Rent Withholding for Minnesota: A Proposal

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Rent Withholding For Minnesota: A Proposal

I. INTRODUCTION

The Citizens League recently made the following proposal: We recommend that the 1969 Legislature enact a law that will enable tenants to petition District Court for a correction of building conditions that violate any code pertaining to health, safety or welfare of the building's occupants; with rents to be deposited with a court-appointed administrator for a period up to six months for use in correcting the violation.

The purpose of this Note is to determine whether the adoption of a rent withholding statute similar to the above proposal is necessary for the welfare of the people of Minnesota. Initially, however, it must be decided whether or not the housing situation in Minnesota is such that the public welfare calls for legislative action to alleviate any such problem.

II. HOUSING IN MINNESOTA

A critical housing shortage existed in the United States in the period following the Second World War. Despite all attempts to alleviate it, the shortage still persists in the United States generally and in Minnesota in particular. This housing

1. The Citizens League is an educational, non-profit, non-partisan organization founded in 1952 to help improve life and government in the Twin Cities metropolitan area. It publishes periodic reports on a wide range of public issues.
4. The decade of the 1970's will start with a housing deficit of about 11 million units. This deficit has two parts: substandard units to be removed, and standard crowded units. See F. Kristof, Urban Housing Needs Through the 1970's: an Analysis and Projection, Research Report No. 10, National Commission on Urban Problems 21 (1968) [hereinafter cited as KRISTOF]. The National Commission's report indicated that this figure was too low, among other reasons, because the Census Bureau's classifications of sound, deteriorating and dilapidated are a crude measure of housing quality resulting in a lower estimate of the volume of substandard housing than most reasonable people would arrive at. See NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 68 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY]. See also REPORT OF THE PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME 3 (1968) [hereinafter cited as A DECENT HOME]. It has been recommended that in order to overcome the present shortage and to provide for growth, 2 to 2½ million units will have to be constructed yearly,
shortage has been aggravated by many factors including: (1) inflation; (2) increased building and labor costs; (3) increased demand; (4) restrictive building and zoning codes; (5) obsolete construction practices; (6) increasing birth rate; (7) declining infant mortality; (8) the Vietnamese war; and (9) migration.

Concomitant with this housing shortage there has been a steady increase in the price of available housing, making it even more difficult for many people to own their own homes. In 1968, for instance, the average sales price of houses in the Twin Cities area was almost $25,000, an increase of nearly $4,000 over the average cost of houses in 1967. This dramatic rise in the cost of housing is particularly significant in view of the fact that, at present mortgage requirements, about 54 percent of the families in the Twin Cities area could not buy a new $20,000 house on time and some 35 percent could not buy a used $15,000 house. Moreover, home ownership at any cost for those persons with incomes under $2,500 is not practical. Given the large number of people who are unable to buy homes which cost five to ten thousand dollars below the average selling price of $25,000, competition for cheaper homes intensifies, precluding those in the lowest income groups from participation or success in the scramble that for at least the next ten years, 500,000 to 600,000 units will have to be constructed yearly for lower income families. BUILDING THE AMERICAN CITY at 73 & 180. See also 42 U.S.C. § 1441 (1965), and Note, HOUSING, 32 ALBANY L. REV. 584, 585 (1968).

5. Citizens League, supra note 2, at introduction. If one looks at public housing units built as contrasted to demolition for public housing purposes, one would find that Minneapolis has had a deficit of 4,380 units since 1949 and that St. Paul has had a deficit of 109. The Minneapolis figure, which did not include demolition for roads, etc., was high relative to other major cities in the country. Undoubtedly such results contribute to the housing shortage. See BUILDING THE AMERICAN CITY, supra note 4, at 85.

6. KRISTOF, supra note 4, at 3; Citizens League, supra note 2, at 1-6; B. FREEDEN & R. MORRIS, URBAN PLANNING AND SOCIAL POLICY at introduction (1968). Although the rate of household formation to construction has gone down in recent years, the Kristof study indicates that for the 22 years from 1968-1990 new household formations will increase from a current yearly average of approximately 900,000 to 1.35 million yearly by the latter part of the 1980's. KRISTOF, supra note 4, at 4, 73. Moreover, the average size of households is expected to decline. By 2000 it is estimated that there will be 1.68 persons per household. U.N. DEPARTMENT OF ECONOMICS & SOCIAL AFFAIRS, WORLD HOUSING CONDITIONS AND ESTIMATED HOUSING REQUIREMENTS 2 (1965).

7. Citizens League, supra note 2, at 3.

8. Citizens League, supra note 2, at 2. Nationally it is estimated that one person in every eight, paying 20 percent of his income for housing, cannot now afford to pay the market price for standard housing. See A DECENT HOME, supra note 4, at 7.

ble for available homes. It would appear that prices will be
even higher in the future, given impetus by urbanization\textsuperscript{10} and
the natural, rapid rate of deterioration of our present housing
supply.\textsuperscript{11}

It is said that "[d]ecent housing as a primary goal of society
has been so long and vigorously urged by Presidents, the Con-
gress, distinguished citizens, and local legislatures as to be be-
yond dispute." If such is the case, we have not reached our
"primary goal." In 1965 almost eight million families lived in
substandard housing,\textsuperscript{13} two-thirds of them in metropolitan
areas.\textsuperscript{14} In Minnesota the problem is much the same. In 1960,
for example, of a total of 1,119,000 housing units in the state,
only 70.4 percent were "sound," while 6.4 percent were "de-
teriorating" and 23.1 percent were "dilapidated" or lacking in
one or more plumbing facilities.\textsuperscript{15} Likewise, in our major cities,
the percentage of available units which have been labeled as
"standard" range from a low of 70.9 percent in St. Cloud to a
high of 81.0 percent in St. Paul.\textsuperscript{16} Moreover, much of the
housing in the Twin Cities is very old and thus readily subject
to decay.\textsuperscript{17}

\begin{enumerate}
\item \textsuperscript{10} "Today, 70 percent of all Americans live on one and one-half
percent of our land . . . [B]y 1980 this will be 80 percent on the same
land." Office of Pub. Affairs, Department of Housing and Urban
\item \textsuperscript{11} In many of our urban centers housing is deteriorating more
quickly than it can be replaced. It has become economically im-
possible for private investors to provide new rental housing for
low income groups; and subsidized public housing will take
many, many years to fill the gap even if current rates of urban
renewal and other construction are greatly increased. Hence
we must improve the methods for maintaining our present hous-

Gribetz \& Grad, \textit{Housing Code Enforcement: Sanctions and Remedies},
\item \textsuperscript{12} Sax \& Hiestand, \textit{Slumlordism As A Tort}, 65 \textit{Mich. L. Rev.}
869, 889 (1966).
\item \textsuperscript{13} H.R. Rep. No. 365, 89th Cong., 1st Sess. 1 (1965) (report of
House Banking and Currency Committee accompanying the Housing
and Urban Development Act of 1965).
\item \textsuperscript{14} B. Friedmen \& R. Morris, \textit{supra} note 6, at 57.
\item \textsuperscript{15} U.S. \textit{Bureau of the Census, Statistical Abstract of the
U.S.} 728 (88th Ed. 1967).
\item \textsuperscript{16} 74.2 percent of the houses were considered sound in Duluth
and 77.2 percent were considered sound in Minneapolis. U.S. \textit{Bureau
of the Census, County \& City Data Book} 516 (1967).
\item \textsuperscript{17} Citizens League, \textit{supra} note 2, at 8, noting that 30 percent of
the housing in the Twin Cities area is over 50 years old. It can be
expected that this housing if not presently substandard, is most likely
to become so if not properly maintained.
The consequences of a housing shortage and the resulting high cost naturally weigh most heavily upon the poor. Since housing is either unavailable or too expensive, the poor are forced to rent. For the poor, having to rent has several disadvantages. First, the rental units available at a price they can afford are necessarily of the lowest quality located in the most run-down areas of our cities. They are forced to rent in slums created in part by the housing shortage. Moreover, and perhaps more important, increased costs for shelter mean that the poor must cruelly curtail expenditures for other necessities.

Second, because of the shortage, a seller’s market prevails which limits the bargaining power of the poor who are forced to enter into “contracts of adhesion.” Finally, since many of our poor are nonwhite, and are kept out of all but the more run-down areas of our cities, either because of their race or their income, the housing problem involves important racial implications and considerations. The result of this is that dwellings occupied by nonwhite households are generally of much poorer quality than those occupied by whites. In fact, nearly two-thirds of all non-

18. Citizens League, supra note 2, at introduction. If one looks at total housing units in the United States he would find, for example, that 19 percent of our housing units are substandard, while the substandard percentage rises to 36 percent for housing units occupied by the poor. If owner-occupied units are examined one finds that 11 percent are substandard when all groups are considered but that 30 percent are substandard for the poor. Similarly, for renter-occupied units, 23 percent were substandard for all groups while 42 percent were substandard for the poor. See BUILDING THE AMERICAN CITY, supra note 4, at 76. The problem is particularly acute in the public sector for the poor with large families because very few units of three or more bedrooms have been built. Id. at 67.

