).

29. 1 American Law of Property § 3.52 (Casner ed. 1952).

bility for the rent. In the case of such ouster from only a portion of the leased premises, the lessor is denied the right to rent for the portion retained by the tenant because he "is not permitted to apportion his own wrong."[30]

By itself, the doctrine of partial eviction is unlikely to be of much assistance to slum dwellers; there is no evidence that situations producing partial evictions are at all common or pose a significant problem.[31] One recent case, however, has suggested that the doctrine might have considerable impact if used in association with the concept of constructive eviction. In a constructive eviction an interference by the landlord, short of an actual ouster, may be so detrimental to the tenant's continued use of the premises that the tenant is permitted to vacate and he is thereby excused from all liability for future rent. If the facts giving rise to a constructive eviction were sufficient to satisfy the requirement of actual ouster amounting to a partial eviction, the tenant might be permitted to remain rent free until the landlord remedied the situation.

In *Gombo v. Martise*,[32] which developed out of the New York City rent strikes in 1964, the trial judge ruled that the facts presented an opportunity to find a "partial constructive" eviction. He reasoned that a tenant who was deprived of an essential service was as severely damaged as the tenant who was actually ousted from a small portion of the premises, and he ruled that such a tenant might remain rent free until services were restored. A lack of precedent for such a determination proved fatal on appeal, but the analysis may some day win judicial favor. In the *Gombo* case the trial judge had tried in this way to institute rent withholding by judicial decree as a form of leverage to compel the landlord to provide adequate services. It is not surprising that this initial attempt at finding a partial constructive eviction failed. What is sorrowful is that there has been so little judicial experimentation in landlord and tenant law, and that the little which we have had has come so late.[33]

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30. Fifth Avenue Building Co. v. Kernochan, 221 N.Y. 370, 371, 117 N.E. 579, 580 (1917).

31. Fifth Avenue Estates, Inc. v. Scull, 42 Misc. 2d 1052, 249 N.Y.S.2d 774 (Sup. Ct., App. Term 1964) the tenant successfully raised the defense of partial eviction where he had been excluded from one room in an eleven room luxury apartment. The rent for the entire year during which the tenant had been kept out of possession was denied to the landlord.

32. 41 Misc. 2d 475, 246 N.Y.S.2d 750 (N.Y. City Ct. 1964), *rev'd per curiam*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964). This case was discussed widely in the newspapers because of its importance in the New York City rent strikes. See N.Y. Times, Jan. 9, 1964, p. 1, col. 2 and Wall Street J., Feb. 4, 1964, p. 16, col. 4. The label "rent strike" may be somewhat misleading, especially in its pejorative connotation. In most instances, tenants did no more than exercise their rights under N.Y. Real Prop. Law § 755.

For a somewhat related and equally creative departure see Judge Martin's opinion in Pines v. Perssion, 14 Wisc. 2d 590, 111 N.W.2d 409 (1961), in which the Wisconsin Court refused to follow the existing common law rule and held that there was an implied warranty of habitability in a one year lease of a furnished house. See also the dissenting opinion of Judge Bazelon in Bowles v. Mahoney, 202 F.2d 320, 325 (D.C. Cir. 1952).

33. While much of the current attention to the problems of slum tenants is associated with the federal anti-poverty program, the concern for modernizing landlord and tenant law is much older. Note, for example, Bennett's comment in 1937: "The task of modern courts has been to divorce the law of leases from its medieval setting of real property law,

LEGISLATIVE REFORM

Fortunately an assault upon deplorable housing conditions in big city slums did not wait upon judicial innovation.[34] Reformers recognized that slum tenants themselves lacked both the economic power and the legal authority to compel landlords to provide safe and decent housing, and they turned to the legislature for remedial action. Eventually some measure of victory was won and laws were passed establishing minimum standards for certain New York City tenements.[35] Over the years this legislation has been applied to an increasing number of dwellings in New York City and minimum qualifications for safe and sanitary housing have been elevated.[36] Similarly, in 1952, a companion law was enacted to cover the remainder of the state.[37] Under both of these statutes local governments are authorized to adopt housing codes with more stringent requirements which may be better suited to local needs and responsibilities.[38] Housing codes set minimum standards for existing buildings and thus apply retroactively;[39] the owner of a building which does not comply with whatever standards the current housing code requires may be compelled to undertake sufficient repairs and improvements to bring his building into compliance with these new standards.[40] Constitutional authority in support of both the compulsory and the retroactive features of housing codes is derived from the well recognized obligation of the government to take reasonable and suit-

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and adapt it to present day conditions and necessities by means of contract principles . . . ." *The Modern Lease*, 16 Texas L. Rev. 47, 48 (1937).

34. For a history of the reform movement in New York, see Lubove, The Progressives and the Slums (1962). A brief account is presented by one of the participants in Mitchell, *Historical Development of the Multiple Dwelling Law*, 35A McKinney's Consolidated Laws of New York Ann. ix (1946). Typically legislation was limited to those dwellings housing several families, *i.e.*, multiple dwellings.

35. Tenement House Law, N.Y. Sess. Laws 1867, ch. 908.

36. A new Tenement House Act was adopted in 1901, N.Y. Sess. Laws 1901, Vol. I, ch. 334. In 1929, the Multiple Dwelling Law was enacted. N.Y. Sess. Laws 1929, ch. 713. This was substantially recodified in 1946. N.Y. Sess. Laws 1946, ch. 950. For a detailed discussion of the necessary provisions of such a law, see Veiller, A Model Housing Law (New York, rev. ed. 1920).

37. The Multiple Residence Law was adopted by N.Y. Sess. Laws 1951, ch. 580, effective July 1, 1952.

38. N.Y. Mult. Dwell. Law § 3(4); N.Y. Mult. Resid. Law § 329. To assist local communities, the New York State Division of Housing has prepared a model housing code; see N.Y. Div. of Housing, Model Housing Code, Vol. 2 (1960).

