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Impoverished Tenants in Twentieth Century America

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*Landlord and Tenant Law:
Past, Present and Future*

Edited by

Susan Bright



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Foreword

The relationship of landlord and tenant is of considerable importance in social, political and economic terms. It can relate to a small inner city flat or a corner street shop, at one end of the spectrum, and to a superstore or a 1000 hectare farm at the other end.

In these circumstances, it is scarcely surprising that the relationship of landlord and tenant and the law of England have had such a substantial mutual effect. The number of cases, indeed of important cases, arising out of disputes between landlords and tenants has been very substantial, over the past five centuries. The past 25 years are no exception. There has been a stream of legislation dealing both with the landlord and tenant relationship generally, and particular aspects of the relationship (perhaps most notably the residential aspect) over the past 120 years. Again the past 25 years have been no exception. There has hardly been a time since its inception that the Law Commission has not been considering more than one aspect of the relationship as being ripe for reform.

The relationship is of considerable interest to lawyers for other reasons. The nature of leases is anomalous. They represent freestanding assignable interests in land, and are therefore subject to the law of real property; yet they also constitute contracts, which are classically common law concepts. The classification of a lease as a 'chattel real' seems something of a contradiction in terms, but it is consistent with its hybrid nature.

To the practitioner, disputes between landlords and tenants give rise to a well-balanced mixture of factual disputes, real property law, equity and common law. To the legislator, landlord and tenant law gives rise to interesting policy problems, often involving knotty drafting problems and the difficult task of balancing the free market against social engineering.

There are two well-known, respected and up-to-date works on the subject of landlord and tenant law (the sheer size of these books is a measure of the difficulty and importance of the topic), a number of excellent books on specific legal topics, and, from time to time, a number of stimulating articles on specific cases or areas. However, there is a gap in the market, and it is that gap which this admirable book fills. The gap is for a book which gathers together the most important and interesting current topics in the field of landlord and tenant law, and considers them in an authoritative, imaginative and engaging way.

In her introduction, Susan Bright, who has done splendidly as editor of this book, summarises the thrust and purpose of each of the chapters. One only has to scan the titles and authors to see the aptness and breadth of the

position of tenants *vis-a-vis* landlords. Though neither the European Convention on Human Rights or the United Kingdom Human Rights Act 1998 includes social and economic rights, the existence of these provisions has perhaps contributed to a human rights awareness (which indirectly supports security of tenure). The Law Commission Report explicitly refers to the need to comply with human rights principles.¹²⁸ Australia has no provision equivalent to Article 8 of the Convention which protects the right to respect for a home, or Article 6 which provides the basis for applying procedural protections to tenants.¹²⁹ It remains to be seen whether the approach recommended by the 1975 *'Law and Poverty Report'*,¹³⁰ will ever be fully accepted in Australia.

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Impoverished Tenants in 20th Century America

RICHARD H CHUSED*

INTRODUCTION

AMERICAN LANDLORD-TENANT law has little of the complexity that has enveloped English practice in the second half of the 20th century. Sharp statutory differences in the treatment of agricultural and commercial leaseholds, widespread use of long-term residential ground leases, and legislated security of tenure for some types of property occupants have come to dominate the English law of leaseholds—to the point where there is now a specialised bar that deals with the issues on a regular basis. Few analogous developments arose in the United States. Those that did were largely responses to wartime or economic emergencies that disappeared in fairly short order. Indeed, by comparison to England, American law is naively simple. With the exception of a few aspects of residential tenancies, private contract law governs the operation of most leaseholds. Differences in the handling of agricultural, office, shopping centre, commercial and ground leases have arisen in response to tax law, business needs and custom rather than legislative mandate.¹

The lack of complexity is itself an important commentary on the nature of American private property law—a legal culture dominated by market forces, heavily dependent upon private bargaining and only sporadically responsive to the needs of those least able to prosper in an individualist environment. For a legal historian, therefore, the most interesting moments

¹²⁸ Law Commission (UK), 'Renting Homes' (n 4) [2.11].

¹²⁹ The effect of these provisions is discussed in Law Commission (UK), 'Renting Homes—1: Status and Security' (n 21) Part V.

¹³⁰ Sackville (n 7) 81 and 102–3 and recommendations 22–29.

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¹ Statutory intervention has certainly had an impact on American property law. But most of the statutes are related either to public law aspects of property, such as land use, zoning, historic preservation and the like, or to confirming the validity of new ownership forms, as in the horizontal property regimes regulating the development of condominiums and the structure of ownership interests in their common areas.

in the development of landlord-tenant law are often those when the poor appeared on judicial or legislative radar screens. That is the sort of history which this paper presents.

American private law's treatment of poor tenants during the 20th century is largely a 'before and after' tale. Before 1970, impoverished tenants were the orphans of American law, left to fend for themselves in a largely hostile judicial environment. As the 20th century opened, residential eviction law was governed by a strange amalgam of English common law; American statutory changes designed to assist in the development of urban apartment complexes; and, procedural limitations on the issues that could be raised when landlords sought possession of property due to non-payment of rent or the expiration of a lease. The combination allowed landlords to rid themselves of non-paying or holdover tenants in speedy proceedings, where the only justiciable issues were whether the rent had been paid or the lease had expired. Through the first two-thirds of the 20th century, urban landlord-tenant courts evicted tens of thousands of tenants from their houses and apartments. The courts evinced no sympathy for the plight of tenants, even in the face of substantial evidence that rented premises were in terrible condition, or that evictions were being sought for arbitrary reasons. By the time of the urban riots in the mid-to-late 1960s, landlord-tenant courts became one of many sources of racial discontent and tension—out of touch with widespread changes in other areas of consumer law; dominated by bias in favour of landlords; and, wanting in empathy for the urban poor.

After 1970, a series of changes appeared—some beneficial and some harmful to the interests of renters. The historical cusp was the appearance of the implied warranty of habitability. Beginning in 1970, a deluge of state court opinions appeared giving tenants the right to raise defences based upon the quality of their housing, when landlords brought actions to evict them for non-payment of rent.² In an historical blink of an eye, the tone, though not always the reality, of tenants' private legal status changed.

While private eviction law stagnated through the first two-thirds of the 20th century, a few reforms in the status of tenants appeared early in the century—most notably, the adoption of building and housing codes forcing the construction of higher quality housing, and the alteration of rules governing liability of landlords for injuries to tenants. Public housing subsidy

² The first two cases to clearly provide such a defence were *Javins v First National Realty Corp* 428 F 2d 1071, 138 US App DC 369 (DC Cir, 1970); and *Marini v Ireland* 56 NJ 130, 265 A 2d 526 (1970). *Javins* is the more famous of the two, and is now a staple in introductory property courses taught in American law schools. For a comprehensive history of the case, see: RH Chused, 'Javins v First National Realty Corporation' (2004) 11 *Georgetown J on Poverty L & Pol* 191. In the following decade, *Javins* and *Marini* were followed by decisions in many states, including Massachusetts, California, New York and Pennsylvania. Lower courts, in many states, also began to use the implied warranty long before the highest courts of their states formally approved the practice.

programs first appeared during the Great Depression and grew rapidly after the Second World War. Spurred on by a war-generated housing shortage; a post-war boom in birth rates; and, the return of tens of thousands of soldiers in need of housing, the federal government began to organise and pay for the construction of new housing.