19. P. WENDT, supra note 3, at 197.

20. The average ratio of housing costs to gross income for the total population is 15 percent, but for the poor, the percentage is much greater. Thus, renters with income under $2000 in 1969 ($3000 is the federal poverty level) pay as follows: 90 percent pay 25 percent or more for rent; and of these 13 percent pay 25-35 percent of their income for rent and 77 percent pay over 35 percent for rent. For those with incomes between $2000 and $3000 per year, 63 percent pay 25 percent of their income or more for rent; and of these, 31 percent pay 25-35 percent for housing and 32 percent pay more than 35 percent of their gross income for housing. KRISTOP, supra note 4, at 61-63.

21. The phrase means “take it or leave it.” It seems to sum up the position the tenant finds himself in in today’s housing market wherein the landlord has the upper hand and knows it.


24. While nonwhite households constitute ten percent of all SMSA (Standard Metropolitan Statistical Areas) households, they oc-
whites living in urban centers live in neighborhoods characterized by inadequate, substandard housing.\(^{25}\)

Naturally, the poor are concerned. A recent survey conducted by the Minneapolis Urban League in several “target areas” revealed that housing was the greatest concern of the people in those areas surveyed. Some 23 percent of those questioned expressed concern about their housing problem. This figure was nearly twice as high as the next most frequently expressed concern.\(^{26}\)

The problem of unsatisfactory housing is not new to this country or this community and its severity seems apparent. Yet, from the days of the English common law to the present, the law has provided the tenant with few weapons which he can use against a landlord who will not properly maintain rental property.

It is recognized that the root cause of slums is economic, and that neither law reform\(^{27}\) nor strengthened and enforced housing codes\(^{28}\) will bring about all the necessary changes. Before the housing problem of our cities can be completely solved we also need an adequate supply of relocation housing, more housing for the poor and loans, grants and other incentives to low income homeowners, landlords and tenants. Any program should allow property to be repaired and maintained according to redefined housing code standards without merely increasing housing costs for the poor, who already pay too great a percentage of their income on housing, or rendering “standard” housing


\(^{26}\) Minneapolis Urban League, Minneapolis Urban League Door-To-Door Survey, Oct. 1969. In this survey 1796 replies were received; 406 of these were about housing; 230 about police; 192 about recreation; and 180 concerned improvements in city services.

\(^{27}\) J. Levi, P. Hablutzel, L. Rosenberg & J. White, Model Residential Landlord-Tenant Code 10 (1969) [hereinafter cited as Model Residential Landlord-Tenant Code]. This was a tentative draft prepared for the American Bar Foundation.

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economically inaccessible. However, landlord-tenant law does play its part in the solution of the overall problem.

III. TENANT'S REMEDIES

At common law, the landlord, in the absence of an express covenant to the contrary, was under no duty to repair the demised premises, except those parts of the building which the occupants enjoyed in common. Nor was there an implied covenant that the premises would be fit for the purpose for which they were let or that they would remain so. Instead, the tenant was deemed to have purchased an interest in land for the duration of the term, and he remained liable for the rental upon the premises unless physically evicted therefrom. This was the simple principal of caveat emptor. Moreover, liability for the agreed rental price persisted even if the building, let as a dwelling, was completely destroyed without the tenant at

29. BUILDING THE AMERICAN CITY, supra note 4, at 273. The necessity for redefining what is a decent home and a suitable living environment has been strongly urged as a prerequisite to decent housing. Id. at 67. The redefinition is necessary because present codes, even if enforced, would not provide "decent" housing. It is interesting to note that this report has recommended a "neighborhood conservation code" to define a "suitable living environment."

30. Harpel v. Fall, 63 Minn. 520, 65 N.W. 913 (1896); Saturnini v. Rosenblum, 217 Minn. 147, 14 N.W.2d 108 (1944).


32. Wilkinson v. Clauson, 29 Minn. 91, 12 N.W. 147 (1882); Krueger v. Ferrant, 29 Minn. 385, 13 N.W. 158 (1882). Contra, Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931). There are at least two jurisdictions which have an implied warranty of fitness in short term leases of furnished premises. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). Courts have, however, begun to recognize implied warranties of habitability. See, e.g., Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969) (indicating that since a lease is essentially contractual that contractual remedies are available to the parties). It has always been held, however, that the lessee can rescind for misrepresentation or deceit. Robbins v. Jones, 143 Eng. Rep. 768, 776 (1863); Gamble-Robinson Co. v. Buzzard, 65 F.2d 950 (5th Cir. 1933); Scudder v. Marsh, 224 Ill. App. 355 (1922).


34. The only numerous multiple dwellings known during the common law period of agrarian England were inns and rooming houses. These were governed by law quite unlike that which related to agrarian leases. The proprietor had more responsibilities to his guests than does a landlord to a tenant. Modern law has neglected to see the closer analogy between the modern apartment dweller and the common law guest in an inn than between the modern apartment dweller and the agrarian tenant. MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 27, at 6-7.
fault. Fortunately, this harsh result has been changed by statute in some states including Minnesota.

Furthermore, even if the landlord expressly covenants to repair the premises, but later fails to fulfill his obligations pursuant to such a covenant, the tenant can neither terminate his tenancy nor stop paying his rent. The tenant's only remedy for a landlord's broken covenant to repair is an action at law for damages. This result has been justified by holding that the covenant to repair is independent of the covenant to pay rent. It may have been reasonable to hold these covenants independent in agrarian England, when the object of the bargain was to use the land for farming and the landlord had no right to enter upon the demised premises, but such an interpretation is archaic when applied to conditions in urban America.

To some extent, the courts have recognized the inapplicability of the English rules. Now, actual physical eviction is not the only way to avoid paying rent. The courts have added the concept of "constructive eviction" to the common law. This concept has been said to be a surrogate for the contract rule of the mutual dependency of covenants. Constructive eviction requires an intentional and substantial interference by the landlord with the tenant's enjoyment of the leased premises. Substantial interference has been held to include the failure to provide heat, decay and faulty construction, defective plumb-

35. For continued liability as in a fire, see Fowler v. Bott, 6 Mass. 63 (1809).
36. Minn. Stat. Ann. § 504.05 (1947) provides:
The lessee or occupant of any building which, without fault or neglect on his part, is destroyed or is so injured by the elements or any other cause as to be untenable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner thereof, unless otherwise expressly provided by written agreement; and the lessee or occupant may thereupon quit and surrender possession of such premises.
37. Long v. Gieriet, 57 Minn. 278, 59 N.W. 194 (1894).
38. Id.
40. Model Residential Landlord-Tenant Code, supra note 27, at 34.
41. Mutuality: where a substantial breach by one party terminates the duty of performance by the other party. C. Mohnihan, Introduction to the Law of Real Property 73 (1962).
42. Bass v. Rollins, 63 Minn. 226, 65 N.W. 348 (1895).
ing and a leaky roof,\textsuperscript{44} vermin\textsuperscript{45} and the failure to provide fire escapes as required by statute.\textsuperscript{46} However, in every case, before the tenant can claim a constructive eviction, he must vacate the demised premises\textsuperscript{47} within a reasonable time.\textsuperscript{48}

Avoidance of rent can be accomplished only if the tenant vacates the demised premises and vacation is permissible only when an eviction or a constructive eviction can be shown. This is unsatisfactory for the tenant. Whether the tenant has a lease or not, the remedy he foresees when he enters into possession is neither the avoidance of liability for rent nor the right to vacate the premises. The tenant wants his dwelling to be fit and habitable throughout his tenure there, but fitness is precisely the objective that is legally impossible to achieve. The right to vacate merely exposes the tenant to a dilemma: whether he should stay in his present location with all its defects, or attempt to find another dwelling at a time when prices are high and dwellings are scarce.\textsuperscript{49} Should the tenant decide to move, he will probably end up facing the same dilemma again, with no way of securing correction of the defects. Thus, vacating one dwelling is indeed a Pyrrhic victory.\textsuperscript{50} The law offers only movement to a class of people who are decidedly immobile.\textsuperscript{51}