39. While the movement for housing reform has roots deep into the nineteenth century, it is only in the years since World War II that housing codes have become common. As recently as 1950 the National Association of Housing and Redevelopment Officials reported that only a dozen cities had adopted such codes. *Stopping Slums before they Start*, 7 J. Housing 160 (1950). By 1960, well over two hundred cities had adopted codes, and current figures indicate that approximately 700 cities have passed housing codes. Lange, *Municipal Housing Codes*, 27 Muni. Yearbook 318 (1960). For a discussion of the role of the federal government in promoting housing codes, see Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 Law & Contemp. Prob. 685 (1960); see generally, Note, *Municipal Housing Codes*, 69 Harv. L. Rev. 1115 (1956); Note, *Administration and Enforcement of the Philadelphia Housing Code*, 106 U. Pa. L. Rev. 437 (1958).

40. Housing codes should be distinguished from building codes which set minimum standards for new construction and are entirely prospective in application.

able steps to protect the health and safety of the public under the police power.[41] While housing codes have been helpful in defining minimum standards, and in providing necessary flexibility for local individuality, they are not self-executing.[42] A considerable effort must be exerted to secure compliance within the minimum standards they establish;[43] both maintenance and repair costs are an expensive item in the management of real property, and many owners have been understandably reluctant to spend money without the expectation of increasing their rate of profit. To aid in enforcement, provision for both civil and criminal penalties are usually included within the codes, but great difficulty has been met in using these sanctions effectively against owners who fail to maintain safe and sanitary dwellings.[44] Frequently extensive delays are encountered in prosecuting a landlord, and even when conviction is secured, experience indicates that the fines imposed have been so low that numerous recalcitrant landlords accept them as nothing more than a minor cost of doing business.[45] The ultimate objective of housing codes is to compel the repair and rehabilitation of our existing housing resources;[46] but all too often an owner finds it less expensive to pay a slight fine than to make needed repairs.[47] A general dissatisfaction with the effectiveness of traditional enforcement methods has given impetus to utilizing rent withholding as a more persuasive method of motivating owners to bring offending buildings into compliance. The Spiegel Law has seized upon this device for the enforcement of minimum housing standards.[48]

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41. Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). In spite of the extensive authority which can be mobilized under the police power, one commentator has suggested that housing reformers have been shortsighted in neglecting to enlist economic sanctions which would provide an element of self-regulation. See Dunham, *Private Enforcement of City Planning*, 20 Law & Contemp. Prob. 463 (1955).

42. Extensive treatment of the problems encountered in enforcing housing codes in nine major cities is contained in the encyclopedic Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801 (1965).

43. The procedures employed in New York City were the subject of an informative study conducted by the Community Service Society of New York. See Community Service Society, *Code Enforcement For Multiple Dwellings in New York City* (1962).

44. See the detailed study, Community Service Society, *Code Enforcement for Multiple Dwellings in New York City: Enforcement Through Criminal Court Action* (1965). Several years ago, the Attorney General's New York City office began a vigorous campaign against "incorporated slum lords." Presently the City of New York has taken over this function under the receivership provision of N.Y. Mult. Dwelling Law § 309.

45. On August 19, 1965, the New York Times reported that the average citywide fine had dropped 26% during the past year from $18.75 to $13.96. N.Y. Times, Aug. 19, 1965, p. 33, col. 1. On similar evidence Ford concluded many years ago that "judges may . . . lack interest in or sympathy with the purpose of the law." *The Enforcement of Housing Legislation*, 42 Pol. Sci. Q. 549, 558 (1927).

46. See Osgood & Zwerner, *Rehabilitation and Conservation*, 25 Law & Contemp. Prob. 705 (1960).

47. The futility of small fines is quite clear: "[B]y hypotheses we are trying to force property owners not to make decisions which they regard as profitable, [and] we have expected a fine, usually a small one, to deter such owners from making these choices." Dunham, *Private Enforcement of City Planning*, 20 Law & Contemp. Prob. 463 (1955).

48. For a general discussion of rent withholding, see Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 Calif. L. Rev. 304 (1965).

THE SPIEGEL LAW

"Avoidance of abuses in connection with rent checks," is the express statement of purpose contained in the Spiegel Law,[49] and additional emphasis on the statute's role in ensuring the proper and expeditious expenditure of public funds appears in the message of Governor Rockefeller which he issued upon signing the bill into law. The Governor noted: "It has been estimated that as much as $25 million of welfare funds are paid annually to landlords of substandard dwellings in New York City alone."[50] To assist public agencies in

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49. N.Y. Soc. Welfare Law § 143-b reads:

§ 143-b. Avoidance of abuses in connection with rent checks

1. Whenever a recipient of public assistance and care is eligible for or entitled to receive aid or assistance in the form of a payment for or toward the rental of any housing accommodations occupied by such recipient or his family, such payment may be made directly by the public welfare department to the landlord.

2. Every public welfare official shall have power to and may withhold the payment of any such rent in any case where he has knowledge that there exists or there is outstanding any violation of law in respect to the building containing the housing accommodations occupied by the person entitled to such assistance which is dangerous, hazardous or detrimental to life or health. A report of each such violation shall be made to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations.

3. Every public welfare official shall have the power to initiate or to request the recipient to initiate before the appropriate housing rent commission any proper proceeding for the reduction of maximum rents applicable to any housing accommodation occupied by a person entitled to assistance in the form of a rent payment whenever such official has knowledge that essential services which such person is entitled to receive are not being maintained by the landlord or have been substantially reduced by the landlord.

4. The public welfare department may obtain and maintain current records of violations in buildings where welfare recipients reside which relate to conditions which are dangerous, hazardous or detrimental to life or health.

5. (a) It shall be a valid defense in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building wherein such welfare recipient resides which relate to conditions which are dangerous, hazardous or detrimental to life or health as the basis for non-payment.