After 1970, the trends reversed. Just as the implied warranty of habitability and other changes arrived, support for subsidised housing waned. The political consensus changed, and the focus of attention shifted from poor to middle class renters. The shift in focus, when combined with a reduction in housing available for the poor, left those at the bottom of the economic ladder in a precarious position. It may be that the status of deeply impoverished tenants is only marginally better now than it was in 1900.

BEFORE THE CUSP

The 19th Century Private Law Backdrop

At the turn of the 20th century, American eviction law was a strange mixture of the common law of ejectment, and statutory developments designed to enhance the power and authority of residential landlords. The historical tone of private residential landlord-tenant law in the first two-thirds of the 20th century was indelibly linked to the structure of law in the 19th century. Even today, legal structures dating well back into the 1800s dominate the operation of most eviction courts.

Tenants most commonly came into contact with the legal system when landlords sought their eviction for non-payment of rent. Actions were brought less frequently for holding over after the expiration of a lease. Two other types of disputes—actions by landlords seeking rent from tenants who abandoned their rented living quarters, and by tenants seeking recovery for damages to person or property occurring during their occupancy of rented property—arose from time to time, but they were irrelevant to the daily lives of most 19th century renters. Eviction actions brought during the early 19th century were usually styled as ejectment cases. The ejectment rules America inherited from England came laden with a number of restrictions, including sometimes lengthy pleading contests; six-month waiting periods; and, other complications that limited the ability of landlords to rid themselves quickly of non-paying or holdover tenants.³ While this sort of structure made some sense in agricultural settings where eviction meant loss of a tenant family's livelihood, landlords in new American cities quickly began to complain that their wellbeing was endangered by the inability to

³ Self-help remedies were available in some circumstances. But penalties associated with their erroneous use substantially reduced the utilization of non-judicial procedures.

quickly remove non-paying lessees. New York modified its ejectment statutes in 1820, and many other quickly growing states followed suit before the century was half over.⁴

By 1900, the eviction actions across the country were routinely summary in nature, and tenants living in urban areas who failed to pay their rent or held over were brought to special courts designed to quickly evict them. A combination of substantive property rules and procedural limitations on the ability of tenants to raise defenses to their eviction resulted in hearings in which the only issue was whether rent was actually unpaid or the lease was really over. Though the summary eviction courts came to be seen as procedurally anomalous and unfair by 1970, they fit quite comfortably with pleading systems in 19th century America. States relied on versions of the English writ system, in some cases until the middle of the 20th century. That meant that causes of action, and the responses that could be made to them, were limited and formalised. Ejectment actions, for example, tried only the right to possession. Other issues, including any promises made by landlords to maintain rented premises, were deemed extraneous to the action. Tenants with claims about such matters had to bring separate actions. Similarly, since counterclaims were unknown, a tenant could not set off against rent claimed by the landlord in eviction cases damages arising from personal injuries caused by the owner's negligence.

The courts processed the cases quickly; handled a large volume of disputes; and, almost always, issued judgments for landlords. Tenants were given a very short period of time (usually about 10 days) to appear in court after they were served with a summons and complaint. If all went well, a landlord could rid themselves of a tenant in less than a month.

The combination of the substantive ejectment law, as modified by summary eviction statutes, and the procedural limitations on pleading, led to a quite narrow view of the landlord-tenant relationship. A lease was a simple exchange of the right to possession for a period of time, in return for the payment of rent. Landlords fulfilled all of their obligations by transferring possession to their tenants. Tenants were obligated to continue paying rent, even when the premises were no longer habitable.⁵ Only if the landlord was responsible for the rented premises becoming uninhabitable, was the tenant said to be constructively evicted from the property, and, if they completely

⁴ For more details on the early history of American eviction law and the history of New York's summary dispossession statutes, see: RH Chused, 'Landlord-Tenant Court in New York City at the Turn of the Nineteenth Century' in W Steinmetz, (ed), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany and the United States of America* (Oxford, OUP, 2000) 411.

⁵ The common law rules held that a tenant was responsible for rent even, if the building was destroyed by fire, storm, or other natural cause. That result was altered by statute throughout the US in the 19th century. For examples of cases involving the obligation to repair, see: *Schmidt v Pettit* 8 DC 179 (1873); and *Murry v Albertson* 50 NJL 167, 13 A 394 (1888).

departed from the premises, excused from the duty to pay.⁶ Landlords were under no obligation to make repairs, or to protect tenants from injuries to person or property. Indeed, if the tenant failed to maintain the premises, an action in waste could be brought by the landlord to recover for the decline in the property's fitness.⁷ Other contractual undertakings, including any promises by landlords to make repairs or maintain the premises, were deemed 'independent' of the leasehold agreement and irrelevant in eviction proceedings.

The adoption of summary dispossession remedies, which removed limitations on ejectment actions and speeded up the eviction process, left impoverished urban tenants at the mercy of their landlords. Those not paying their rent were summoned to court. Those who showed up were asked if they had paid their rent.⁸ If the answer was 'No', then judgment was entered for the landlord without further ado. The best the tenant could do was plead for a few extra days to find another place to live. Eviction court was not a happy place.

20th Century Contract and Tort Reforms

As the 20th century opened, the struggles of tenants, especially those living in newly cacophonous American cities, came onto the radar screens of Progressive Reformers. Muckrakers wrote savage articles and books about the tragic lives of tenement house occupants and impoverished workers in New York City.⁹ Scandals flared and fires killed and injured many unable to escape from overcrowded buildings.¹⁰ New York was the first state to intensively review the urban housing situation, and the subject of tenement house reform was frequently on the legislative agenda of the New York legislature.¹¹ Acts were passed in 1867, 1879, 1887 and 1901. The early

⁶ Some courts even required a showing that the landlord intended to make the property unusable before excusing the tenant from the obligation to pay the rent: *Stewart v Childs* 86 NJL 648, 92 A 392 (1914). Constructive eviction was irrelevant in eviction cases: it was only a defence when a tenant left the premises and was then sued for unpaid rent.

⁷ For example, *Moore v Townshend* 33 NJL 284 (1869).

⁸ Many, of course, did not show up. Some did not understand the legal papers they received. Others were not served with process, declined to go to court, moved before the hearing date or were simply scared to go. The same barriers still exist. In many contemporary urban eviction courts, most tenants still do not appear at their hearings.

⁹ The most famous are: J Riis, *How the Other Half Lives* (New York, NY, Charles Scribner's Sons, 1890); L Steffens, *The Shame of the Cities* (New York, NY, McClure Phillips, 1904); and U Sinclair, *The Jungle* (New York, NY, Doubleday Page, 1906).

¹⁰ See: H Bonner, *Tenement House Fires in New York* (New York, NY, Evening Post Job Printing House, 1900).