If we assume that the tenant decides to stay in an unfit building because he does not want to travel a greater distance to work, make his children change schools, leave his friends and neighbors or get involved in the inconvenience and expense of moving, there is no way he can force the landlord to correct the

\begin{itemize}
\item \textsuperscript{44} Rea v. Algren, 104 Minn. 316, 116 N.W. 580 (1908).
\item \textsuperscript{45} Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1934).
\item \textsuperscript{46} Leuthold v. Stickney, 116 Minn. 299, 133 N.W. 856 (1911).
\item \textsuperscript{47} The Automobile Supply Co. v. The Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942); Loining v. Kilgore, 232 Minn. 347, 45 N.W.2d 554 (1951); Bowder v. Gillis, 132 Minn. 189, 156 N.W. 2 (1916). Vacating can pose a dilemma for the tenant because the court may not agree that the circumstances complained of constituted a constructive eviction. One court has alleviated this problem by allowing a declaration of constructive eviction in equity without a prior abandonment. Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959).
\item \textsuperscript{48} Sweeting v. Renning, 235 Ill. App. 572 (1924) (24 days unreasonable); Cerruti v. Burdick, 130 Conn. 234, 33 A.2d 333 (1948) (4 months unreasonable); Greenstein v. Conradi, 161 Minn. 234, 201 N.W. 602 (1924) (3 months reasonable).
\item \textsuperscript{49} \textit{See} \textit{Time}, March 16, 1970, at 88. Of course, the vacancy rate here would not include abandoned buildings.
\item \textsuperscript{50} Walsh, \textit{Slum Housing: The Legal Remedies of Connecticut Towns and Tenants}, 40 CONN. B.J. 539, 555 (1966).
\item \textsuperscript{51} B. \textit{Frieden} & R. \textit{Morris}, supra note 6, at 520.
\end{itemize}
violations which render the premises unsafe, unsanitary or hazardous to life or health. Of course he can bring a civil action against a landlord for a breach of his covenant to repair, 52 or he can report housing violations to the local building inspector. In either case, however, he may be given “notice” to promptly vacate. 53

Specific performance is also unavailable to the tenant, even though there is language, but no holding to the contrary. 54 Nor can a tenant attempt to enforce building or housing codes on his own. Since the landmark case of Davar Holdings, Inc. v. Cohen, 55 the courts have held that the landlord’s duty to maintain his property is one owed to the municipality and not to the tenants. The tenant can only make a complaint to the housing department.

It is anomalous that a tenant is unable to compel proper maintenance of his own house or apartment, but if a neighbor creates a condition which threatens the tenant’s health, safety and repose, he need only bring an action in equity to have such a nuisance abated. Courts of equity, while traditionally having the power to give relief against either a public or private nuisance by compelling its abatement, 56 have not extended the remedy to a

52. It is highly doubtful that the poor, in the absence of a statute, ever receive a covenant from their landlord that the landlord will repair the demised premises. If the tenant does receive such a covenant, however, and decides to sue for damages, the tenant has a hard time showing the amount of his damages because of the heavy burden of proof. See 501 DeMers, Inc. v. Fink, 148 N.W.2d 820 (N.D. 1967). Moreover, where the landlord’s promise to repair is oral, the promise is seldom enforced by the courts because of the parole evidence rule unless the tenant can show that the oral agreement is independent of the lease. In that case some courts will enforce it. See 32 Am. Jur. 2d Landlord and Tenant §§ 145-53 (1970); Frosh v. Sun Drug Co., 91 Colo. 440, 16 P.2d 428 (1932).


56. Sullivan v. Royer, 72 Cal. 248, 13 P. 655 (1887); Oehler v. Levy, 234 Ill. 595, 85 N.E. 271 (1908); State v. Ohio Oil Co., 150 Ind. 21, 49 N.E. 809 (1898).
tenant for dangerous conditions created or maintained by his landlord.\textsuperscript{57} Although the power to abate a nuisance can be exercised in apparently trivial situations involving nothing more than something which offends the aesthetic sense,\textsuperscript{58} the theory of nuisance has traditionally been applied only to conditions outside the premises of the perpetrator.\textsuperscript{59}

In sum, the remedies available to a tenant against his landlord with whom there is a contractual relationship, are inadequate, especially when compared to the remedies available to a tenant against his neighbor. Reason and logic preclude distinguishing the two, and a distinction based upon historical development, while explaining how the difference evolved, is of no value in explaining why we should permit them to remain.

Although the tenant has been rendered unable to help himself, some effort has been made to provide legislation which will enable the state to help the tenant. The most common form of aid is the housing code.

\section*{IV. HOUSING CODES IN MINNESOTA}

Housing codes\textsuperscript{60} have proven inadequate as a device for compelling the maintenance of dwellings in conformity with defined minimum standards. One of the primary reasons for this

\begin{itemize}
\item [57.] Brill & Brill v. Flagler, 23 Wend. 354 (N.Y. Sup. Ct. 1840).
\item [60.] Housing codes differ from building codes in that the former regulate maintenance while the latter regulate the initial construction or later reconstruction. Credit for the principle that programs should be developed in the housing area for public health and safety is usually given to Edwin Chadwick in England and Lemuel Shattuck in the United States. The first true housing act was the New York Tenement House Act of 1901, N.Y. Sess. Laws 1901, ch. 334. While several states have adopted housing codes, only one state statute applies to all local governmental units within the state. N.J. REV. STAT. § 55:13A-1 et seq. (1967). Minnesota has no state housing or building code that applies to private dwellings. The one that was enacted applied only to first class cities without a home rule charter. However, there are no such cities in the state. MINN. STAT. ANN. §§ 460.01-86 (1963). According to the files of the League of Minnesota Municipalities, at least 35 cities and villages in Minnesota have housing codes. About one-third of them have adopted the Uniform Housing Code published by the International Conference of Building Officials. One of the more interesting provisions of one of the ordinances provides for vacation of a dwelling when, among other things, the dwelling "presents an imminent and serious hazard . . . to the mental health of the occupants." Edina, Minn., Ordinance 149-3, § 5(b), December 29, 1966.
\end{itemize}
failure is that "inspection departments are not adequately staffed to enforce housing codes . . . and . . . inspectors are frustrated in attempts to compel enforcement."61  This is particularly true in Minneapolis where the number of housing inspectors is insufficient to do an adequate job. According to one manager of the Minneapolis Department of Inspections, the inspection of registered multiple dwellings alone is currently 50 to 60 percent behind schedule, and some thirteen additional men are needed to make his department effective.62

Another factor that has contributed to the failure of housing codes is the lack of remedies available to punish violators.63 In 1968, for instance, Minneapolis issued 3,599 more housing orders than were abated. However, only 182 violation tags were issued.64 About 40 percent of the tags issued were paid by the violator at an average cost of less than $18 per tag; and of the 50 tags that were defended, 24 were either dismissed, stayed, suspended or the defendant was found not guilty. The remaining 26 defendants, who were found guilty, paid less than $15 per tag on the average.65 The legal penalties imposed are no more than a

62. Interview with Daniel W. Kupcho, Manager of Inspection Operations, Minneapolis Department of Inspections, in Minneapolis, Oct. 23, 1969. Minneapolis has a current total of 31 housing inspectors. Some of these men are supervisory personnel, however, and do not spend their time inspecting. This does not appear to be a very large force considering the fact that Minneapolis has a population of nearly one-half million. The importance of the number of inspectors cannot be underestimated. It has been said that the adequacy of the number of inspectors is of much more practical importance than the legal means of enforcement. Grad, supra note 28, at 10.
63. It is interesting to note that housing inspectors have only come into being on the municipal level in the last ten to fifteen years. The typical inspector, who goes through a city block by block and house by house first appeared in the city of Baltimore. Karvelas, DUTIES OF THE HOUSING INSPECTOR, PROCEEDINGS OF THE 1969 CONFERENCE ON CODE ENFORCEMENT 27 (1969).
64. Ordinance Violation Tags Issued Under the Housing Code by the Department of Inspections for the Year 1968.
65. Ordinance Violation Tags Issued Under the Housing Code by the Department of Inspections for the Year 1968.
slap on the hand and an inadequate incentive to induce landlord compliance with the housing codes.  

Housing code enforcement has further difficulties. The landlord-owner may be a resident of another state so as to make compliance difficult to enforce; or the owner may be a poor contract-for-deed owner who cannot afford to make the repairs and whom the departments dislike prosecuting. A recent Supreme Court decision creates further difficulties. In that case, Camara v. Municipal Court of San Francisco, the Court held that entry upon premises can be denied to an inspector without a warrant. If a party refuses entry to an inspector, a further administrative and time-consuming obstacle is placed upon a building department's activities.