(b) In any such action or proceeding the plaintiff or landlord shall not be entitled to an order or judgment awarding him possession of the premises or providing for removal of the tenant, or to a money judgment against the tenant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law relating to dangerous or hazardous conditions or conditions detrimental to life or health. For the purposes of this paragraph such violation of law shall be deemed to have been removed and no longer outstanding upon the date when the condition constituting a violation was actually corrected, such date to be determined by the court upon satisfactory proof submitted by the plaintiff or landlord.

(c) The defenses provided herein in relation to an action or proceeding against a welfare recipient for non-payment of rent shall apply only with respect to violations reported to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations.

6. Nothing in this section shall prevent the public welfare department from making provision for payment of the rent which was withheld pursuant to this section upon proof satisfactory to it that the condition constituting a violation was actually corrected. Where rents were reduced by order of the appropriate rent commission, the public welfare department may make provision for payment of the reduced rent in conformity with such order.

50. McKinney's 1962 Sess. Laws of New York, 3678.

obtaining their full dollar's value for rent allowances, welfare officials are authorized to withhold rent payments for housing accommodations of welfare clients who live in buildings which contain "any violation of law . . . which is dangerous, hazardous or detrimental to life or health."[51] The welfare client is protected from eviction under the provision of the statute which states: "It shall be a valid defense in any action or summary proceeding against a welfare recipient for non-payment of rent to show existing violations in the building . . . as the basis for non-payment."[52]

The statute, as originally adopted, contained a serious limitation upon its ability to guarantee that public funds would not be used in support of substandard housing. Presumably the tenant's ability to assert the statutory defense to eviction marks the effective limits of the agency's opportunity to withhold rent. If the defense is unavailable to the tenant and he is evicted, the statute accomplishes very little because the agency always has the option of moving the tenant to other quarters if that is all it wishes to do.[53] Focusing, therefore, on the availability of the statutory defense to the tenant, it is quite apparent that the agency can be maneuvered into the position where it will be subsidizing substandard housing, despite the avowed intention of the Spiegel Law to prevent this. For example, assume that the landlord of a welfare client is notified by the welfare department on January first that rent is being withheld because hazardous violations have been discovered in his building. During the following six months the landlord does nothing to remedy the situation and consequently he receives no rent for this period. Then on July fifteenth, he begins repairs which he completes shortly before the end of the month. On August first, the landlord sues for all back rent, and because there are no outstanding violations at the time he brings suit, the tenant has no defense to the action under the statute. At this point the welfare department is obliged to pay all of the back rent due the landlord for the preceeding seven months, even though during at least six and one-half months of this time the building constituted a hazard and the tenant was not receiving full value for his rental dollar. Thus the Spiegel Law would have provided a means for postponing payment of rent where hazardous violations existed, but it would

51. N.Y. Soc. Welfare Law § 143-b(2).

52. N.Y. Soc. Welfare Law § 143-b(5) (Supp. 1965). It is customary for the welfare department to provide the tenant with legal representation without charge. Conditions sufficiently severe to provide rent withholding would assuredly be the basis for a valid claim of constructive eviction.

53. The right of the tenant to claim a constructive eviction and move out, and the power of the city to order the dwelling vacated are of little practical value. As the Special Committee on Housing and Urban Development of the Association of the Bar of the City of New York commented, "The right to move in times of housing shortage, is an empty right. . . . The power to vacate in times of housing shortage is one whose exercise is abhorred since it damages those most in need of protection, viz. the tenants." Memorandum, 305/63/9, at 3-4 (1963). In New York City less than 40 buildings were vacated by order of the City in 1963. Gribetz, *New York City's Receivership Law*, 21 J. Housing 297 (1964). In Chicago only 187 buildings were vacated in 1964. 1964 Chicago Dep't of Buildings Ann. Rep. 6.

not have prevented public funds from being ultimately used in support of unsafe housing.[54]

This defect was remedied by an amendment in 1965 which provided that the "landlord shall not be entitled to an order or judgment awarding him possession of the premises or providing for removal of the tenant, or to a money judgment against the tenant, on the basis of non-payment of rent for any period during which there was outstanding any violation of law . . . ."[55] It may be that the 1965 amendment was less a change in policy than an attempt to cure a shortcoming of the original draftsmanship. There is some reason to believe that the language added in 1965 does no more than make explicit what was fully intended under the earlier wording.[56] The final subsection of the statute originally stated that "nothing in this section shall prevent the public welfare department from making provision for payment of the rent which was withheld pursuant to this section upon proof . . ." that the violations have been cleared.[57] This provision may fairly be taken to mean that the department had the discretionary authority to repay back rent once violations were corrected, or to declare the rent forfeit.[58] But if the provision is read as authorizing abatement of back rent by the welfare department it is difficult to deter-

54. The department might avoid paying any rent at all in this hypothetical situation if it moved the tenant shortly before repairs were completed; of course the tenant would remain liable for all of the back rent once his defense under N.Y. Soc. Welfare Law § 143-b(5) was no longer available. Some indication that the welfare department will not be liable is seen in the summary of a recent Opinion of the Attorney General, but the facts which he had under consideration evidently involved a situation in which the violation had not yet been removed: "A local public welfare department is not required to pay rent pursuant to the provisions of . . . [N.Y. Soc. Welfare Law § 143-b], if prior to the conclusion of a summary proceeding to evict the tenant-recipient, the latter ceases to be a recipient of public assistance." 1963 Ops. N.Y. Atty. Gen. 181. There has been at least one suggestion that a welfare department persuaded a client to move, not because better quarters were available, but because it gave the department the opportunity to save rent money which it had withheld. But the department and the tenant may not have the last word. "The practice has also been reported of landlords promptly evicting tenants after the repairs have finally been made." Wald, Law and Poverty: Report to the National Conference on Law and Poverty, 17, n.52.