¹¹ The classic histories are: R Lubove, *The Progressives and the Slums: Tenement House Reform in New York City 1890-1917*, 2nd edn, (Westport, CT, Greenwood, 1962); and S Andrachek, 'Housing in the United States: 1890-1929' in G Fish, (ed), *The Story of Housing* (New York, NY, Macmillan, 1979).

enactments, which required that buildings be constructed with fire escapes and windows in each room, lacked enforcement mechanisms, and, therefore, only had marginal impacts. By the end of the century, widespread discussion arose about housing conditions in New York City. The publication of Jacob Riis' *How the Other Half Lives* in 1890, generated widespread discussion of tenement house districts. In response to Riis' work, as well as scandals arising from ownership of large numbers of tenement houses by the Trinity Church, a major institution with many famous members, the New York General Assembly's Tenement House Committee, produced a massive report during the 1894 session of the state legislature.¹²

Despite many calls for the enactment of reform legislation, the first major reform, largely generated by Lawrence Veiller and his work with the Charity Organisation Society of the City of New York, was not adopted until 1901. The Charity Organisation Society installed an exhibition about tenement house life which ran for only two weeks in 1900. Despite its short lifespan, the exhibit was seen by thousands of visitors, many of whom lived far from the slums and had no prior exposure to the plight of their residents. Veiller and the Society also put together a major report with detailed legislative recommendations. The exhibition and report caused widespread discussion, and led the state legislature to act.¹³ The statute, adopted in 1901, imposed room size requirements, and required the installation of plumbing facilities in new buildings. But, most importantly, it also established a Tenement House Commission to enforce both the previously adopted and new regulations.¹⁴ The Triangle Shirt Waist Factory fire in 1911,¹⁵ created additional pressure for regulation of housing and factory buildings.¹⁶ The adoption of legislation in 1901 led to major changes in the way tenement houses were built and regulated in New York.¹⁷ Other states followed New York's lead.¹⁸ Though these changes had a deep impact on the way housing

¹² *Report of the Tenement House Committee* (NY, Assembly Documents, 18th Sess No 37, 1895).

¹³ Veiller was very active in the deliberations. See: L Veiller, *Housing Conditions and Tenement Laws in Leading American Cities: Prepared for the Tenement House Commission* (New York, NY, Evening Post Job Printing House, 1900); and L Veiller, *Tenement House Reform in New York, 1834–1900* (New York, NY, Evening Post Job Printing House, 1900).

¹⁴ For a summary of the events leading to the adoption of the 1901 Act, see: A Dolkart, 'The Tenement House Act', http://www.tenement.org/features_dolkart.html, accessed 8 August 2005.

¹⁵ L Stein, *The Triangle Fire* (Philadelphia, PA, Lippincott, 1962).

¹⁶ D Von Drehle, *Triangle: The Fire That Changed America* (New York, NY, Atlantic Monthly, 2003); Stein (n 15).

¹⁷ The classic older histories of the tenement reforms include: R DeForest and L Veiller, (eds) *The Tenement House Problem* (New York, NY, Macmillan, 1903); and L Veiller, 'The Housing Problem in American Cities' (1905) 25 *Annals of the Am Academy of Pol & Soc Sciences* 248.

¹⁸ For example, *Report of the New Jersey Tenement House Commission* (Somerville, NJ, Unionist-Gazette, 1904); and JE Kemp, *Report of the Tenement House Commission of Louisville* (Louisville, KY, 1909).

was built in New York and other cities, they made only marginal changes in the daily lives of most tenants.¹⁹

The Progressives, who authored the reports and supported the tenement reform legislation, were deeply committed to a series of views about the impact of environmental factors on human behaviour, and the need for reforms to protect the interests of middle and upper class Americans. It was widely assumed across the political spectrum that individuals were responsible for their own moral and economic wellbeing, and that creating a healthy environment for children was crucial to the future health of the nation.²⁰ The times were littered with movements—right, centre and left—seeking improvement in deportment and morals through changes in society.

However, none of these reform movements paid very much attention to the daily housing or other needs of the poor. While 'radicals' running settlement houses like Jane Addams' famous Hull House in Chicago struggled against the tide to provide services to immigrants,²¹ and blacks trying to eke out a living in the festering slums of early 20th century America, the most influential reformers paid such people little heed. Interested in large-scale environmental factors that endangered the wellbeing of the middle and upper classes, and prone to blaming immigrants, minorities and the poor for their own predicaments, most Progressives ignored the one place where tenants most commonly came in contact with the legal system—summary eviction courts.

It is a bit counterintuitive that Progressives paid so little attention to eviction courts. But the tolerance and empathy of many of the reformers for the impoverished residents of urban slums mirrored the attitudes of the time—rife with racial and ethnic biases and *laissez-faire* politics. Servicing the daily needs of disfavoured groups populating summary eviction courts was never a high priority of the major reformers. Indeed, a strong argument may be made that most Progressives were much more interested in protecting the middle class from the behaviour of those living in the slums, rather than in taking steps to help the poor directly. This was certainly true of those advocating the adoption of zoning in the early 20th century.²²

Changes did begin to occur, however, in the law of some jurisdictions dealing with the liability of landlords to tenants. Spurred by the availability of contingent fees, some lawyers took on cases where the poor (or working poor) were seriously injured while in residential property. Their

¹⁹ There is now a 'Tenement House Museum' in New York City with a terrific website: <http://www.tenement.org>, accessed 8 August 2005. A 'Tenement House Encyclopedia' is available <http://www.tenement.org/encyclopedia.pdf>, accessed 8 August 2005.

²⁰ The best history of positive environmentalism is: P Boyer, *Urban Masses and Moral Order in America, 1820–1920* (Cambridge, MA, Harvard University Press, 1978).

²¹ For example, R Shpak-Lissak, *Pluralism and Progressives: Hull House and the New Immigrants, 1890–1919* (Chicago, IL, University of Chicago Press, 1989).

²² See: RH Chused, 'Euclid's Historical Imagery' (2001) 51 *Case Western Reserve L Rev* 597.

persistence did not pay off quickly. Even in the face of serious and deadly problems, the old common law rules barring landlord liability for tenant injuries were enforced by the courts of New York and other states well into the 19th, and sometimes the 20th, century. When, for example, sewer systems were constructed without proper venting so sewer gas seeped into apartments, liability was rarely found.²³ Late in the 19th century, the common law rules excusing landlords from responsibility for injuries to their lessees were slightly modified to take the invention of the apartment building into account. Landlords were deemed responsible for the maintenance of common areas in their buildings over which tenants had no control.²⁴

The first cases in the early 20th century, indicating that tenement house reforms might lead to changes in the rules limiting landlord liability, involved falls in badly lit hallways in New York apartment buildings. Although the injuries occurred in common areas and therefore could have been decided by recourse to the standard late 19th century rules, the courts looked to the tenement house legislation as a source of law for defining the landlord's duty of care to tenants. If the codes required landlords to maintain their apartments at a certain level of repair, courts read that obligation as creating a duty of care to tenants and, therefore, as a repeal of the 19th century rule that landlords were not responsible for their negligent actions causing injury to tenants.²⁵ The breathtakingly brief opinion in the breakthrough case of *Altz v Leiberson*, now a classic in the history of American landlord-tenant law, was written by Justice Cardozo.²⁶ Relying upon standards established by the housing codes, his Honour held that a landlord was responsible for injuries caused to a tenant when a bedroom ceiling collapsed.