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66. The Model Residential Landlord-Tenant Code § 1-106, supra note 27, partially solves this problem by expanding the state's jurisdiction to absentee landlords and owners on the basis of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Presently two states have such a statute: ILL. ANN. STAT. ch. 110, 317 (Smith-Hurd 1956); WIS. STAT. § 262.05(6) (b) (Supp. 1969).

67. Prosecuting tenants for violations is difficult because they are a vocal group which can put great pressure on local officials, the burden of establishing their guilt is great and Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967), could be effectively utilized by them. Grad, supra note 28, at 88, 89.  

68. The Camara and See decisions leave control of the boiler-room, basement, machine room and other non-public areas to the landlord and inspection thereof can be made only with his consent. Usually there will be no problem where a multiple dwelling is involved and a tenant has made a complaint, but consent will be a factor in owner-occupied one- and two-family dwellings. The biggest problem, however, is that the warrant issue procedures of the states are wholly inappropriate for the issuance of warrants for housing inspections. Grad, supra note 28, at 105-07.
The efficient enforcement of housing codes is also retarded by the lack of coordination between inspecting departments and prosecuting departments. Housing officials often complain that prosecutors are not familiar enough with local housing and building codes and state health statutes. A Minneapolis housing official indicated that the Department of Housing Inspections needed a staff attorney since cooperation with the city attorney's office was difficult, time consuming and often unsuccessful. Ambiguities in the language of local housing codes further complicate enforcement efforts. There has also been disagreement among the courts as to whom, between landlord and tenant, should be required to make repairs ordered by a governmental authority pursuant to a local housing or sanitation code. Oftentimes, this burden wrongly falls upon the tenant who simply cannot afford to make such repairs. Fortunately, the courts are more rational when substantial structural alterations or improvements are necessary. In such cases, the courts place the duty to repair upon the landlord, even if the tenant had covenanted to make repairs.

There are other reasons why tenants either will not or should not have the burden of making repairs on the demised premises. The most obvious reason is that they are economically unable to afford repairs. Other important factors preclude the tenant from making the repairs. First, the complexity of modern

71. Walsh, supra note 50, at 549.
72. For example, it once took four men 30 hours to get a warrant to enter a dwelling for inspection. Moreover, since the city attorney who finally handles a case has only a short time to prepare for trial, many cases are not prosecuted as ably as they should be, with the result that some cases are lost which should have been won. Interview with Daniel W. Kupcho, Manager of Inspection Operations, Minneapolis Department of Inspections, in Minneapolis, Oct. 23, 1969.
73. Walsh, supra note 50, at 546.
75. See National Comm'n on Urban Problems, Building the American City, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 68 (1968) [hereinafter cited as Building the American City].
76. Yall v. Snow, 201 Mo. 511, 100 S.W. 1 (1906); Knight v. Foster, 163 N.C. 329, 79 S.E. 614 (1913). This is a reasonable result because it seems only fair that the tenant should pay only for that which he would "consume."
homes makes the tenant unable to repair either because he lacks the expertise, or local laws relating to plumbing and electrical wiring make it illegal for him to do so. Moreover, it costs more for a tenant to make repairs than it costs the landlord because the latter is not a one-time user and can achieve economies of scale unavailable to the individual tenant. Also, should the tenant contemplate repairs, he probably will decline because he has no guarantee of tenure.

Finally, it must be decided who should have the burden to repair. Since there is a slow rate of housing replacement, thereby requiring the preservation of existing housing, and since the successful conservation of existing housing depends on well drawn and enforced housing codes, from society's point of view the most important question is who is best able to bear the burden of repair and preservation. When this approach is taken, it appears that the burden of repair and upkeep of property is too great for most tenants.

The Twin Cities has a substantial number of families in the low income brackets. The 1969 annual income levels after taxes are estimated to be as follows: 16,500 families under $2,000; 38,500 under $3,000; 60,500 under $4,000; 93,500 under $5,000 and 137,500 under $6,000. In view of these statistics, it is not surprising that at least 74,000 persons in Minnesota were receiving some form of federal public assistance in 1965. It is obvious that many of these people cannot afford to make repairs on the property they lease. Consequently, if the landlord is not given the burden, such repairs will not be made. This result is exemplified by the Minneapolis Indian:

[R]ecent surveys have shown the Indians' greatest problem is housing, and that much of it is not fit for human habitation. It is housing characterized by cockroaches, poorly heated and dimly lighted rooms, shattered windows covered with cardboard, sagging doors that don't lock, plumbing that doesn't work, plaster that is cracked and steps that are broken. It was found that 70 percent of the Indians living in the Phillips area reside in sub-

79. Id. at 9.
80. Id. at 10.
81. Gribetz & Grad, supra note 63, at 1255.
83. Citizens League, supra note 61, at 2. See also Building the American City, supra note 75, at 285.
standard housing.\textsuperscript{86}

Despite the inadequate legal sanctions to punish noncompliance with our housing codes, the large number of Minnesota dwellings which are substandard and the inadequate legal remedies available to tenants to secure decent housing, the position of the Minneapolis Department of Inspections seems to be that there really is no housing problem in Minneapolis. An officer of that department gave two reasons for this attitude. First, he indicated that many improvements have been made in our housing supply since 1960 which have not yet shown up on the reports and records.\textsuperscript{87} Second, he believed that whatever housing problem there was certainly was not the type that his department could deal with. He took the position that if housing was in a state of deterioration, decay and uninhabitability that it was "90 percent a tenant problem." That is, that the landlords had made every effort to provide decent housing for their tenants but that the tenants were responsible for continually undoing all that the landlords accomplished.\textsuperscript{88}

\textsuperscript{86} Citizens League, \textit{supra} note 61, at 9.

\textsuperscript{87} In this respect he appears to have been correct. It is estimated that our housing deficit will have been reduced 30 percent during the 1960's, from 15.4 million in 1959 to 10.8 million in 1969. \textit{F. Krustof, URBAN HOUSING NEEDS THROUGH THE 1980's: AN ANALYSIS AND PROJECTION}, Research Report No. 10, National Commission on Urban Problems 16 (1968). This follows closely the gains made in the 1950's. Beginning in 1950 there was a housing deficit of approximately 21 million units and by the end of the decade nearly 5½ million substandard units had disappeared or roughly 25 percent. About 60 percent of the substandard units that were no longer substandard in 1959 resulted from improvements in the property. This large amount of improvement is reflected in increased expenditures for repairs made during the 1950's, from $3 billion in 1950 to $4.2 billion in 1960, and during the 1960's the figure has remained slightly above the $4 billion mark. \textit{Id.} at 9-11.

\textsuperscript{88} Interview with Daniel W. Kupcho, Manager of Inspection Operations, Minneapolis Department of Inspections, in Minneapolis, Oct. 23, 1969. He claimed, for instance, that if one would rent to Indians they would proceed to tear all the woodwork out of a dwelling, including the doors, and build campfires on the floor. In this regard it has been suggested that tenants should be trained in the proper use of their dwellings. \textit{See, e.g., BUILDING THE AMERICAN CITY, supra} note 75, at 284. Some steps in this direction have already been taken. The Public Health Department has, for example, used "health educator aides" to provide actual assistance to slum dwellers in the city of Chicago. \textit{PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION \& WELFARE, HEALTH EDUCATION AIDES—A METHOD FOR IMPROVING THE URBAN ENVIRONMENT} (National Center for Urban and Industrial Health, 1968). Baltimore has made some unique educational experiments in their housing clinic. They permit tenants charged with violations of the housing code to receive a form of suspended judgment if they attend a
The opposite view was taken by an official at the Minneapolis Urban League who indicated that recalcitrant landlords are the primary source of inadequate housing. Moreover, he felt that the Department of Inspections was not doing an adequate job. He mentioned that on one occasion tenants tried unsuccessfully for a period of six months to get a housing inspector to come out to a multiple dwelling to inspect a complaint. One commentator has suggested that one of the major reasons why tenants fail to participate actively in maintaining adequate housing can be traced directly to the landlord and his eviction practices. If, for example, a tenant reports a violation to a local housing department, the landlord will give him notice to quit or evict him in some manner. It is easy to understand why tenants do not take a more active part: they have really nothing to gain and everything to lose. Fortunately, a few enlightened courts have begun to offer the tenant more protection by refusing eviction when a tenant reports building code violations.

It has already been noted that the landlord generally has no duty to repair in the absence of an express covenant; and even if there is an express covenant which the landlord fails to keep, the tenant's only practical remedy is to vacate the premises unless he wants to sue the landlord for damages—an improbable alternative for the alienated poor. Since the only other alternative, housing code enforcement, has failed to provide the tenants with the tool they need to secure decent housing, something more is needed. One possibility is a rent withholding statute that places the burden of repair upon the landlord and provides the tenant with a quick, effective remedy in the event of a landlord's noncompliance with the housing code.

