Notes and Comments

Tenant Unions: Collective Bargaining and the Low-Income Tenant

More than 15 million people throughout the country live in substandard or deteriorating rental housing units. Many municipal housing codes or state tenement-house laws declare such housing conditions unlawful. But if the landlord chooses to ignore complaints, the tenant usually has no quick, effective remedy to compel even emergency repairs. He can protest to the building department or initiate a costly, drawn-out court proceeding. Or the tenant can move—provided, of course, he can find another flat to rent.

In several Chicago apartment buildings, however, tenants now have an alternative: grievance machinery under a collective bargaining agreement between landlord and tenant union. Recently, for example, a Chicago slum tenant discovered that several floorboards on his back porch had rotted through. The tenant reported the condition to the union grievance committee. Upon investigation the committee decided that the whole porch was about ready to go, and at its weekly meeting with the landlord asked him to replace the entire structure. The landlord denied that the porch was dangerous but suggested that he would

1. This figure somewhat understates the situation. There are 5.3 million deteriorating or dilapidated occupied rental housing units in the United States. G. BEYER, HOUSING AND SOCIETY 144 (1965). The average household in the United States has 3.8 people. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 35 (1960). These figures yield an estimate of approximately 18 million people living in substandard rental housing units. Most substandard housing is rented. Cf. B. DUNCAN & P. HAUSER, HOUSING A METROPOLIS—CHICAGO 84 (1960).


3. See, e.g., DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF JUSTICE & OFFICE OF ECONOMIC OPPORTUNITY, TENANTS' RIGHTS 5-6 (1967) [hereinafter cited as TENANTS' RIGHTS]; ILLINOIS LEGISLATIVE COMMISSION ON LOW INCOME HOUSING, FOR BETTER HOUSING IN ILLINOIS 21-22 (1967) [hereinafter cited as ILLINOIS COMMISSION]; MASSACHUSETTS SPECIAL COMMISSION ON LOW-INCOME HOUSING, FINAL REPORT 64 (1965) [hereinafter cited as MASSACHUSETTS COMMISSION].


5. "Tenant union," as it is used in this Note, refers only to a tenant organization which seeks a collective agreement with the landlord defining the obligations of both the tenants and the landlord. See TENANTS' RIGHTS 16-17.

fix it the following year. The committee was unimpressed; it demanded that the issue go to the arbitration board created by the collective bargaining agreement. The three-member board, composed of landlord and union representatives and a third person selected jointly by landlord and union, found the porch unsafe; but upon verifying the landlord's limited financial resources, it directed him to replace only floorboards actually rotting away. Had the landlord still refused to repair, the tenant-union members could have withheld their rent and paid their money instead into an escrow account, until either the landlord made the required repairs or the union could finance the work itself through the accumulating funds.

The alluring tenant union model has spurred the negotiation of collective bargaining agreements between tenants and landlords not only in Chicago but also in other cities across the country. As yet no mass movement has developed because of the large effort required to organize a union and hold it together. But as early associations have gained experience, the sophistication of their contracts and of their negotiations with landlords has increased. In some cases landlord as well as tenant has come to appreciate the advantages of a stable tenant organization. Even the federal government has recognized the institution. Although few unions have been in existence long enough to justify any firm conclusions about their ultimate usefulness, their initial successes and failures suggest that they can play a significant role in some housing situations where other techniques are unavailing.


Public housing authorities have also begun to appreciate the value of tenant organizations. See National Association of Housing and Redevelopment Officials, Public Housing is the Tenants (Critical Issues, III) 27 (1967); letter from Van Story Branch, assistant director for housing management, Baltimore Urban Renewal and Housing Agency, to the Yale Law Journal, Nov. 30, 1957; hearings on proposed housing legislation for 1957 before the subcomm. on housing and urban affairs of the senate comm. on banking and currency, 90th Cong., 1st sess., pt. 1, at 642-43 (1957).