Cardozo's explicit use of tenement house reforms to establish that landlords owed a duty of care to their tenants did not immediately become the national norm. It took until the middle of the 20th century before all states fell into line.²⁷ Washington DC, for example, did not adopt a comprehensive housing code until 1955. A few years after the code went into effect, Judge Bazelon, explicitly relying in *Whetzel v Fisher Management Company* on the ground

broken decades earlier by Justice Cardozo in *Altz*, used the newly adopted regulations to impose a duty on landlords to maintain the safety of their premises.²⁸ In a telling example of the slow progress of tort reform, 19th century rules were still being used in New Jersey until the 1950s. Even the future Justice Brennan, writing as a state appellate judge before his rise to prominence, expressed no dismay as he wrote a formalist opinion excusing a landlord from liability for injuries to a guest who fell on the front steps outside a dwelling.²⁹ An *Altz*-like result was not rendered by the New Jersey Supreme Court until 1958.³⁰

The slow progress of landlord-tenant tort reform mirrored the continued use of summary eviction proceedings into the middle of the 20th century. Other areas of civil law, however, changed more rapidly. The reforms created noticeable dissonance between the way American law treated tenants on the one hand, and consumers of other goods and services on the other. The notion endemic in landlord-tenant law that different parts of a contract were independent of each other,³¹ for example, disappeared from basic contract law before the Great Depression.³² Justice Cardozo, as in so many other important areas of American civil law, did the major work in the 1920s.³³ Contract and commercial law shed a number of old rules that seriously limited the ability of merchants to deal flexibly with market needs. In a famous series of opinions, the New York Court of Appeals, taking note of the importance of commercial usages and expectations in construing contractual terms, viewed the deals, even if they dealt with series of events occurring over a significant period of time, as unified contracts with dependent, rather than independent, covenants.³⁴ Product liability rules, especially important to the developing automobile industry of the early 20th century,

²⁸ 282 F 2d 943, 108 US App DC 385 (1960). In two earlier cases that arose before the adoption of the housing code, Judge Bazelon failed to muster a court majority to impose a duty of care on landlords to maintain their properties in a safe and sanitary manner: *Hanna v Fletcher* 231 F 2d 469, 97 US App DC 310 (1956); and *Bowles v Mahoney* 202 F 2d 320, 91 US App DC 155 (1953).

²⁹ *Patton v Texas Co* 13 NJ Super 42, 80 A 2d 231 (1951).

³⁰ See: *Michaels v Brookchester* 26 NJ 379, 140 A 2d 199 (1958). Later, the New Jersey Supreme Court took the next logical step and imposed a duty on landlords to compensate for injuries caused by their negligence, even when state or local statutes did not establish a performance standard: *Braitman v Overlook Terrace Corp* 68 NJ 368, 346 A 2d 76 (1975). The court also imposed an implied warranty of fitness on developers of new housing sold to the general public: *Schipper v Levitt & Sons Inc* 44 NJ 70, 207 A 2d 314 (1965).

³¹ See text following (n 7).

³² For more on this transition, see: WH McGovern Jr, 'Dependent Promises in the History of Leases and Other Contracts' (1978) 52 *Tulane L Rev* 659.

³³ *Jacob & Youngs v Kent* 230 NY 239, 129 NE 889 (1921).

³⁴ For example, three famous opinions by Justice Cardozo: *Wood v Lucy, Lady Duff-Gordon* 222 NY 88, 118 NE 214 (1917); *Jacob & Youngs v Kent* 230 NY 239, 129 NE 889 (1921); and *Sun Printing and Publishing Association v Remington Paper and Power Co Inc* 235 NY 338, 139 NE 470 (1923). For commentary, see: A Corbin, 'Mr Justice Cardozo and the Law of Contracts' (1939) 39 *Columbia L Rev* 56; and W Pratt 'Contract Law at the Turn of the Century' (1988) 39 *South Carolina L Rev* 415.

²³ Early cases provided tenants with no relief. The first breakthrough case, decided by a New York trial court, followed the path taken later by Judge Cardozo's opinion in *Altz v Lieberman*, discussed shortly in the text. In *Bradley v Nestor* 67 How Pr 76 (NY Com Pleas, 1884), a tenant moved out of an apartment because it was filled with sewer gas. The tenant successfully defended a later suit for rent on constructive eviction grounds, noting that an administrative order to make repairs had been issued.

²⁴ *Jaffe v Harteau* 56 NY 398 (1874); and *Schwartz v Apple* 48 NYS 253 (NY City Ct, 1897).

²⁵ For example, *Ziegler v Brennan* 78 NYS 342 (NY App Div, 1902); *Gillick v Jackson* 83 NYS 29 (NY App Div, 1903); and *Bornstein v Faden* 133 NYS 608 (NY App Div, 1912).

²⁶ 233 NY 16, 134 NE 703 (1922).

²⁷ MA Wolf, (ed), *Powell on Real Property* (Newark, NJ Matthew Bender, 2003) §1.2-16B.04. For a more complete telling of this story, see: MJ Davis, 'A Fresh Look at Premises Liability as Affected by the Warranty of Habitability' (1984) 59 *Washington L Rev* 141.

also emerged,³⁵ and required payment to those who were injured by defects in consumer goods.³⁶ Finally, the Federal Rules of Civil Procedure, filled with provisions dramatically expanding the availability of counterclaims and other devices expanding the scope of litigation, were promulgated in 1938. By mid-century, the landlord-oriented operation of summary eviction courts was significantly out of sync with the operation of standard civil courts on both substantive and procedural levels. The foundation for reform had been laid.

Public Support for Housing

While the law governing evictions stagnated through the first two-thirds of the 20th century, government expenditures for housing gradually increased after the onset of the Great Depression. The downturn in economic standards during the 1930s produced the first, limited, political consensus calling for the federal government to construct housing.³⁷ Millions of middle-class Americans were pushed into poverty after 1929. Traditional American instincts to blame the poor for their predicament were marginally suppressed by a sense that the plight of the newly impoverished had little to do with their pluck and grit. The Wagner Steagall Act 1937 was the result.³⁸ Heavily opposed by the real estate industry and labelled 'socialist' by the right wing, it was so filled with limitations that the poorest did not benefit. The Act was viewed mostly as a slum clearing effort to provide housing for the working poor. New housing could be built only if it replaced destroyed units. In addition, no operating subsidies were included in the grants to local housing authorities. As a result, only those with some income could afford to rent the units.³⁹

The program, however, gradually grew. Spurred by desperate housing needs during and after the Second World War, Congress gradually removed some of the restrictions on eligibility, and increased construction budgets. As a result of significant sums of money placed in the pipeline beginning in 1948, new public housing starts reached a peak of about 70,000 units in 1951. However, the post-war interest in public housing faded during the

³⁵ The best known of the early cases is Justice Cardozo's work on products liability in *MacPherson v Buick Motor Co* 217 NY 382, 111 NE 1050 (1916).