55. N.Y. Sess. Laws 1965, ch. 701, amending N.Y. Soc. Welfare Law § 143-b.

56. Apparently the official position of the City of New York was that rent abatement was intended by the legislature. See Memorandum in Support of A.I. 720 by Paul Bragdon, Assistant to the Mayor of the City of New York ('65 Welfare #1). The Commissioner of the N.Y. Dep't of Bldg. held a similar view. See Gribetz, *New York City's Receivership Law*, 21 J. Housing 297, 298 (1964). The Deputy Commissioner of the N.Y.C. Dep't of Welfare has written: "It has been the policy of this Department not to authorize payment of rent for the period when the violation was in existence, except in cases where the Court rendered judgment for the landlord and such payment was necessary to prevent eviction." Letter From Philip Sokol, August 25, 1965. A Monroe County welfare official also reported that he believed that the department had authority to abate rent. Letter of August 23, 1965.

57. N.Y. Soc. Welfare Law § 143-b(6) (Supp. 1965).

58. An alternative interpretation of this section might be that it merely permits the department to repay rent if the department elects to do so; without this section, it might be argued that the department is not authorized to make a back payment of rent because the department has no liability to the landlord. Its only responsibility is to the tenant's present needs and past accommodations might not qualify as a proper expenditure of department funds. See discussion of the lack of privity between the landlord and the welfare department in Trozze v. Drooney, 35 Misc. 2d 1060, 1062-63, 232 N.Y.S.2d 139, 141-42 (Binghamton City Ct. 1962).

mine how the tenant was protected against either eviction or a judgment for back rent once the landlord corrected all outstanding violations. Whatever the legislative intent was, some local welfare officials took the position that the original wording of the statute authorized abatement of rent for such time as violations actually existed.[59] The 1965 amendment made it clear that the department now has authority to abate rent for any period that a violation has existed, and the tenant's defense to eviction or a money judgment has likewise been clarified.

Rent Abatement

The provision for rent abatement added by the 1965 amendment raises two fundamental questions, one relating to its constitutionality, and the other to its desirability. The Spiegel Law has been the subject of very little litigation and there has been no determination of its constitutionality by an appellate court. The lower court decisions which have upheld its constitutionality construed it as authorizing nothing more than a temporary suspension of the landlord's right to collect rent. Justice Wachtel faced the issue explicitly in *Milchman v. Rivera*[60] and sustained the statute against the landlord's assertion that it imposed an unconstitutional deprivation of property without due process of law. Concluding that the Spiegel Law constitutes a valid and proper exercise of the police power, Justice Wachtel stated:

> There is nothing so drastic or onerous in the means specified in this act as to invalidate it, nor is there any taking of property involved in its operation .... The landlord is not permanently deprived of his rent. Under the law, the Welfare Department is empowered to withhold the rent for the benefit of the landlord until the violations which are dangerous, hazardous and detrimental to health and safety are removed.[61]

It is not at all clear that the provision authorizing abatement of rent and suspension of the landlord's power to evict the tenant may be sustained. In its original form, providing for nothing more than rent withholding, the Spiegel Law was characterized by most commentators as being of "doubtful constitutional validity";[62] while that is probably an overly cautious evaluation, the

59. See references cited note 56, *supra.*

60. 39 Misc. 2d 347, 240 N.Y.S.2d 859 (N.Y.C. Civ. Ct. 1963), *appeal dismissed,* 13 N.Y.2d 1123, 196 N.E.2d 555, 247 N.Y.S.2d 122 (1964).

61. *Id.* at 354-55, 240 N.Y.S.2d at 868. A similar conclusion was reached in Schaeffer v. Montes, 37 Misc. 2d 722, 730, 233 N.Y.S.2d 444, 452 (Bronx Civ. Ct. 1962). And see Fidler v. Kurtis, 40 Misc. 2d 905, 244 N.Y.S.2d 77 (Sup. Ct. 1963) approving the decision in *Milchman v. Rivera.* The statute was held unconstitutional in Trozze v. Drooney, 35 Misc. 2d 1060, 232 N.Y.S.2d 139 (Binghamton City Ct. 1962) apparently on the ground that the police power may be used to promote decent housing conditions, but that "The Social Welfare Law is not the proper vehicle to require compliance with minimum housing standards." *Id.* at 1064, 232 N.Y.S.2d at 143.

62. Memorandum of the Special Committee on Housing and Urban Development of the Association of the Bar of the City of New York, p. 5 (1964). That the provision for temporary rent withholding in N.Y. Real Prop. Actions Law § 755 was held constitutional would lend support that temporary withholding does not exceed the limits of due

1965 amendment may have increased its vulnerability to constitutional attack.

In addition to the issue of constitutionality the provision for rent abatement also raises important questions of policy. While it is undoubtedly a desirable social goal to end public subsidization of substandard housing, it would be unfortunate if this goal were achieved at the expense of further depletion of our housing resources. A certain rigidity in the Spiegel Law may contribute to this unfortunate result. It is undoubtedly true that many pieces of slum property are owned by people with limited financial means. If these less affluent property owners are to be encouraged to repair their buildings, they must have access to the necessary funds, and it is quite likely that the income derived from current rents may be indispensable to undertaking these repairs.[63] Of course the welfare department has the option to pay the back rents once violations have been removed, and it is conceivable that an impecunious owner might be able to borrow against this possibility, but even in such a case the welfare department is left with the decision of whether or not to release the funds. Just what factors the welfare department is to weigh in making such a determination are not indicated in the statute. Taking the hypothetical case of a poor but well-intentioned owner as an example of a situation in which the department might feel it served the best interest of the community to release the funds rather than abate them, the department would still have the chore of passing upon the bona-fides of the landlord's assertion that he cannot make repairs without the guarantee of the eventual release of the withheld funds. The welfare department may have experience in ferreting out the hidden assets of relief recipients, but it is of doubtful wisdom to place this sort of decision within the department's jurisdiction. At a minimum it will add considerably to the department's workload. If the determination is complex or time-consuming, it is likely that out of self-protection a rigid policy will be adopted, either in favor of abatement or of releasing funds; in either case injustice will result unless each case is examined on its merits.