V. DEVELOPMENT OF THE CONCEPT

The idea of a rent withholding or rent abatement statute is

number of sessions at the housing clinic where they acquire proper housekeeping techniques and sound attitudes toward housing maintenance. Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 825, 826 (1965).

Interview with Johnaton Byrd, Minneapolis Urban League, in Minneapolis, Oct. 27, 1969.


91. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968). An Illinois statute gives the tenant some help by prohibiting the landlord from evicting a tenant for reporting a code violation. ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966). See also R.I. GEN. LAWS ANN. §§ 34-20-10, -11 (Supp. 1969) (making it illegal for a landlord to raise a tenant's rent in retaliation for a tenant's having reported a code violation).

92. See note 49 supra and accompanying text.
not new. In 1914, a model statute was proposed by Veiller which would have deprived the landlord of rent during the period when the demised premises were in violation of minimum standards. Other forms of rent abatement, not sanctioned by the law, but analogous to withholding (i.e., a rent strike) have been used throughout the present century in Mexico, England, New York and Cleveland, and tenant unions have been formed to protest housing conditions. The first welfare department rent withholding scheme began in 1961 when the Cook County Department of Public Aid without statutory authority instituted rent withholding from certain landlords. All these efforts were an attempt to force recalcitrant landlords to improve certain unacceptable, dangerous or unsanitary housing conditions. Apparently the efforts of the welfare department in Cook County were successful because their procedure was later incorporated into a statute giving legal sanction to the practice.

A different approach has been employed for some time in California, Montana, North Dakota, Oklahoma and Louisiana. Each of these states has a statute which authorizes the tenant to make repairs to the demised premises himself and deduct the cost from his rental payment, provided the landlord has not contracted away his duty to repair; that he has received notice of the condition to be repaired; that he has failed to make the necessary repairs within a reasonable time; and that the cost of the repair to be made by the tenant does not exceed one month's rent. Another state apparently reached this result by decision.

Advocates of rent withholding have said that the idea has a firm common law heritage. They conclude that it is simply an

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95. The immediate model for tenant unions was that of Jesse Grey's Community Council on Housing in New York City between 1963 and 1964. In 1966 some 20-odd unions with 10,000 members were in existence. F. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS*, Research Report No. 14, National Commission on Urban Problems 139 (1968).
96. *See Note, supra note 94, at 333.
97. ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd 1968).
98. CAL. CIV. CODE §§ 1941, 1942 (West 1954); LA. CIV. CODE ANN. arts. 2692-94 (West 1952); MONT. REV. CODES ANN. §§ 42-201-212 (1947); N.D. CENT. CODE §§ 47-16-12-13 (1960); OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1952); S.D. CODE §§ 38.0409-0410 (1939).
extension of the concept of "partial eviction" as enunciated by Judge Cardozo in *Fifth Avenue Building Co. v. Kernochan*.\(^{100}\) In that case he said, "[i]f such an eviction, although partial only, is the act of the landlord, it suspends the entire rent because the landlord is not permitted to apportion his own wrong."\(^{101}\) The same idea and language appears in *Smith v. McEnnay* (Holmes, J.),\(^ {102}\) and in the more recent case of *Gombo v. Martise*.\(^ {103}\) A recent case in the District of Columbia is also said to have legalized rent withholding under certain circumstances, although the holding was based on a different theory.\(^ {104}\) The United States Court of Appeals for the District of Columbia observed, while refusing to grant a landlord a preliminary injunction to prevent funds from being placed in escrow by rent strikers, that a "tenant's liability for rent in the face of housing regulation violations is an area of the law very much open at present."\(^ {105}\)

**VI. CURRENT RENT WITHHOLDING STATUTES**

Presently there are some twelve rent withholding or rent abatement statutes in at least ten states\(^ {106}\) and one foreign country, England.\(^ {107}\) In addition rent withholding was sanctioned by judicial decision in Louisiana.\(^ {108}\) One municipality, St. Louis, passed a rent withholding statute, but it was

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100. 221 N.Y. 370, 117 N.E. 579 (1917).
101. *Id.* at 373, 117 N.E. at 580.
102. 170 Mass. 26, 48 N.E. 781 (1897).
promptly invalidated.\textsuperscript{109} This enumeration does not include the "repair and deduct" statutes previously mentioned.\textsuperscript{110} Rent withholding statutes, largely the product of the past decade,\textsuperscript{111} are of two basic types. Under one type, the withholding action is instituted by a public agency, a welfare department,\textsuperscript{112} and in other cases by the building or housing department.\textsuperscript{113} In the other type, action is initiated by the tenant either individually\textsuperscript{114} or jointly with others.\textsuperscript{116} Although most of these statutes are of an "offensive" character, some of them provide the tenant with a defense to an action for summary eviction.\textsuperscript{116}

Except for the two welfare oriented laws, these statutes can also be distinguished from one another on the basis of the purposes underlying the various remedies provided by them. Under this distinction withholding may serve two different functions: abatement or receivership.

Statutes of the former type provide for an abatement of the tenant's rent when repairs are not made after rents are withheld\textsuperscript{117} or for a reduction in the amount of rent the tenant must pay.\textsuperscript{118} These statutes can be construed as giving damages to the tenant as compensation for living in squalor (like a partial construction eviction). It is hoped that rent abatement which threatens permanent loss of income will operate \textit{in terrorem} to induce the landlord to make necessary repairs.\textsuperscript{119} The only problem with abatement statutes is that while they compensate the tenant for his discomfort they do not help him get his home repaired and both society and the tenant lose in the long run.\textsuperscript{120} The second type of withholding statutes have a receivership provision which enables the local

\begin{itemize}
\item \textsuperscript{109} City of St. Louis v. Golden Gate Corp., 421 S.W.2d 4 (Mo. 1967).
\item \textsuperscript{110} See note 98 \textit{supra}.
\item \textsuperscript{111} N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963) has been on the books since 1939.
\item \textsuperscript{112} ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd 1968); N.Y. Soc. WELFARE LAW § 143-b (McKinney 1966).
\item \textsuperscript{113} See, e.g., CONN. GEN. STAT. REV. §§ 19-347 (a)-(h) (1969); IND. ANN. STAT. § 48-6144 (Supp. 1969); N.J. STAT. ANN. §§ 2A:42-72, -84 (1966).
\item \textsuperscript{114} MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).
\item \textsuperscript{115} N.Y. REAL PROP. ACTIONS §§ 769-82 (McKinney Supp. 1969) requires participation by one-third of the tenants in the building.
\item \textsuperscript{116} See, e.g., N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963).
\item \textsuperscript{117} See, e.g., PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).
\item \textsuperscript{118} N.J. STAT. ANN. §§ 2A:42-74, -84 (1966).
\item \textsuperscript{119} F. GRAD, \textit{supra} note 95, at 145.
\item \textsuperscript{120} Id.
\end{itemize}
When an uncorrected violation of the housing code has been shown, both statutes provide that future rents are to be deposited with a receiver, clerk of court, escrow account or the like. Once the rents have been deposited or the action initiated, the tenant cannot be evicted by the landlord for the nonpayment of rent or for initiating the action. This protection usually exists only until the necessary repairs have been made. However, the tenant forfeits his immunity from eviction if he fails to deposit his rental pursuant to the terms of the statute and in no event can the tenant maintain the action if he was responsible for the violation complained of.

Under either statute the kind of violation necessary before rents will be withheld is usually one which is certified as causing the building to be "unfit for human habitation" or "dangerous, hazardous or detrimental to life or health." The New York statute is more specific. That statute empowers the proper department to prepare a list of "rent impairing" violations. The existence of any one of these violations prima facie constitutes grounds for rent withholding. A "rent impairing" violation is one which "constitutes, or if not promptly corrected, will constitute, a fire hazard or serious threat to the life, health or safety of the occupants thereof."

The landlord is usually given a fixed period of time in which to make the necessary repairs upon the premises: ten days, a reasonable time, six months or one year. In Pennsylvania, if the landlord has failed to make the necessary repairs within the allotted time, he may forfeit the money which has been deposited, in which case the money is returned to the tenant. Few of these statutes provide for forfeiture, however.