³⁶ The most trenchant summary of the changes may be found in G Gilmore, 'Law, Logic and Experience' (1957) 3 *Howard LJ* 40.

³⁷ The first public housing program run by the US arose during the First World War. Various states also undertook housing programs during the 1920s and 1930s. For more on this early history, see: MS Fitzpatrick, 'A Disaster in Every Generation: An Analysis of Hope VI: HUD's Newest Big Budget Development Plan' (2000) 7 *Georgetown J on Poverty L & Pol* 421.

³⁸ 50 Stat 888 (1937).

³⁹ The best summary history of early public housing programs in the US is L Friedman, 'Public Housing and the Poor: An Overview' (1966) 54 *California L Rev* 642.

Eisenhower years. Under the onslaught of defence needs during the Korean War and political assaults during the McCarthy Era, new starts fell almost to zero by 1956.⁴⁰

However, the same forces that were to later generate enormous pressure to change the operation of summary eviction courts, led to a gradual reinvigoration of the public housing program. Healthy tax receipts, growing pressure from the civil rights movement, and increasing sensitivity to the great disparities in wealth between rich and poor produced policy changes and larger budget allocations for housing. Federal rules barring racial discrimination in public housing programs were announced in 1962,⁴¹ and operating subsidies to try to improve the terrible maintenance programs in many public housing projects were first made available in 1969.⁴² In 1970, construction began on over 100,000 public housing units,⁴³ an indication of the widespread sense that change in national housing policies toward the poor was long overdue.⁴⁴ Eviction court reform was also in the wind.

THE CUSP

In many ways, the United States was the only show in town after the Second World War. Much of the previously industrialised world was left devastated by the conflict. American manufacturing capacity emerged from the war unscathed, and fully able to supply the world with industrial and consumer goods. The economy began a 25 year period of unprecedented growth, and much of the population had high expectations for improvement in their economic, family and spiritual lives. Blacks returning from overseas military service, as well as their families, friends and peer communities also expected, and demanded, their share of the national wealth. Bolstered by the desegregation of the armed services⁴⁵; the integration of the federal

⁴⁰ A nice graphical presentation of public housing starts through 1970 is available in HJ Aaron, *Shelter and Subsidies: Who Benefits from Federal Housing Policies* (Washington DC, Brookings Institution, 1972) 110.

⁴¹ 'Equal Opportunity in Housing' (Exec Ord No 11,063, 27, Fed Reg 11,527) (20 November 1962).

⁴² Aaron (n 40) 113; Fitzpatrick (n 37) 431.

⁴³ Aaron (n 40) 110.

⁴⁴ Expenditures on other recently adopted programs also increased dramatically in 1970. Interest subsidy programs supporting purchase and rental of below market rate housing by the near poor resulted in the construction of another 200,000 units. The programs became embroiled in scandal, as various officials and developers obtained subsidies without fulfilling rehabilitation or other obligations. Foreclosures of badly run projects left hundreds of buildings, many abandoned, in the hands of the federal government: RA Hays, *The Federal Government and Urban Housing: Ideology and Change in Public Policy* (Albany, NY, State University of New York Press, 1995) 112–21.

⁴⁵ President Truman announced this decision on 2 February 1948. It was formalised in 'Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services', (Exec Ord 9981, 13 Fed Reg 4,313) (26 July 1948).

work force; and, the Supreme Court's disavowal of segregated schools,⁴⁶ the Civil Rights Movement hit its stride in the 1950s.⁴⁷ Black Americans and some of their white peers began to hit the streets demonstrating against segregated restaurants, movie theatres (and other facilities), public buildings, libraries (and other publicly funded institutions), and segregated work places and unions. Congress resisted the pressure to adopt major civil rights legislation until the 1960s, when it adopted the Civil Rights Act 1964,⁴⁸ the Voting Rights Act 1965⁴⁹ and the Fair Housing Act 1968.⁵⁰

These 'Civil Rights Acts' were only a part of an array of changes that marked one of the most important reform eras in American history. The rapidly growing wealth of the nation made the contrasts between rich and poor, and white and black citizens, starkly visible. A broad based national movement to assist the less fortunate emerged for the first time since the Great Depression. President Johnson's remarkable 'War on Poverty'⁵¹ spawned a Legal Services Program, so that, for the first time in American history,⁵² large numbers of impoverished people (including many tenants sued in summary eviction cases) could appear in court with lawyers. Lack of legal assistance had been one of the major reasons why eviction reforms had lagged behind other legal changes.

With the availability of grants for legal assistance to the poor, new legal services offices sprouted up all across the nation.⁵³ The stage was set. The

⁴⁶ *Brown v Board of Education* 347 US 483, 74 S Ct 686 (1954).

⁴⁷ There are many Civil Rights Timelines online. For instance, the Mississippi Humanities Council <http://www.usm.edu/crdp/html/cd/intro.htm>, accessed 6 January 2006; and the Public Broadcasting Service websites http://www.pbs.org/wnet/aaworld/timeline/civil_01.html, accessed 6 January 2006.

⁴⁸ PL 88-352, 78 Stat 252 (2 July 1964).

⁴⁹ PL 89-110, 79 Stat 437 (6 August 1965).

⁵⁰ PL 90-284, 82 Stat 81 (11 April 1968).

⁵¹ Announced in a speech given on 16 March 1964, Johnson called for and gained passage of the Economic Opportunity Act 1964: LB Johnson, *Papers of US Presidents, Lyndon B Johnson, 1963-1964*, Vol 1 (Washington DC, Government Printing Office, 1965) 375-80. The short-lived Office of Economic Opportunity it created gave grants to a variety of local efforts to organize poor people and, most importantly for our purposes, established offices to provide legal services for the poor. The office was abolished in 1974 by President Nixon. Two of the programs it spawned (Head Start and the Legal Services Program) survived and were transferred to other agencies.

⁵² Low-level representation programs had been around for quite some time. Early in the 1960s, the Ford Foundation began to fund a few experimental offices. In 1964, Edgar and Jean Cahn published a law review article advocating the establishment of a nationally-funded legal services program: ES Cahn and J Cahn, 'The War on Poverty: A Civilian Perspective' (1964) 73 *Yale LJ* 1317. It was widely read and discussed. The Cahns were also friends of Sargent Shriver, the first person to run the Office of Economic Opportunity. They heavily influenced the way he ran the agency. In a major initiative, a large grant program for legal assistance to the poor was created in 1965.

⁵³ For the history of publicly funded legal services, see: E Johnson Jr, *Justice and Reform: The Formative Years of the American Legal Services Program* (New Brunswick, NJ, Transaction, 1973); AW Houseman, 'Civil Legal Assistance for Low-income Persons: Looking Back and Looking Forward' (2002) 29 *Fordham Urban LJ* 1213; and J Mahoney, 'Green Forms and

new lawyers representing the poor, often recent law school graduates, were well schooled in eviction law issues, and eager to challenge extant practices. The few relevant law review articles were widely studied in law school property courses of the era.⁵⁴ Meetings and conferences to develop eviction court litigation strategies also occurred across the country.