Even in its operation as a rent withholding statute, the Spiegel Law may be unduly restrictive. The dilemma of the impecunious landlord may well arise in the context of rent withholding, and it is possible that the only way some owners have of financing repairs is to pay for them out of current rents. There is no provision under section 143-b permitting the department to release withheld rent money prior to the complete removal of all outstanding hazardous violations. In some circumstances the judicious release of rent money might actually contribute to the rehabilitation of a dilapidated dwelling. If there is a reluctance to trust the landlord to disburse withheld rent for repairs, then

process. See Emray Realty Corp. v. De Stefano, 5 Misc. 2d 352, 160 N.Y.S.2d 433 (Sup. Ct. 1957).

63. The Citizens' Housing and Planning Council of N.Y., Inc., while favoring "the principle of rent abatement" urged defeat of the amendment which authorized abatement under N.Y. Soc. Welfare Law § 143-b because it provided that "*all* [emphasis added] the rent is abated" and thereby "leaves no bargaining power to be used on the landlord." Letter of August 9, 1965.

there should be some provision to permit either the tenant, the welfare department, or some independent agency, such as the city buildings department, to have access to withheld rent money for minor repairs which require immediate attention. Such authority now exists under Real Property Actions and Proceedings Law section 755 with respect to rent deposited in court in New York City; similar flexibility should be possible under the Spiegel Law.[64]

Hazardous Conditions

In order to invoke its authority under the Spiegel Law, a welfare department must be aware of conditions in the welfare client's building which are "dangerous, hazardous or detrimental to life or health." To permit a welfare client to remain in such a building, even if the department is no longer subsidizing its upkeep, may pose a more serious problem than the mere "abuse" of rent checks which the law was designated to correct. Some thoughtful critics have argued that any time a department of welfare invokes the Spiegel Law it is a public admission by that department that it is not properly performing its responsibilities as a public agency;[65] if a dwelling is dangerous, it is suggested that alternative housing should be provided.[66] Saving the department the cost of paying rent does not benefit the client, and in fact it might give rise to a possible conflict of interest. It has been suggested that some welfare departments might be tempted to permit families on relief to remain in unsafe quarters in order to then use the Spiegel Law to reduce the strain on the department's own budget.

One answer to this criticism is that in many cases the potential threat to the tenant's health and safety would be sufficiently remote to justify continued occupancy; for example, a department might know that a building has a defective furnace, and yet not feel it necessary to remove a welfare client during the summer months when the furnace would not normally be in use. Likewise, the department might argue in all candor that the danger presented by existing conditions is no greater than that of any other available accommodations which the department could afford to offer. But these reasonable explanations of why a department might permit a welfare client to remain in a

64. N.Y. Real Prop. Actions Law § 755 permits a court to stay a summary dispossess proceeding against a tenant for non-payment of rent if an order to remove a housing violation has been issued to the landlord and the circumstances in the building constitute a constructive eviction, provided that the tenant deposits his rent with the court as it falls due. In 1965, this statute was amended to provide that the court could use the rent so deposited to pay materialmen, contractors or others whose services were essential to the proper maintenance of the building. See N.Y. Sess. Laws 1965, ch. 881, adding § 755(3) to the Real Prop. Actions Law. Prior to this amendment no person was permitted to withdraw any money from the funds deposited during the stay.

65. One welfare department official has commented that use of the Spiegel Law caused his agency some uneasiness: "success placed this department on notice that its welfare clients stood in danger of life and limb [and this] caused grave concern to the department . . . ." Letter of September 9, 1965.

66. For example, see Memorandum of New York County Officers Association, April 22, 1965.

building in spite of adverse conditions raise an additional question: if the danger is either slight or remote, is it equitable to abate the rent?[67] Here withholding would be more readily justifiable.

Degradation or Salvation

Additional objections have been leveled at the practice of singling out welfare recipients for special treatment.[68] Some social workers have contended that the Spiegel Law centers attention upon the plight of the welfare recipient and may tend to degrade him either by introducing a sense of inferiority or by reinforcing whatever feelings he may already have about his own inadequacy.[69] And it has been suggested that the welfare client could become a pawn in a struggle between the welfare department and the landlord, and suffer embarrassment at the need to appear in court to answer a dispossess order.[70] Admittedly, a welfare recipient may be placed under some emotional strain whenever an issue is made over his housing conditions under the Spiegel Law, but this must be balanced against the possible advantage to be gained from bringing an increased number of dwellings into compliance with minimum code standards. The professional staff of the welfare department is certainly capable of determining the possible hardship and advantage in each individual case and invoking the law only where there is a clear net gain to be had. This same approach provides an answer to the charge that the Spiegel Law will make it more difficult for welfare recipients to obtain housing. Some authorities fear that landlords will not be willing to run the risk of rent withholding or abatement and will therefore refuse to rent to anyone they know to be on public assistance.[71] There is evidence that in some communities it has become increasingly difficult to secure rental housing for welfare families because a local department has made vigorous use of the power conferred by the Spiegel Law.[72] But again, one may fairly assume that a local agency will be capable

67. In contrast, rent reductions authorized under the New York rent control law may be commensurate with degree to which the tenant is deprived of the use of the premises or of necessary services. N.Y. City Rent & Rehabilitation Law § Y51-5.0(h)(3).

68. This argument has been raised as the basis of a claim that the statute is an unconstitutional denial of equal protection of the laws. It was rejected in Schaeffer v. Montes, 37 Misc. 2d 722, 728, 233 N.Y.S.2d 444, 451 (Bronx Civ. Ct. 1962), on the ground that the classification was not arbitrary.