In most cases, once the landlord has failed to make the or-

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122. N.Y. SOC. WELFARE LAW § 143-b (McKinney 1966).
124. Id. Rent impairing violations include failure to provide heat, hot water or fire escapes, and such things as failure to register the building for occupancy, failure to register a change of ownership and a failure to provide a dwelling with a janitor.
125. ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd 1968).
dered repairs within the allotted time, a "receiver" is appointed to make the repairs for him. One statute provides that should the deposited rents be inadequate in amount to make the necessary repairs and corrections, the municipality may advance additional sums of money to the receiver to make the necessary repairs. In return for this "loan," the municipality secures a lien on the property in the amount of the loan. If the property is not worth repairing, however, it will be torn down.

In addition to protecting the tenant from eviction for non-payment of rent, the statutes sometimes provide further protection. Thus, if the Pennsylvania landlord, in retaliation for the withholding of rents by the tenants, shuts off necessary utilities which he has covenanted to furnish, the cost of providing these services can be paid by the administrator or receiver out of the withheld rents. The Illinois statute stipulates that a criminal action can be maintained against a landlord who terminates utility services after a rent withholding action has commenced. By the terms of a Michigan statute, a tenant can recover in a civil action for injury sustained because of conditions which are "unsafe, unsanitary or unhealthful." This seems to be a legislative formulation of current notions of "slumlordism as a tort." Some of the statutes make one exception to the general rule

132. MASS. GEN. LAWS ANN. ch. 111, § 127 (1967). Minnesota has a statute under which hazardous buildings can be repaired or removed also, but that statute has no rent withholding provisions. See MINN. STAT. ANN. §§ 463.15, -26 (Supp. 1970). The act defines a hazardous building as follows: "Hazardous building means any building which because of inadequate maintenance, dilapidation, physical damage, unsanitary condition or abandonment, constitutes a fire hazard or a hazard to public safety or health." The statute has not yet been used to compel better living conditions for tenants, but has been strictly and narrowly construed, and delays are often given to the owner. It has even been suggested that a condition necessary for a building to come within the act is that it be unoccupied. See Ukkonen v. Minneapolis, 280 Minn. 494, 160 N.W.2d 249 (1968). It is unfortunate that this type of statute is not used in a more imaginative manner because it could be a useful device for helping those persons who live in dilapidated housing. Moreover, virtually every municipality in the state has a similar ordinance or can act pursuant to the state statute. See, e.g., Two Harbors, Minn., Ordinance No. 227, January 27, 1964.
134. ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd 1968).
that a tenant can remain on the premises simply by depositing his rents with the receiver. When the premises are too immediately dangerous to life, health and safety to permit continued occupancy, the tenant is forced to vacate and if for some reason he cannot, the landlord may have to initiate repairs within a shorter period of time. Thus, in Michigan, the landlord usually has a reasonable time in which to make the required repairs; however, if the violation constitutes an immediate hazard and the tenant is unable to vacate, the landlord is given only three days in which to initiate repairs.

The landlord is also given protection under these statutes. First, the tenant must show that the violations exist, that the landlord has had notice of their existence and that the landlord has refused to repair within the time allowed by the statute. Furthermore, the landlord can avoid withholding if the violations complained of were caused by the tenant or his invitees, either willfully or negligently. If the landlord is restrained in his efforts to repair by a tenant, the tenant not only loses

137. IND. ANN. STAT. § 48-6144 (Supp. 1969); MASS. GEN. LAWS ANN. ch. 111, §§ 127 (A)-(H) (1967); MICH. COMP. LAWS ANN. § 125.530 (Supp. 1969). In cases where the tenant has to show a condition dangerous to health or safety in order to invoke the withholding provisions of the statute, it might be difficult to argue that one should be permitted to remain on the premises when they are in such a dangerous condition. Hopefully, the proper court or department would order a building vacated only in a very few extreme cases. If they do not, tenants might refrain from reporting violations and refuse entry to local inspectors. Moreover, it would seem preferable in most cases to permit a tenant to remain in a dangerous dwelling pending repairs rather than to force him out if he has no place to go. In the latter situation a court could take judicial notice of the housing shortage and permit the tenant to remain until substitute housing could be found. This was done in one case. See Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. N.Y. 1946).


139. Id.

140. ILL. ANN. STAT. ch. 23, §§ 11-23(a)-(d) (Smith-Hurd 1968); MASS. GEN. LAWS ANN. ch. 239, §§ 8A(1)(a)-(d) (Supp. 1969); N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1969).


142. N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1969). It is interesting to note that in Philadelphia, landlords have complained that tenants deliberately damage their property to qualify for rent withholding, and then block repair attempts. Tenants are said to consider the escrow account to be a kind of savings account. Wall Street Journal, Aug. 13, 1969, at 9, col. 2. This may argue against having a forfeiture of rent provision as Pennsylvania does, but the usefulness of a statute that avoids forfeiture should not be affected, since the landlord will still be denied the money.
his action, but he can also be evicted.\textsuperscript{143} In New York the law provides that an action brought by a tenant in bad faith enables the court to assess the reasonable costs of the owner, not exceeding $100, against the tenant.\textsuperscript{144}

The landlord may also be given financial help in his efforts to correct existing violations and to ease his burden. A New York statute provides that any increase in the assessed valuation of a dwelling resulting from improvements made pursuant to a housing code are exempt from taxation for a period of twelve years.\textsuperscript{145} The federal government provides some additional assistance with loans of up to $3,000 to help some landlords bring their dwellings up to code specifications.\textsuperscript{146}

\section*{VII. RENT WITHHOLDING UNDER ATTACK}

Rent withholding has been the topic of much concern, conversation and criticism. The most enduring and consistent attack has been that such a statute will force many landlords out of the low-income rental business. It is believed that the landlord will, if unable or unwilling to upgrade his property, simply abandon it for rental purposes.\textsuperscript{147} In this regard, one observer has noted:

Perhaps the most stubborn obstacle to the improvement of housing through code enforcement is the practical effect of strict enforcement: Often thousands of tenants would be thrown into the streets with no place to go. Faced with the need for extensive repairs the landlord may either raise the rent substantially, or simply vacate the building and take it out of the housing supply. If either possibility occurs the effect will be to push impoverished tenants out into a market where adequate low rent housing is extremely scarce. As a consequence, displaced tenants would be forced to relocate in already overcrowded slum areas, or in improved areas but at the cost of spending a greater share of their income on housing, or in the hard-to-find public housing.\textsuperscript{148}

This fear has been borne out, but for other reasons. In the

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{143} N.Y. Mult. Dwell. Law § 302-a (McKinney Supp. 1969).
\item \textsuperscript{144} Id.
\item \textsuperscript{145} N.Y. Ad. Code § J51.2.5(c) (1963).
\item \textsuperscript{146} Housing and Urban Development Act of 1965 § 106, 42 U.S.C. § 1466 (Supp. 1965). The effectiveness of this aid is severely limited because the aid is available only in an urban renewal area where there is concentrated code enforcement. For a listing of federal loan and grant programs available for the assistance of individual owners see The Vice President's Handbook for Local Officials, ch. 17, particularly pp. 185-93 (1967).
\item \textsuperscript{147} Wall Street Journal, Aug. 13, 1969, at 1, col. 1.
\item \textsuperscript{148} Note, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304, 320-22 (1965).
\end{itemize}
\end{footnotes}
past few years the rate of abandonment of buildings in some of our larger cities in the East and Midwest has been terrifying. Abandonments for selected major cities have been reported as follows: (1) Boston, 350 buildings in two years; (2) Philadelphia, 20,000-24,000 residential structures; (3) New York, 114,000-130,000 apartments; (4) Houston, 7,500 apartments; and (5) Chicago, 950 buildings.\(^{149}\) Several interrelated explanations have been suggested for this phenomenon. First, the slum is becoming less profitable and the landlord is moving. Tenant strikes and urban violence coupled with high costs and interest rates and scarcity of capital drive landlords out of business. Migration of whites, and sometimes blacks, further aggravates the problem.\(^{150}\) One magazine put it this way: "The abandonments are caused by a convergence of urban ills: crime, shifting populations, economic squeeze and the American propensity to waste.\(^{151}\)

The real tragedy in the situation is that once the building is no longer managed or occupied, the so-called "midnight plumbers" move in and strip the building of everything that can be carried away and sold.\(^{152}\) Once this stage is reached the building is no longer habitable and is ripe for demolition. The tragedy of this process is exemplified by the fact that in a survey of 14 major cities, abandonment of dwellings that could be rehabilitated at a reasonable cost was taking place almost exclusively in poor, minority group neighborhoods.\(^{153}\) It is apparent that an efficient housing program should be administered so that these abandoned structures can be quickly taken over by the local governmental unit, before the buildings are "sacked" by the "midnight plumbers" and thereafter unrepairable at a reasonable cost. In the alternative, loans or grants should be made available to the landlord so that abandonment is unnecessary. It appears from this that any statute utilizing rent withholding will have to take cognizance of the economic realities of our urban areas and will have to be financed so as to minimize the already serious abandonment problem.