I. The Origins of Tenant Unionism

Tenant organizations are not exclusively the product of present conditions. As long ago as the 1890’s, severe economic depressions and housing shortages triggered the formation of tenant groups.10 In New York City, for example, the acute post-World War I housing shortage and the depression of the 1930’s both produced large scale tenant organizations.11 Such groups, arising in response to extraordinary conditions, sought and received temporary legislative palliatives such as moratoria on evictions as well as rent reductions.12 Predictably, the organizations were short-lived; once the pinch had eased, they melted away. More recently, the grievances animating tenant organizations have shifted to the chronic ills of city slums: deteriorated housing, high rents, and absentee landlords. The most recent and well-publicized wave of tenant protests swept New York in 1964, when the massive rent strikes led by Jesse Gray gained wide publicity.13 Even there, however, the tenant groups demanded only one-shot repairs from the landlord. Some tenants won, but even they must start the whole struggle afresh as soon as another defect appears.14

The goals and tactics of tenant unions differ sharply from those of earlier groups. Their emphasis is on a stable organization dealing directly with the landlord on a continuing basis. Like a labor union, the tenant union begins by joining individual tenants into a cohesive association, and then negotiates an agreement with the landlord defining the obligations of both parties and providing specific procedures for the resolution of disputes. Although the similarities between tenant and labor unions are evident enough, tenant unions neither derive exclusively from the labor model nor represent so sharp a break with past landlord-tenant law as might appear at first glance. Tenant unions reflect the convergence of two developments: a trend in recent landlord-tenant statutes toward increased tenant participation in efforts to improve housing conditions, and the civil rights movement with its offspring, the war on poverty.

14. The inadequacies of the rent strike which does not produce an organization capable of overseeing long-term reforms spurred two critics to call for more revolutionary measures. They urged tenants to refuse to pay any rent (to the landlord or into escrow) and thus to bring the system to its knees. Piven & Cloward, Rent Strike, THE NEW REPUBLIC, Dec. 2, 1967, at 11, 15.
A. Remedial Statutes

The common law of landlord-tenant relations has long been incapable of dealing satisfactorily with the problems of private housing in an urban industrial society. Traditional notions of property rights have sharply restricted the tort liability of apartment house owners for even dangerously dilapidated structures so long as the tenants were in possession of the premises. In order to collect his rent the landlord had no obligation even to maintain the apartment in a habitable condition. By a relentless adherence to the doctrine that covenants in a lease are independent, the courts preserved the landlord’s right to collect the rent even when he breached a written promise to repair. The courts conceded only the principle of constructive eviction to the tenant, but that relief was scant comfort except in the most outrageous circumstances. The common law, in short, gave the landlord the right to keep his property in whatever condition he desired. Its sole solution for tenant complaints was the right to terminate the lease and quit the premises.

Legislatures, however, have not regarded property rights with such awe. Slums are ancient phenomena, and statutes have long recognized that the public interest in adequate, safe, and sanitary housing conditions may override private property claims. In the late nineteenth and early twentieth centuries state legislatures responded to the inadequacies of the common law by enacting tenement-house statutes in an effort to set minimum housing standards. Over the next 50 years the early regulations evolved into the elaborate housing codes of today. But administrative enforcement of housing codes did not eliminate substandard housing; where the landlord’s operation was profitable, fines for housing-code violations effectively amounted only to a tax on his

17. Johnson v. Haynes, 330 S.W.2d 109 (Ky. 1959); Stone v. Sullivan, 500 Mass. 450, 455, 15 N.E.2d 476, 479 (1936); see Annot., 28 A.L.R.3d 446 (1933). In some jurisdictions, a landlord may be liable for injuries which would have been avoided if he had honored his agreement to repair. 2 F. Harper & F. James, Torts § 27.16 at 1514 (1956); 1 H. Tiffany, Real Property § 106 (3d ed. 1939).
19. For a brief history of housing legislation, see Grad & Gribetz, supra note 2.
business. Consequently, some states established receiverships, permitted welfare departments to withhold rents, or authorized public agencies to make emergency repairs with bills over to the landlord for costs. The courts have consistently upheld such measures as valid exercises of the state police power.

Until recently, most statutes could be enforced only at the initiative of an official arm of the government, either judicial or administrative. Now, however, tenant-initiated remedies are receiving increased attention because they are thought more effective. Also implicit in tenant-initiated remedies is a growing awareness that the tenant has a special interest in adequate housing in preserving the public health and welfare generally.

The earliest tenant-initiated remedies were the "repair and deduct" statutes which allowed individual tenants to withhold rent under carefully circumscribed conditions to repair significant defects in their apartments. Although such statutes did relieve the tenant somewhat from his total reliance on government action to protect his interests, the threat and effect of individual rent withholding were minimal.