69. See, for example, Community Service Society of New York, *Report of the Committee on Housing and Urban Development* (1962): "[I]t is degrading to recipients of public assistance to the object of special treatment of this kind." *Id.* at 19.

70. See, Community Service Society of New York, Memorandum on Housing Legislation, No. 37, March 11, 1965.

71. Community Service Society of New York, *Report of the Committee on Housing and Urban Development* 62-63 (1963); Memorandum of Citizens' Union Committee on Legislation, April 23, 1965.

72. One County Welfare official has written: "As the effectiveness of the defense provided by the statute . . . became known, landlords knowing or suspecting that they were in violation of the . . . codes . . . would not rent to welfare recipients since they knew that we would defend them in court . . . . Thus developed an ironic situation, to wit: The more successful we were in using section 143-b, the availability of housing in this community shrunk proportionately, making our housing problem . . . more acute." Letter of September 1, 1965.

of weighing the advantages of widespread use of the Spiegel Law against the possible antagonisms its use generates. The state of the local rental market will be a very significant factor in any such decision, and if the law remains in its present form under which the local agency has full discretion, it is difficult to foresee any necessary disadvantage to the welfare recipient.[73]

The Club of Continued Occupancy

Continued occupancy without rent payment can be a truly effective "club" in persuading a landlord to provide his tenants with necessary services or to make needed repairs. But something less than the impact of this "club" may be all that will result under the Spiegel Law. The tenant is given a statutory defense against a money judgment or an order of eviction in a summary proceeding only in case the landlord bases his claim on non-payment of rent. This is inadequate protection if the tenant is to be free to wield the "club" with force. Most, if not all, welfare tenants will be living under month-to-month tenancies and these are subject to termination upon one month's notice. It appears that a landlord who did not wish to make repairs demanded by the welfare department could serve a notice to vacate upon the welfare client, and then, on the appropriate date bring suit to oust the tenant, not for non-payment of rent, but for continuing in possession "after the expiration of his term, without the permission of the landlord."[74]

If the legislature intended to protect the welfare client against such an eviction it is unfortunate that explicit mention was not included within section 143-b of the Social Welfare Law. Alternatively, provision might have been placed in the Real Property Actions and Proceedings Law, either as an exception to the class of persons who are eligible to maintain a special proceeding under section 721, or in the form of an additional requirement under section 741 that petitioner allege that there are no hazardous violations in his building. It is possible that the legislature believed that sufficient protection already existed against the use of a summary proceeding to circumvent the Spiegel Law. Perhaps reliance was placed upon the opportunity of the tenant to raise an equitable defense. Again it may have been that the provision for a stay—from four to six months—was deemed adequate; if this latter is the true explanation, some new legislation is in order because one of the applicable statutes has since lapsed.[75] In any case the Spiegel Law is not clear in plugging this possible loophole and there is some reason for apprehension if the landlord seeks to evict the tenant for holding over after the expiration of his term.[76]

73. Reports from New York City, Oneida County and Nassau County indicate that no increase in the difficulty of finding housing for welfare recipients has been observed. See letters of August 30, 1965 and September 8, 1965.

74. N.Y. Real Prop. Actions Law § 711(1). For possible defenses to such an action, see Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Geo. L.J. 519 (1966).

75. N.Y. Real Prop. Actions Law §§ 751, 753; the former section, applicable outside the City of New York, lapsed following September 1, 1964.

Departmental Discretion

There was considerable ambiguity in the Spiegel Law as originally enacted concerning the precise role the welfare department was to play in determining what housing conditions were sufficiently hazardous to warrant rent withholding. The statute states that a public welfare official may act "in any case where he has knowledge that there exists or there is outstanding any violation of law . . . which is dangerous, hazardous or detrimental to life or health. A report of each such violation shall be made to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations."[77] Was a welfare official limited in his authority to those "violations of law" which were reported to him by an "appropriate" department, or was this last sentence added to assist the welfare department rather than to restrict its discretion? The answer may depend upon whether any significance is attached to the use of the alternative terms "exists or is outstanding" in the preceding sentence. Assuming that a mere redundancy was not intended, it is possible to conclude that violations are "outstanding" only when an appropriate agency (a health or buildings department most likely) has taken official action, but that a violation "exists" whenever it in fact occurs. If this is the proper construction of this section, then the welfare department has full authority to determine when a violation of a housing code or other health or safety law takes place. In some circumstances this might require technical competence not normally possessed by welfare workers, although in most cases it may be assumed that the welfare official would not act on any but the most obvious violations without consultation with appropriate technicians from other departments. But even if it be concluded that the welfare department is limited to those violations reported to it by "appropriate agencies," the statute still leaves it up to the welfare official to determine which of the reported violations are serious enough to constitute a condition "dangerous, hazardous or detrimental to life or health;"[78] such a determination must be made because only these serious violations will authorize the department to withhold rent. It seems reasonable to entrust both the decision as to whether a violation exists in a building and whether it is hazardous to the appropriate technical departments rather than calling upon the welfare official to develop this added[79] competency.

76. Welfare officials in Monroe County and Nassau County have pointed to this flaw and suggested that it be remedied. See letters of August 23, 1965 and September 9, 1965. Perhaps this defect was overlooked because tenants in New York City are protected against such evictions under the City's rent control regulations. N.Y. City Rent & Rehabilitation Law § Y51-6.0.

77. N.Y. Soc. Welfare Law § 143-b(2).

78. For objections to the vague standards and extensive authority given to welfare officials, see Community Service Society of N.Y., *Report of the Committee on Housing and Urban Development* 62-63 (1963); Memorandum of Citizens' Union Committee on Legislation, April 23, 1965.

79. See Kuperberg v. Rivera, N.Y.L.J., Jan. 14, 1963, p. 17, col. 2 (Sup. Ct. 1963) for the view that only the Buildings Department was authorized to declare a violation dangerous.