Strict code enforcement under a withholding statute will probably cause an initial slump in the selling price of some sub-

\(^{151}\) Time, Mar. 16, 1970, at 88.
standard units. That slump will occur where the high price commanded for such property in the absence of code enforcement is adjusted downward in anticipation of expenses that will have to be made for repairs.\textsuperscript{154} Thereafter, however, the effects of supply and demand will probably drive the price of units upward again, but there is no indication how much higher the average cost of renting will be nor how long higher cost will last. If, in fact, the cost of purchasing rental property drops as investors make adjustments for necessary repairs, it might reasonably be expected that rents in some cases will not increase at all because the total investment in the building or dwelling involved will not necessarily increase.

Even if units are abandoned in the short-run, however, the long term effect may not be a loss of housing units. In fact, after the initial impact, a withholding statute should have the long term effect of causing fewer units to be removed. This will happen because if the buildings are properly maintained—as they presumably would be after the statute was passed—they should necessarily last longer, and fewer units would have to be removed from the housing market each year. Not even the strongest critics of rent withholding have suggested that the number of buildings saved from a premature abandonment in the long run will not in fact exceed the number that initially have to be removed from the market because it is economically unfeasible to repair them. Nevertheless, the fears expressed have substance, and landlords may board up their holdings when faced with great expenditures. The legislature could minimize the short term impact of this action by putting some ceiling on the number of dwellings that will be torn down in a year or the amount of money a landlord will have to spend in making repairs, depending on his investment, income and other relevant factors. Such action could ease the prospect of forcing some homeless tenants into the streets.

There are indications, on the other hand, that some owners of substandard housing can afford to make the necessary repairs. Indeed, some authorities indicate that substandard housing is more lucrative than standard housing.\textsuperscript{155} Although substandard housing is cheaper to buy than standard housing, the rents paid by the ordinary slum tenant are not much cheaper than that

\textsuperscript{154} Minneapolis Citizens League, Adequate Housing is Now Everyone's Problem 21, May 5, 1969 [hereinafter cited as Citizens League].

\textsuperscript{155} See Note, supra note 148, at 320.
paid for more desirable housing. In any event, if slum ownership is a business that requires the maintenance of indecent facilities, it has been suggested that it is the kind of a business that should be eliminated.

It is too simple an answer merely to suggest that housing codes and tenants' rights should be enforced at all costs. Such an approach would simply drive landlords of low cost housing out of the market and leave the government with a great burden. Instead, a means must be devised whereby the tenant can procure decent housing and the landlord a fair profit. It must be realized that code enforcement is justified by its social purpose alone regardless of whether it is economically possible to recover the cost of the effort through the enhancement of property values. Thus, the government, both state and national, must provide grants and loans to landlords in all areas of our large cities to help defray the cost of providing decent housing. Such a program must be a concomitant part of any rent withholding scheme. Nor would the cost of such a program be a burden on our economy. Such costs would have to be balanced against the very real costs of recent riots in some of our major cities, riots whose causes are traceable in part to inadequate housing. The government has subsidized housing for the more affluent members of our society for many years by providing tax deductions for interest on mortgages and real estate taxes while excluding the imputed value of lodging from income. All these factors support the proposition that money should be put into loan and grant programs for landlords and poor homeowners.

Other criticisms of rent withholding statutes have been directed at the application and effectiveness of a particular statute already in existence, rather than at the propriety or effectiveness of the principle itself. For example, there have been complaints that under a receivership statute the city might become a gigantic landlord, or that the landlord should not be

157. Sax & Hiestand, supra note 136, at 892.
able to sit back and let the city manage his property, make the
necessary repairs and collect the rents. It is also thought to be
unfair that under this procedure the landlord is able to take adv-
tage of the city's competitive bidding procedures which may
substantially reduce the costs of repairing his property. Insofar
as there is merit to these objections, most can be cured by im-
posing a fee upon the landlord when the city has to undertake
the necessary repairs to property. In fact, one New York
statute authorizes the receiver to collect a fee for his services.
As to the city-as-landlord objection, the simple answer is that
this might be the only way to achieve the necessary results.

Other minor problems have arisen. For example, under the
New York receiver statute (§ 7A), tenants feel that the ad-
ministrator is a "friend" to whom they need not pay rent. When
this happens problems may arise under a statute which
does not clearly define the powers of the receiver, e.g., whether
he can maintain an action for non-payment of rent. The
tenants also have problems under Section 7A, however. It is
often difficult to get the necessary one-third of the tenants to-
gether to protest a violation because of distrust of city officials
or a fear of retaliation by the landlord. Even if these problems
are overcome, poor tenants have a problem securing legal as-
sistance, and courts have a problem locating a willing and capa-
bile administrator.

The objection has also been made that government participa-
tion in rent withholding is undesirable. The Spiegal Law in
New York has been criticized because the welfare department
institutes the proceedings. It is alleged that if rents are
withheld only by welfare department action, landlords will be
prone to discriminate against tenants on welfare by refusing
to rent to them. Others have voiced apprehension of welfare
department participation because of their "paternalism" and pec-
uliar "mentality." Other forms of government participa-

161. Walsh, Slum Housing: The Legal Remedies of Connecticut
Towns and Tenants, 40 CONN. B.J. 539, 553 (1966).
163. Gribetz & Grad, Housing Code Enforcement: Sanctions and
164. F. Grad, supra note 158, at 130.
165. Id.
166. Id. at 129-30.
167. Note, Rent Withholding—Public and Private, 40 CHI. B. REC.
14, 17 (1966).
168. Interview with Johnaton Byrd, Minneapolis Urban League, in
tion have led to equally undesirable results. In Connecticut, for example, the receivership statute has not worked because it makes a government official the receiver, and Connecticut officials expressed an almost unanimous reluctance to use it.\(^{169}\) A simple solution to the problems expressed by these criticisms is to adopt a statute that places initiative in the hands of the tenant and imposes a duty to appoint a professional receiver.

Finally, the New York and Illinois statutes have been called "self-defeating" because they encourage the landlord to avoid providing adequate housing for as long as possible. This prompted one commentator to suggest that rents should not be deposited during the period of disrepair but forfeited.\(^{170}\) Forfeiture, however, would appear to be ill-advised since the purpose of the statute is not so much the punishment of the landlord but attainment of decent housing for tenants, and this goal may be reached more directly by imposing a fee when the city is required to do the work.

**VIII. A RECOMMENDATION**

At this point several conclusions seem justified. First, it has long been our national goal to provide adequate housing for all our citizens,\(^{171}\) probably because we believe all people deserve as a matter of right to live under certain minimum standards of safety, health and decency. Second, our present housing supply, already inadequate, is deteriorating almost faster than it can be replaced,\(^{172}\) and steps must be taken to preserve the existing supply by strict enforcement of housing codes which are presently on the books. Finally, there is no doubt that housing codes strictly enforced can help prevent decent housing from deteriorating into a slum,\(^{173}\) and that a rent withholding statute would be the harbinger of efficacious code enforcement if coupled with financial assistance.

Such a statute would have further socially desirable results. It gives the tenant who is subjugated by form leases, independent covenants, deposits and a lack of bargaining power and legal


\(^{171}\) U.S. Housing Act § 1, 50 Stat. 888 (1937) as amended Housing Act of 1949, 42 U.S.C. § 1401 (1964) provides for federal policy as follows: "to provide a decent home and a suitable living environment for every American family."

\(^{172}\) Gribetz & Grad, *supra* note 163.

\(^{173}\) Id. at 1257.
power, a remedy that is effective and relevant in modern, urban society. It would have the incidental benefit of helping the minority group tenant who is restricted to low-quality housing areas for reasons other than shortages or ability to pay.\textsuperscript{174}

It gives the tenant an instrument which has the qualities of “immediacy and drama,”\textsuperscript{175} and would probably help alleviate some of the alienation, hostility and suspicion the poor now exhibit. In short, it would give them some power within the legal system to address a major cause of disenchantment with the established order.