As the lawyers talked, the black neighbourhoods exploded. On 11 August 1965, looting and burning decimated much of the Watts area in Los Angeles. It was the first in a series of events that rocked Detroit, Chicago, Cleveland, Newark, Washington DC and many other American cities. Complaints about housing were amongst the most serious causes of the urban riots.⁵⁵ The availability of legal services, in combination with the civil rights pressures and violence in black neighbourhoods, made changes in eviction courts inevitable. Despite improvement in the overall quality of housing stocks in the United States during the 20th century,⁵⁶ many judges

Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States' (1998) 17 *St Louis U Public L Rev* 223. The program reached its funding peak in the 1970s. Taking inflation into account, federal funds available for legal services programs in 2001 amounted to about half of the amount available in 1980, when Ronald Reagan was elected President: Houseman (n 53) 1222.

⁵⁴ The first two articles were by Hiram Lesar: H Lesar, 'Landlord and Tenant Reform' (1960) 35 *NYU L Rev* 1279; and H Lesar, 'The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?' (1961) 9 *U Kansas L Rev* 369. Two more important pieces appeared mid-decade: J Sax and FJ Hiestand, 'Slumlording as a Tort' (1965) 65 *Michigan L Rev* 869; and R Schoshinski, 'Remedies of the Indigent Tenant: Proposal for Change' (1966) 54 *Georgetown LJ* 519. There was also one case that got much attention. *Pines v Persson* 14 *Wisc 2d* 590, 111 *NW 2d* 409 (1961), ordered the return of a security deposit to tenants who had declined to take possession of a house because of code violations. The court used implied warranty language in its opinion. By 1970, *Pines* was routinely cited by judges writing opinions leading to changes in eviction courts.

⁵⁵ The 'Kerner Commission' was created by President Johnson to investigate the urban disturbances. It concluded that housing problems were a significant contributing cause of the unrest: US Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* (Washington DC, Government Printing Office, 1968) 257-63.

⁵⁶ Many general measures support this point. First, the percentage of housing units lacking complete plumbing systems (hot and cold piped water, a bathtub or shower, and a flush toilet) has fallen from 45.3% in 1940 to 1.1% in 1990: US Census Bureau, 'Historical Census of Housing Tables: Plumbing Facilities' <http://www.census.gov/hhes/www/housing/census/historic/plumbing.html>, accessed 4 September 2005. Second, crowding declined significantly between the end of the Depression and 1980, after which it levelled off or even rose slightly. 'Crowded' is defined as one or more persons per room. 'Severe crowding' is more than one and one-half persons per room. Here is data for 1940 and 2000, taken from US Census Bureau, 'Historical Census of Housing Tables: Crowding', <http://www.census.gov/hhes/www/housing/census/historic/crowding.html>, accessed 5 September 2005.

CROWDING IN HOUSING UNITS

Year	Total Units	No. Crowded	% Crowded	No. Severely Crowded	% Severely Crowded
1940	34,447,032	6,964,894	20.2	3,085,922	9.0
2000	105,480,101	6,057,890	5.7	2,873,122	2.7

were concerned that judicial unresponsiveness to the needs of the poor placed the legitimacy of the American judicial system at risk.

The dam finally broke in 1970. Within 11 days of each other, the United States Court of Appeals for the District of Columbia Circuit and the New Jersey Supreme Court, held in *Javins v First National Realty Corporation*,⁵⁷ and *Marini v Ireland*,⁵⁸ that tenants could plead a breach of an implied warranty of habitability as a defence to an action to evict for non-payment of rent. Other courts followed in short order.⁵⁹ Though *Javins* is by far the better known of the two cases,⁶⁰ *Marini* is actually a better indication of the height of the legal hurdles that the courts were willing to cross in their desire to reform summary eviction law. In both cases, the courts refused to apply the old independent covenant approach to leases; declared that warranties of quality were implied in rental housing agreements as in other areas important to consumers; and, refused to limit the jurisdiction of eviction court to the simple question of whether or not rent had actually been paid. But this last step, namely broadening the jurisdiction of the courts, was infinitely more difficult to accomplish in *Marini*, than it was in *Javins*.

The New Jersey summary eviction statute (at issue in the *Marini* case) barred appeals from evictions except on the ground of lack of jurisdiction.⁶¹ In a summary eviction case, all a landlord needed to allege in order to provide a jurisdictional foundation was that there was a landlord-tenant relationship; that the tenant was in possession; and, that rent was due.⁶² In the standard case, the only practical way for a tenant to contest the case was to claim that the rent had actually been paid. But that factual contest did not challenge the court's jurisdiction. In fact, it relied on the court's jurisdiction to contest the landlord's claim for possession. If the trial court did not believe the tenant's testimony that the rent had been paid, taking an appeal was barred by the New Jersey statute.

Given all the events swirling around the New Jersey Supreme Court in the late 1960s (riots, violence, racial anger, urban disarray), the judges were desperate to find a way to change the operation of the landlord-tenant court.⁶³ When *Marini* was brought to the court by attorneys from Camden

⁵⁷ 428 F 2d 1071 (DC Cir 1970).

⁵⁸ 265 A 2d 526 (NJ 1970).

⁵⁹ See n 2.

⁶⁰ The fascinating background of the parties, lawyers, judges and events behind the case is in Chused 'Javins v First National Realty Corporation' (n 2).

⁶¹ Civil Actions in County District Courts: Proceedings Between Landlord and Tenant NJS §2A: 18-59. The statute still has not been amended since 1970.

⁶² *Ibid*, NJS §2A: 18-53(a).

⁶³ The strength of their desire for reform was obvious in *Reste Realty Corp v Cooper* 53 NJ 444, 251 A 2d 268 (1969). *Reste* was a constructive eviction case involving a commercial, not residential, lease. It easily could have been decided by using old common law constructive eviction rules. Instead, the court wrote a dicta filled opinion saying that lease covenants were dependent rather than independent, that landlords warranted the conditions of their premises, and that caveat emptor views of leaseholds were dead.

Regional Legal Services, Judge Haneman wrote a unanimous opinion holding that whether rent was due and owing was a jurisdictional issue! Despite centuries of understandings that a well pleaded complaint provided a jurisdictional foundation for litigation of factual disputes, Haneman J's astounding view in *Marini* was that:

The jurisdictional issue, ie, the statutory basis for removal, can be twice raised in a dispossess action. First, by motion directed at the complaint for failure to accurately allege the necessary facts with particularity. Second, on trial failure to adduce adequate proof to corroborate the allegations of the complaint.⁶⁴

Without the overwhelming historical and cultural forces pushing the court to act, this result was unthinkable. The New Jersey Supreme Court, like many other tribunals and legislatures around the country,⁶⁵ wanted to act and it did.⁶⁶

AFTER THE CUSP

The national consensus that had emerged during the 1950s and 1960s as to the unacceptability of long-standing cultural wrongs and the need to

⁶⁴ 265 A 2d, 530.