A welfare official should be able to obtain a speedy inspection by an allied department to prevent undue delay, and a determination by fully qualified technicians would be more persuasive should the landlord institute judicial proceedings to test the welfare department's decision to withhold rent.[80]

Some of this ambiguity has been removed by a 1965 amendment which provides that the defense given by the statute "shall apply only with respect to violations reported to the appropriate public welfare department by the appropriate department or agency having jurisdiction over violations."[81] The amendment, while restricting the department to those violations reported to it, does not clearly state who has the responsibility for determining which of the reported violations qualify as sufficiently hazardous for action by welfare officials. A direction by the legislature that the "appropriate department" prepare a list of hazardous violations for use by welfare officials as a guide, or that each violation reported to the welfare department be designated as "hazardous" or "non-hazardous" would remove any remaining ambiguity.

Extending Protection

If a hazardous violation is found anywhere in the building which houses a welfare client the department is authorized to invoke the Spiegel Law; it is not necessary that the violation occur in a portion of the building occupied by the welfare client. Thus the statute covers situations not within the protection traditionally offered under constructive eviction; to claim a constructive eviction the tenant must show some actual interference with the use and enjoyment of the premises he occupies. It is conceivable that under a literal reading of the Spiegel Law a violation in an unoccupied portion of the building might justify rent withholding. A violation might be of such a nature that it presented a hazard to anyone coming in contact with it, but entirely irrelevant to all others. For example, a defective fire escape leading from a third story rear apartment might constitute a hazard to anyone living in the apartment from which the fire escape provides an emergency exit, but it is doubtful that it would actually threaten the health or safety of a welfare client who lived in the ground floor front apartment. And if the third floor rear apartment was temporarily vacant, the violation would still exist, yet in a portion of the building actually unused and totally unrelated to the safety of the first floor welfare tenant. In defending the applicability of section 143-b to the entire building in which a welfare tenant resides one court has commented: "The purpose of the law to eradicate slums is not adequately served by conditions

80. One county welfare official has reported delay up to 2½ months in obtaining the cooperation of the technical staff of the buildings department. See letter of August 23, 1965. Another welfare official reports that "we couldn't ask caseworkers to make any official determination because they are not, by training, building inspectors." The buildings department was relied upon for inspections and there was no difficulty in obtaining cooperation. See letter of February 12, 1964.

81. N.Y. Sess. Laws 1965, ch. 701, adding N.Y. Soc. Welfare Law § 143-b(5)(c).

which may exist in a particular apartment only."[82] Another court has explained the need for such extensive power by referring to the shortage of housing available to welfare recipients; presumably more buildings will be repaired under the impact of the statute's broad sweep, thus increasing the availability of adequate housing.[83] It is suggested that some relationship between the violation noted and the safety of the welfare client should be clearly demonstrable if the statute is to retain its validity as a reasonable means of protecting against abuses in rent checks. In most cases such a relationship will not be difficult to establish, and limiting the statute to such violations should not seriously impair its effectiveness.

Tenants' Responsibilities

Landlords of slum properties have long contended that their own tenants constitute one of the chief causes of deteriorating conditions in their buildings. When a tenant is responsible for causing a hazardous condition in his building it would appear that the welfare department is still within its authority to withhold rent until the landlord makes the necessary repairs. In this situation the landlord has strong reason to oust the tenant out of self-protection, but until he can effect such ouster section 143-b offers a potential bar to his authority to collect rent. This is not to suggest that the landlord should not have the primary responsibility for making repairs, even those made necessary by the conduct of his tenants. The wellbeing of others in the building may depend upon repairs being made at once, and a hazardous condition does not become less of a threat because it is caused by the tenant rather than by the landlord or a third party. Perhaps wise judicial construction would avoid the somewhat incongruous result of withholding rent when the welfare tenant himself has caused the damage, but other statutes make this exception explicit and its omission here might lead to an inconsistent result if not to an unjust one.[84]

It appears that the legislature intended to place the authority to withhold rents in the welfare department's hands and not to authorize an individual welfare recipient to act on his own behalf.[85] This conclusion is drawn from the fact that the first section of the Spiegel Law authorizes welfare departments to make direct payments of rent to the client's landlord and four of the re-

82. Milchman v. Rivera, 39 Misc. 2d 347, 357, 240 N.Y.S.2d 859, 870 (N.Y.C. Civ. Ct. 1963).

83. Schaeffer v. Montes, 37 Misc. 2d 722, 728, 233 N.Y.S.2d 444, 450 (N.Y.C. Civ. Ct. 1962).

84. See, for example, N.Y. Real Prop. Actions Law § 755(1): "The court shall in no case grant a stay where it appears that the condition . . . has been created by the wilfull or negligent act of the tenant or his agent." The same requirement appears in N.Y. Real Prop. Actions Law, Article 7-A. The lack of such a restriction was one of the reasons that the County Officers Ass'n objected to the Spiegel Bill. See N.Y. County Officers Ass'n, Memo of April 22, 1965; Community Service Society of N.Y., *Report of the Committee on Housing and Urban Development* (1963) raises the same point. *Id.* at 62-63.