22. CONN. GEN. STAT. REV. § 19-347b (Supp. 1965); ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1967); MASS. GEN. LAWS ANN. ch. 111, § 127H-1 (1965); N.J. STAT. ANN. §§ 2A:42-79 to 2A:42-82 (Supp. 1969); N.Y. MULT. DWELL. LAW § 305 (McKinney Supp. 1967). Receivership laws have not been very effective. Note, Receiverships in the Rehabilitation of Urban Housing, 2 HARV. CIV. RIGHTS-CIV. LIB. REV. 219, 230-31 (1967); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 823-30 (1965). In the first two years following enactment of New York's receivership law, less than 100 buildings were placed in receivership or were brought up to code requirements under threat of a receivership. Gribetz, New York City's Receivership Law, 21 J. HOUSING 297 (1964).
27. Sax & Hiestand, supra note 26, at 871-75.
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In the past three years Massachusetts and New York have passed provisions authorizing the tenant to rely on the legal process as sword rather than shield; he may initiate a lawsuit against the landlord to compel correction of dangerous housing conditions. The New York statute is the first explicitly to legalize collective tenant action and establish its ground rules. Article 7A of the New York Real Property Actions and Proceedings Law allows one-third of the tenants in a slum dwelling to petition for an order directing the landlord to repair conditions "dangerous to life, health, or safety" without a prior inspection by the building department; if necessary, the court may place the building in receivership. Article 7A allows organized tenants an effective initiative to seek and obtain receiverships; the state, however, still insists on injecting itself into every landlord-tenant dispute by requiring a cumbersome, time-consuming, and expensive court proceeding.

B. Civil Rights and the War on Poverty

The emergence of tenant-initiated statutory remedies gave some impetus to the formation of tenant unions; another catalyst was the sudden popularity of community organization in the civil rights movement and the war on poverty. The herculean task of organizing apathetic slum residents has required organizers to focus on an issue that can catch and hold the interest of the poor. Housing is an obvious choice. Many of the original organizers of tenant unions hoped that the organizations would expand into broadly based community and political groups. While those hopes have yet to materialize, the effort to mobilize the poor for better housing has created, at least in some cases, a spirit of self-sufficiency and self-help.

32. N.Y. REAL PROP. ACTIONS LAw § 778 (McKinney Supp. 1967).
35. Interview with Charles Love, tenant union organizer, in Chicago, May 2, 1967. In Negro slums, a "black power" argument urging black tenants to help themselves and not wait for the "white power structure" to improve their homes has often convinced tenants to participate in tenant unions. Id. See generally M. CLINARD, SLUMS AND COMMUNITY DEVELOPMENT 125-28, 299-308 (1966).
II. The Economics of Slum Housing

The success of the tenant union will ultimately depend upon judicial tolerance of its activities, and upon its bargaining power with the landlord. But its potential for achievement must be gauged by the economics of slum housing. Improvement in the condition of slum housing requires either capital investment for rehabilitation or increased expenditures for maintenance and repairs. Without government assistance or higher rents, such funds can come from only three sources: economies that lower other operating costs, tenant labor, and the landlord's profits.

A. Poor Tenants, Old Housing

Most proposals for improving slum housing focus single-mindedly on the landlord, but funds for maintenance may also be released by lowering operating costs. For while the landlord will resist vigorously if his profits are threatened, he should have no objection if better housing can be provided for his tenants without changing total expenditures. Because of the nature of slum housing, there is reason to hope that this can be done.

In the American city, housing for the poor is old housing. As a building ages, the pattern of income and expenses that it generates changes significantly. Operating expenses for heat, repairs, and janitorial services rise and rents fall. As the building moves toward its fortieth or fiftieth birthday, operating expenses often climb from 40 per cent of income to almost 60 per cent. In addition, keeping the building in adequate condition requires at least occasional capital improvements. In this respect a building is like a car: the older it becomes and the more intensely it is used, the more expensive it is to maintain.

Moreover, the slum tenant's rent covers more than "normal" operating expenses. The lessee who plunks down $35 for the week's rent pays

36. See sections III and IV infra.
37. Most reforms are designed to wring money from the landlord. Schoshinski, Remedies of the Indigent Tenant: Proposal for Change, 54 Geo. L.J. 519, 520-21 (1966); Gilbey & Grad, supra note 2, at 1281; see Sax & Hiestand, supra note 26, at 874-75.
38. Authorities cited note 61 infra.