⁶⁵ For other court decisions, see n 2. State legislatures also quickly stepped into the breach. The Model Residential Landlord-tenant Law was published in draft form by the American Bar Foundation in 1969. Three years later, the Uniform Residential Landlord-Tenant Act was approved for state enactment by the National Conference of Commissioners on Uniform State Laws. Between 1972 and 1978, 18 states adopted the act: Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Montana, Nebraska, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Virginia and Washington. The Act contains a variety of terms obligating landlords to provide services to tenants and allows tenants to raise the landlords' violation in eviction actions brought because of non-payment of rent. As noted at the beginning of the next section of this paper, sympathies for reform ebbed quickly after 1970. Only two states adopted URLTA after 1978: Mississippi and Rhode Island.

⁶⁶ At about the same time, three other less important reforms also appeared. First, landlord tort liability rules changed. While the early 20th century cases used housing and building codes to establish duties of care benefiting tenants, later cases applied standard negligence rules. The most important were premises liability cases in which negligent lapses in security arrangements allowed malefactors to enter buildings. The most famous case is *Kline v 1500 Massachusetts Avenue Apartment Corp* 439 F 2d 477 (DC Cir, 1970). The same rule was applied later in commercial buildings: *Jane Doe v Dominion Bank of Washington* 963 F 2d 1552 (DC Cir, 1992). Second, courts and legislatures all over the country responded to the arbitrary eviction of periodic tenants by creating a retaliatory eviction defence barring owners from removing tenants after they complained about housing code violations. The best known of the early retaliatory eviction cases is *Robinson v Diamond Housing Corp* 463 F 2d 853 (DC Cir, 1972). Finally, procedural limitations on the eviction of tenants from public housing were approved. The well-known case of *Goldberg v Kelly* 397 US 254, 90 S Ct 1011 (1970) required that a fair hearing be provided to welfare recipients before their benefits were terminated. Shortly before *Goldberg* was decided, the Supreme Court took a case to decide whether the Constitution imposed hearing requirements on public housing providers before they evicted tenants. When the government issued regulations requiring that tenants be told why eviction was being sought and that hearings be provided prior to their removal, the Court remanded the case to consider the impact of the new rules: *Thorpe v Housing Authority of the City of Durham* 393 US 268, 89 S Ct 518 (1969). The regulations were codified in 1981.

improve public housing was short lived.⁶⁷ The sympathies of many in the middle class changed quickly after the breakout of urban riots in the 1960s, and the appearance of major scandals in public housing subsidy programs during the 1970s.⁶⁸ By 1980, when Ronald Reagan was elected President, many programs that were previously viewed as useful efforts to help and support the poor became branded as giveaways to those, often black, who did not deserve the benefits of public assistance. Public housing programs, originally created to house middle class tenants forced into poverty by the Depression, fell out of favor. As brilliantly chronicled by Lawrence Friedman:

[W]hat would happen to public housing if a rising standard of living released the submerged middle class from dependence on government shelter? Public housing would be inherited by the permanent poor. The empty rooms would pass to those who had at first been disdained—the unemployed, ‘problem’ families, those from broken homes. The program could adapt only with difficulty to its new conditions, because it had been originally designed for a different clientele. To suit the programs to needs of the new tenant would require fresh legislation; and yet change would be difficult to enact and to implement precisely because the new clientele would be so poor, so powerless, so inarticulate. The political attractiveness of public housing would diminish. Maladaptations to reality in the program would disenchant housing reformers; they would declare the program a failure and abandon it to search out fresh cures for bad housing and slums.

All this is precisely what happened.⁶⁹

During the 1970s, domestic and international economic pressure, along with double-digit inflation rates,⁷⁰ meant that even non-poor Americans felt squeezed. The long-running cultural assumption of the middle class, that anything was affordable, fell apart, as did the willingness to be generous to the less fortunate. The consequences were far reaching. Middle-class demands to protect *their* housing investments, and reduce huge rent increases proliferated. Opposition to welfare assistance, public housing, legal assistance for the poor, civil rights, the ‘War on Poverty’ and a host of other programs, intensified. Cuts in federal support for housing programs were among the most Draconian of the myriad cuts imposed during the following decade. Between 1979 and 1990, budget authority for subsidised housing programs fell from about US\$25 billion per year (approx

⁶⁷ The consensus was not universal.

⁶⁸ On the housing scandals, see: n 44.

⁶⁹ Friedman (n 39) 649. The same process occurred in welfare assistance as the body politic came to see the program as a giveaway to often black, undeserving poor.

⁷⁰ Average inflation between 1970 and 1979 was 11.35%. See: ‘Average Annual Inflation Rates by Decade’, http://inflationdata.com/inflation/Inflation_Rate/DecadeInflation.asp, accessed 6 January 2006.

£14 billion) to US\$10 billion (approx £5.5 billion). In addition, most of the budget authority was for support of rental assistance programs, not construction of new public housing—an ideological reallocation of expenditures toward ‘free enterprise’ that helped fewer households per dollar spent.⁷¹ Further changes in housing programs were enacted in the 1990s during the Clinton Presidency, reallocating most housing expenditures to ‘Hope VI’ programs designed to integrate the poor into newly constructed, mixed income communities.⁷² Unfortunately, many of these projects have been built on land previously occupied by now demolished public housing projects. The net effect often was, and is, to reduce the number of subsidised units in the area. Indeed, a strong argument may be made that the Democrats under President Clinton did little, if anything, to improve the availability of publicly supported housing for the poor.⁷³

As programs for the poor faded and inflation rose,⁷⁴ changes benefiting middle-class renters proliferated at the state and local level.⁷⁵ Though war-time rent controls were adopted during both World Wars, few rent regulations existed outside of New York City after the 1950s. The dramatic inflation rates of the 1970s, however, led to some remarkable shifts in policy. In a move never seen in peacetime, federal rent controls went into effect in 1970 under the Economic Stabilisation Act of 1970, part of a broad ranging program designed to curb inflation.⁷⁶ They lasted only a short time,⁷⁷ but many local governments adopted their own controls after the federal rules lapsed.⁷⁸ By the mid-1980s, hundreds of communities had adopted rent ordinances.⁷⁹

⁷¹ A summary of these events is in MA Stegman, *More Housing More Fairly: Report of the Twentieth Century Fund Task Force on Affordable Housing* (New York, NY, Twentieth Century Fund Press, 1991) 25–28.

⁷² For a detailed analysis of this program, see: Fitzpatrick (n 37).

⁷³ For example, RG Bratt, *Housing for Very Low-income Households: The Record of President Clinton, 1993–2000* (Cambridge, MA, Harvard University Joint Center for Housing Studies, 2002). The study is available at http://www.jchs.harvard.edu/publications/homeownership/W02-8_Bratt.pdf, accessed 6 January 2006.

⁷⁴ See, for example, reductions in public housing funds: ‘83 Federal Programs: A Profile of Reagan Targets’ *New York Times*, 20 February 1981, A11.

⁷⁵ The Reagan administration also tried to move funds intended for poor tenants to a new program designed to help the middle class. For example, M Hunter, ‘Plan for Middle-income Rent Subsidies is Killed’ *New York Times*, 25 September 1980, A8.