85. This is the view taken in Fidler v. Kurtis, 40 Misc. 2d 905, 244 N.Y.S.2d 77 (Sup. Ct. 1963).

maining five sections describe the way in which the department is to carry out authorized rent withholding. The only basis for suggesting that the statute impowers a welfare client to withhold rent on his own initiative is the language in subsection 5 which provides the client with a defense to eviction or a money judgment for non-payment of rent. This section does not say that departmental withholding alone may give rise to the defense; rather it says that the defense exists whenever a hazardous violation exists in the client's building. Taken by itself subsection 5 apparently would permit a client to withhold rent, providing there is a record of the violation in the welfare department office. Assuming that the statute in its present form does not authorize the welfare client to withhold rent without the consent of the welfare department, it is appropriate to consider the advisibility of adopting an amendment to permit this. There is considerable evidence that one of the major obstacles to effective enforcement of housing codes is the bureaucracy and inertia encountered in the city departments responsible for taking action. Undoubtedly welfare departments are also plagued by these debilitating influences, in addition to being understaffed. Therefore, it would appear appropriate to permit the welfare client to have the opportunity to act on his own behalf and to be authorized to withhold rent in those cases where the department fails to act. Sufficient safeguards could be imposed to prevent the client from receiving a windfall in case his assistance allowance includes an allocation for rent, and to avoid the risk that the client might squander the withheld rent and not have funds available to compensate the landlord if a court should rule that the facts relied on were not sufficient to justify withholding. If the welfare recipient were required to deposit any rent withheld in court, similar to the practice followed under section 755 of the Real Property Actions and Proceedings Law, there would be little danger of these kinds of abuse. It is quite possible that the effectiveness of the Spiegel Law would be increased if individual welfare clients were given some measure of authority to act in their own behalf, and adequate safeguards could be devised to prevent serious interference with either the landlord's rights or the department's prerogatives.

Law in Action

In view of the possible problems which analysis of the Spiegel Law raises it is interesting to note how successfully it has functioned during the first two years since its adoption. In response to letters of inquiry sent to welfare departments in eight major urban centers in the state, reports have been in unanimous agreement that the Spiegel Law has been assisting welfare departments obtain improved housing conditions for their clients.[86] Several agencies have reported

86. Typical comments upon the effectiveness of the Spiegel Law include: ". . . § 143-b has been one of the most significant acts of Social Welfare Legislation to come out of Albany in quite some time . . ."; ". . . the law is accomplishing what it was intended to bring about . . ."; "the initial effect of § 143-b was a very good one since it dramatically brought to the attention of everyone concerned that the law was concerned with properties

that some new difficulty has been encountered in securing housing for welfare clients because landlords are reluctant to rent to families under the protection of this law,[87] but all report that the existence of the law has made it much easier to persuade landlords to make needed repairs. The suggestion that rent will be withheld has served as a successful "discourager of hesitancy" and provided the welfare workers with additional leverage for their day-to-day negotiations with landlords. The paucity of litigation concerning the statute probably reflects the fact that welfare departments generally do not invoke the Spiegel Law unless they believe that there is substantial likelihood that a landlord will actually be induced to make the necessary repairs. Where there is little likelihood that a landlord will respond cooperatively, either because of financial inability or recalcitrance, the usual practice is to move the welfare client and avoid a prolonged controversy. While its mettle has not yet been fully tested on the "hard" cases, thoughtful use of the Spiegel Law has met with overwhelming approval of those responsible for its enforcement.

In assessing the importance of the Spiegel Law, its influence upon the orientation of welfare workers should not be overlooked. Social workers have been accused of demonstrating "a long history of indifference to the physical elements of welfare such as housing."[88] The alleged indifference is accounted for, in part, by the increasingly psychiatric approach of contemporary caseworkers. If this charge is accurate the Spiegel Law may have a significant influence in reversing this tradition. The statute calls to the profession's attention the responsibility which it must assume in the campaign for improving the housing conditions of the poor. From the frequency with which the Spiegel Law has been used in the past two years there is every reason to believe that social workers are now demonstrating a concern for housing conditions.[89] If the statute has contributed to this interest, it is a significant accomplishment.

Conclusion

Noting the impact which the need for resources planning has had upon traditional concepts of property law, one perceptive scholar has commented that the change has come "from piecemeal attack on fragments of an over-all

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that were in violation"; "It has had a general effect of increasing compliance with city inspections."

These letters of inquiry were sent to officials of all 57 social welfare districts of the state. Following response to this initial inquiry, further investigation was concentrated on those districts reporting that deteriorating housing conditions created a serious problem.

87. See authorities cited in note 62, *supra*.

88. Wood, *Social Welfare Planning*, 352 The Annals 119, 123 (1964). Perhaps this is one of the incidental benefits which Haar had in mind when, speaking of the master plan, he said: ". . . as is the case with the administering of many regulatory devices, more important in final tally than the impact of sanction is the educational influence of the regulatory program." Haar, *The Master Plan: An Impermanent Constitution*, 20 Law & Contemp. Prob. 353, 363 (1955).

89. Informal estimates are that as of September, 1965, rent had been withheld in approximately 850 cases outside New York City where there were over 5,000 reported instances in 1964 alone.

problem. . . ."[90] In the past four years New York has adopted several statutes aimed at increasing the effectiveness of housing code enforcement, and the Spiegel Law is certainly a meaningful contribution toward this goal. But legislative attempts have been fragmented, and as yet there has been no comprehensive effort to adopt legislation which is aimed at a coordinated attack on the problem. The Spiegel Law, as noted in this comment, contains features which differ in several respects from other legislation recently adopted in New York and there is no clear explanation for these differences in standards or in approach. The practice of providing one set of remedies for residents of New York City and another for those who live elsewhere in the state generally has been continued. In authorizing statewide applicability, the Spiegel Law marks a noted exception to this tradition but this only emphasizes the piecemeal quality of the legislative effort. It may be that the problems of New York City are still so distinctive that remedies which are moderate and reasonable there would be drastic and excessive elsewhere in the state. The growth of slums and the steady deterioration of housing conditions outside of New York City suggest that the problem is statewide and that more adequate remedies must be made available to other cities. Recently, New York City has authorized a comprehensive research program to find a substitute to its piecemeal and fragmented approach to code enforcement.[91] The Spiegel Law is a significant move toward establishing statewide policies for housing problems. After this hopeful beginning, it would now be appropriate for the legislature to consider a comprehensive reappraisal of state laws on housing code enforcement.

90. Cross, *The Diminishing Fee*, 20 Law & Contemp. Prob. 517, 529 (1955).

91. Research on this project is being conducted by the Legislative Drafting Research Fund of Columbia University Law School.