Rent withholding has proven to be an effective remedy. Reports have been unanimous that rent withholding in New York has led to better living conditions for welfare recipients.\textsuperscript{176} In Chicago landlord compliance has been reported to be approximately 50 percent,\textsuperscript{177} and in Pennsylvania rent withholding has proven useful.\textsuperscript{178} Although the number of buildings which have been boarded up and abandoned because of various economic and social problems has been great, the economic aspect of this problem can be overcome with adequate financial help. Moreover, since the buildings which have been abandoned have been those which required only minor repairs, the correlation between rent withholding and abandonment is still not clear; and some city officials think that landlords have been deliberately idling some of their dilapidated properties to “pressure city agencies into softpedaling the rent withholding programs.”\textsuperscript{179}

Insofar as economics comes into consideration, it is as much a municipal problem as a landlord problem, and the municipality may have to decide between spending money or permitting buildings to fall into disrepair. The cost of receivership in New York finally forced municipal abandonment of the remedy in 1965,\textsuperscript{180} in spite of the fact that it was the most effective means to secure the repair of buildings available to the city.\textsuperscript{181} To

\begin{footnotes}

\textsuperscript{174}. In Minneapolis, one Indian couple looked at nearly 40 apartments in two days before finding a landlord who would rent to them. Citizens League, supra note 154, at 9. The fact that the minority groups in Minnesota will be aided by this statute is a strong reason for urging its adoption.

\textsuperscript{175}. Note, supra note 167, at 15.

\textsuperscript{176}. Id. at 18.

\textsuperscript{177}. Id. The author does not indicate what happened to the other 50 percent.

\textsuperscript{178}. F. Grad, supra note 158, at 133.

\textsuperscript{179}. Wall Street Journal, August 13, 1969, at 1, col. 1.

\textsuperscript{180}. F. Grad, supra note 158, at 43.

\textsuperscript{181}. Id. at 46-47.
\end{footnotes}
prevent future rent withholding schemes from failing, grants and loans should be available to both the landlord and the municipality to enable the landlord to repair, either before or after he is ordered to do so. The city should have the power to repair or demolish if the landlord fails to act.

The Minnesota State Legislature should consider and enact a comprehensive code patterned after the Model Residential Landlord-Tenant Code proposed by the American Bar Foundation. The statute not only has rent withholding provisions, but makes necessary changes in other defunct vestiges of the common law relative to landlord and tenant. (See APPENDIX containing pertinent sections of the Model Residential Landlord-Tenant Code.)

IX. CONCLUSION

The enactment of a code along the lines suggested by the American Bar Foundation is necessary for the welfare of the people of our state. It would be an effective vehicle for the enforcement of our present housing codes and would give tenants an effective tool in bargaining with landlords for better housing conditions. In the long run, the statute would ease the housing shortage by fostering the preservation of present housing and slowing the rapid rate of deterioration. It would reach absentee owners who now avoid housing codes, and it would soothe our distaste for having welfare funds expended on substandard housing. Hopefully, the Minnesota Legislature will approach this code realizing that "[p]ublic expenditures for decent housing for the nation's poor, like public expenditures for education and job training, are not so much expenditures as they are essential investments in the future of American society."183

182. Several rent withholding bills were presented to the Judiciary Committee of the Minnesota State Senate in 1969, but none of them got out of committee. See, e.g., Senate File No. 2322, April 21, 1969. That bill was introduced by Senators Wayne Popham, Edward Novak and Kelly Gage.

183. REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 3 (1968).
Section 2-206. Tenant's Remedy of Repair and Deduction for Minor Defects.

(1) If the landlord of an apartment building or single family dwelling fails to repair, maintain, keep in sanitary condition, or perform in any other manner required by section 2-203 or as agreed to in a rental agreement, and fails to remedy such failure within (two weeks) after being notified by the tenant to do so, the tenant may further notify the landlord of his intention to correct the objectionable condition at the landlord's expense and immediately do or have done the necessary work in a workmanlike manner. The tenant may deduct from his rent a reasonable sum, not exceeding (fifty) dollars, for his expenditures by submitting to the landlord copies of his receipts covering at least the sum deducted. If the tenant submits a written estimate by a qualified workman at least (four weeks) before having the work done, and substitutes workmen and materials as the landlord may reasonably request in writing, the tenant may deduct from his rent a reasonable sum not exceeding one month's rent by submitting to the landlord copies of his receipts covering at least the sum deducted.

Section 2-207. Tenant's Remedies for Failure to Supply Heat, Water, or Hot Water.

(1) If the landlord fails to provide hot water to a roomer, boarder, or apartment building tenant, when the building is equipped for the purpose, for (one week) after the tenant notifies him of the failure, the tenant may:

(a) upon written notice to the landlord, immediately terminate the rental agreement; or

(b) upon notice to the landlord, keep (one-fourth) of the rent accrued during any period when hot water is not supplied. The landlord may avoid this liability by showing of impossibility of performance.

(2) If the landlord fails to provide a reasonable amount of water or, between (October 1) and (May 1), heat to the roomer, boarder, or apartment building tenant, when the building is equipped for the purpose, the tenant may:

(a) upon written notice to the landlord, immediately terminate the rental agreement; or

(b) upon notice to the landlord, procure adequate sub-
stinate housing for as long as heat or water is not supplied, during which time the rent shall abate and the landlord shall be liable for any additional expense incurred by the tenant, up to (one-half) the amount of abated rent. This additional expense shall not be chargeable to the landlord if he is able to show impossibility of performance.

Section 3-301. Petition for Receivership: Grounds, Notice and Jurisdiction.

Any tenant occupying an apartment building (located in) may petition for the establishment of a receivership in (specify court) upon the grounds that there has existed, for (5) days or more after notice to the landlord, in such building or any part thereof; a lack of heat, or of running water, or of light, or of electricity, or of adequate sewage facilities; or any other condition dangerous to the life, health, or safety of the petitioner; or any combination of such conditions. In the case of the existence of an infestation of rodents or other vermin, the tenant may file a petition for the establishment of a receivership immediately upon notifying the landlord.

Section 3-303. Defenses.

It shall be sufficient defense to this proceeding, if any defendant of record establishes that:

(1) the condition or conditions described in the petition do not exist at the time of trial; or

(2) the condition or conditions alleged in the petition have been caused by the willful or (grossly) negligent acts of one or more of the petitioning tenants or members of his or their families or by other persons on the premises with his or their consent; or

(3) such condition or conditions would have been corrected, were it not for the refusal by any petitioner to allow reasonable access.

Section 3-305. Appointment of a Receiver.

A court may appoint any suitable person as receiver.

Section 3-306. Powers and Duties of the Receiver.

(1) The receiver shall have all the powers and duties accorded a receiver foreclosing a mortgage on real property and
all other powers and duties deemed necessary by the court. Such powers and duties shall include, but are not necessarily limited to, collecting and suing all rents, issues, and, profits of the property, prior to and despite any assignment of rent, for the purposes of:

(a) correcting the condition or conditions alleged in the petition;

(b) materially complying with all applicable provisions of any State or local statute, code regulation, or ordinance governing the maintenance, construction, use, or appearances of the building and surrounding grounds;

(c) paying all expenses reasonably necessary to the proper operation and management of the property including insurance, taxes and assessments, and fees for the services of the receiver and any agent he should hire;

(d) compensating the tenants for whatever deprivation of their rental agreement rights resulted from the condition or conditions alleged in the petition; and

(e) paying the costs of the receivership proceeding, including attorney fees.

(2) (a) The court may authorize the receiver to cover the costs of the above sub-section by the issuance and sale of notes, bearing such interest as the court may fix. Such notes may be negotiable.

(b) Such notes shall be superior to all prior assignments of rent and all prior and existing liens and encumbrances except taxes and assessments, provided that within (sixty days) of such sale or transfer by the receiver of the note, the holders shall file notice of the lien in the office of the (Recorder of Deeds) in the county in which the real estate is located.

(c) The court may further authorize the receiver to enter into such agreements and to do such acts as may be required to obtain first mortgage insurance on the receiver's notes from an agency of the Federal government.

Section 3-307. Discharge of the Receiver.

(1) The receiver shall be discharged when:

(a) the condition or conditions alleged in the petition have been remedied;

(b) the property materially complies with all applica-
ble provisions of any State or local statute, code, regulation, or ordinance governing the maintenance, construction, use, or appearance of the building and the surrounding grounds;

(c) the costs of the above work and any other costs authorized by section 3-306 have been paid or reimbursed from the rents, issues and profits, or notes of the property; and

(d) the surplus money, if any, has been paid over to the owner.

(2) Upon clauses (a) and (b) of the preceding subsection being satisfied, the owner, mortgagee, or any lienor may apply for the discharge of the receiver after paying to the latter all monies expended by him and all other costs which have not been paid or reimbursed from the rent, issues, profits, or notes of the property.

(3) If the court determines that future profits of the property will not cover the costs of satisfying clauses (a) and (b) of subsection (1), the court may discharge the receiver or order him to take such action as would be appropriate in the situation, including but not limited to demolishing the building. In no case shall the court permit repairs which cannot be paid out of the future profits of the property.