⁷⁶ 84 Stat 799 (1970).

⁷⁷ The act expired of its own terms in 1974.

⁷⁸ For these developments, see: MD Bergman, ‘Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord–Tenant Relationship’ [1989] *Annual Survey of Am L* 691; Note, ‘The Constitutionality of Rent Control Restrictions on Property Owners’ Dominion Interests’ (1987) 100 *Harvard L Rev* 1067; and Note, ‘Rent Control and Landlord’s Property Rights: The Reasonable Return Doctrine Revived’ (1980) 33 *Rutgers L Rev* 165.

⁷⁹ E Rabin, ‘The Revolution in Landlord-tenant Law: Causes and Consequences’ (1984) 69 *Cornell L Rev* 517, 527–29.

Another wave of enactments imposed limitations on the owner's ability to evict tenants living in buildings that owners wished to convert to condominiums or cooperatives.⁸⁰ These changes also assisted mostly middle class tenants. Some of the limitations contained in the Uniform Condominium Act, such as a minimum 120-day notice to vacate rule and a requirement that tenants be given the right of first refusal to buy their unit, have been adopted in one form or another by over 20 states since its promulgation in 1980.⁸¹ A number of states have adopted tougher restrictions. New Jersey, for example, delays eviction from a building being converted for one year, if moving and relocation expenses are paid to tenants, and up to five years, if the owner does not provide comparable rental housing.⁸²

Indeed, the late 20th century history of tenancy regulation in New Jersey presents a radical version of the pressure generated by middle class tenants nationwide. The densely populated state provided 'bedrooms' for many thousands of people who worked in Philadelphia and New York.⁸³ Reasonably priced, good quality rental housing was difficult to find in many areas of the state. During the late 1960s and early 1970s, a powerful statewide tenants' organisation appeared. The New Jersey Tenant Organisation (NJTO) came into being while the nation was faced with double digit inflation rates and soaring housing costs. It sought a number of changes from the legislature, including rent controls, restrictions on common law rules allowing for easy termination of periodic tenancies,⁸⁴ limits on condominium conversions, and protections for elderly tenants.⁸⁵ The group quickly grew to become a major force in state politics. During the 1974 legislative session, four major landlord-tenant reform statutes were adopted, including an Anti-Eviction Act which required landlords to demonstrate 'good cause' before evicting any tenant.⁸⁶ Statewide rent

⁸⁰ An overview of these is in BV Keenan, 'Condominium Conversion of Residential Units: A Proposal for State Regulation and a Model Act' (1987) 20 *U Michigan J of L Reform* 639.

⁸¹ For information on adoptions of Uniform Acts, see the Uniform Business and Financial Laws Locator <http://www.law.cornell.edu/uniform/vol7.html>, accessed 11 September 2005.

⁸² Civil Actions in County District Courts: Proceedings Between Landlord and Tenant NJS §2A: 18-61.11. Rent increases during a tenant's continued occupancy must be 'reasonable'.

⁸³ In the 1980s, New Jersey was the most densely-populated state. Bureau of the Census, US Department of Commerce, *Statistical Abstract of the United States 1986* (Washington DC, Government Printing Office, 1985) 12. The population density in 1984 was 1,006 persons per square mile.

⁸⁴ Many leases held by the poor were oral month-to-month periodic tenancies, terminable on one month's notice. No stated reason was required to end the lease. As inflation rose, landlords terminated tenancies and raised the rent more frequently. This led to widespread demands to curb lease terminations.

⁸⁵ For a history of the New Jersey Tenant Organisation, see: KK Baar, 'Rent Control in the 1970s: The Case of the New Jersey Tenants' Movement' (1977) 28 *Hastings LJ* 631.

⁸⁶ Civil Actions in County District Courts: Proceedings Between Landlord and Tenant NJS §2A: 18-61.1 et seq.

controls were not among the measures adopted in 1974. Pressure to adopt such a measure was significantly reduced by the time the legislature met. The federal government adopted rent guidelines in 1970, and just about as they expired three years later, the state Supreme Court ruled that localities had the authority to adopt rent and eviction control ordinances under existing local government statutes.⁸⁷ The court's ruling led to the adoption of dozens of rent and eviction control plans by local governments throughout the state.⁸⁸

CONCLUSION

Poor tenants in America were in a precarious position as the 20th century ended. Public expenditures for housing support remained at a low level. National welfare programs had been significantly narrowed in the 1990s. The rejuvenation of many inner city neighbourhoods led to dramatic increases in urban housing costs. Homelessness increased, as did grant programs to provide assistance for shelters and other emergency programs. The nation applied 'band-aids' to problems created by its own unwillingness to support the construction of enough housing to provide for those in need.

And what of landlord-tenant courts? Despite the dramatic doctrinal change accomplished by *Javins*, *Marini* and their imitators around the country, evictions in many locations continued pretty much as before. As the 1990s unfolded, most tenants sued for possession of their apartments because of non-payment of rent either failed to appear in court or did so without legal assistance. The courts, not obligated to provide counsel to the poor in civil cases, routinely declined either to raise defences on behalf of the unrepresented, or assign counsel. Cuts in legal service programs made it very difficult for poverty lawyers to reach out to those needing assistance. Law school clinical programs could not fill the vacuum. Eviction orders continued to be issued at a high rate.⁸⁹

⁸⁷ *Ingramort v Borough of Fort Lee* 62 NJ 521, 303 A 2d 298 (1973). Rent control ordinances must provide the landlord with a 'just and reasonable return': *Helmsley v Borough of Fort Lee* 78 NJ 200, 394 A 2d 65 (1978) and *Mayes v Jackson Township Rent Leveling Board* 103 NJ 362, 511 A 2d 589 (1986).

⁸⁸ At the time of the decision in *Ingramort*, 18 rent control ordinances were in effect: 'Jersey Towns Win on Rent Control' *New York Times*, 5 April 1973, 93. Six months later, that number shot up to about 60: 'Tenants Enter Political Arena' *New York Times*, 23 September 1973, 77. Today, hundreds of cities have rent control in place, including some of the largest municipalities in the country: Rabin (n 79) 527-29.

⁸⁹ Washington DC, is a prime example of the problem. Both attorneys from legal service programs and student practitioners from law school clinical programs are available in court to help tenants. The court's judges, however, will not ask tenants if they want legal assistance until after the roll of cases is called and those present are given an opportunity to settle their

Were poor tenants better off in 2000 than they were in 1900? Housing conditions in the nation certainly improved during the century. And the legal rules surrounding tenancies changed for the better. However, the lack of public support for housing the poor, and the failure of courts to ensure that the new legal rules were vigorously enforced, rendered much of the improvement for naught. Much work is left to be done.

differences. The agreements reached during the period of negotiation rarely raise implied warranty of habitability issues and the judges rarely inquire if such issues exist when they approve the settlements. Though hundreds of cases are heard every day, only a tiny number are referred for legal assistance. A full report on court practices is available in Final Report of the DC Bar Public Service Activities Corporation Landlord Tenant Task Force (DC Bar Washington DC 1998) (on file with the author).

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