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for the right—and the right of his neighbors—to vandalize the apartment, to have large numbers of children jumping on the furniture, to live in illegally small apartments, to skip out without paying the preceding month's rent, to move frequently, and to pay in weekly installments. Vandalism, children's wear and tear, harassment by housing code agencies, rent skips, high turnover, frequent collections—all are costs that the landlord must cover by charging higher rent for less housing.41 Since poor people by definition cannot afford to pay high cash rents, the landlord increases his price by offering fewer square feet of space and fewer services.42

The tenants themselves, acting in concert through a tenant union, can help reduce the operating costs of housing. Tenants driven by personal frustration or anger at the landlord to vandalize or dump garbage in the hallway can be counseled and cajoled most effectively by other tenants.49 Organization itself can be a major solvent; many tenants do not bother to keep their building clean because they feel other tenants will tear it up anyway.44 The existence of grievance machinery may break the vicious circle in which the tenant vandalizes his apartment in retaliation against the landlord's refusal to make repairs, and the landlord makes no repairs because the tenant vandalizes his apartment. In short, the union may be able to provide the supervision and incentive that presently characterize owner-occupied slum tenements—usually the best maintained buildings in the slum.45

The tenant union may also be in a position to reduce the high rate of turnover and rent skips. One study has suggested that lack of sufficient space and complaints about present housing conditions motivate families to move.46 Tenant union organizers believe that exasperation

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41. See G. Sternlieb, The Tenement Landlord 73-75 (1966) [hereinafter cited as Sternlieb]. A New Haven, Conn. landlord estimated that he could reduce rents by 20 per cent if vandalism and turnover were substantially reduced. Speech by Herbert Cohen to Yale Law School seminar, Nov. 17, 1967. Public housing for low-income tenants also faces these added costs. National Association of Housing and Redevelopment Officials, supra note 8, at 27.

42. A. Schorr, Slums and Social Insecurity 99-100 (1953).


with specific defects causes many slum tenants to move, despite the knowledge that new housing is likely to be as bad as what the tenant left behind.\textsuperscript{47} Without hope of improvement in the present dwelling, however, a poor family will pick up and move anyway. Since a new landlord ordinarily requires a security deposit, a tenant often omits the last month’s rent at the old apartment. By creating a sense of group participation among tenants in the management of the building, the tenant union might halt the constant movement from one substandard apartment to another.\textsuperscript{48} Of course, to the extent that rent skips are the last resort of impoverished people spending money they do not have, not even the union can accomplish anything useful.

**B. Tenant Labor**

Besides cutting costs to the landlord, tenants can contribute their own labor to improve their living conditions. Informal, in-kind rent payments already occur in large areas of the slum housing market. Many landlords, for example, offer the new tenant a month’s free rent if he cleans his own apartment when he moves in.\textsuperscript{49} Mutual distrust between landlord and tenant sharply limits the value of such agreements.\textsuperscript{50} The mere existence of the arrangements, however, suggests that they could become an additional “rent” payment plowed directly back into the building where lessor and lessee are both assured of adequate supervision. A tenant union can devise varieties of “sweat rent”;\textsuperscript{61} a landlord, for example, might reduce the rent where the tenant repairs the apartment with landlord-supplied materials. Obviously such arrangements will depend on the desires of the tenants. But if they want better housing and are willing to invest additional effort to get it, they should be


\textsuperscript{49} See, e.g., B. Steck, JOIN Rent Strikes and Tenant Unions 9 (1966) (copy on file at the Yale Law Journal).

\textsuperscript{50} Id.

\textsuperscript{51} Self-help and sweat equity plans have traditionally been associated with home building by future owners. See Nesbitt, “Self-Help” Homebuilding, 24 J. Housing 275 (1957); Wall St. Journal, Nov. 13, 1967, at 1, col. 1. In addition, sweat equity plans have been advocated for building low-income cooperatives or condominiums. See Davis, Cooperative Self-Help Housing, 92 Law & Contemp. Probs. 409 (1967). Tenant unions may, of course, prepare the way for cooperative or condominium ownership of buildings. Letter from Victor de Grazia, executive vice-president, Kate Maremont Foundation, to the Yale Law Journal, July 11, 1967; cf. Quirk, Wein & Gomberg, A Draft Program of Housing Reform—The Tenant Condominium, 53 Cornell L. Rev. 361, 390-93 (1968).
allowed—if not urged—to proceed. The tenant union remains the only feasible device to ensure the workability of tenant-labor plans.

C. Picking the Deep Pocket

The tenant union, of course, need not limit its goals to the housing improvements which can be financed through lowered operating costs or tenant labor. The landlord as investor and profit-maker represents the most obvious potential source of increased maintenance funds. The extent to which a landlord has profits to yield to a tenant union, however, will depend on several variables: the rate of return demanded by the landlord; the condition of the housing market; and the stage of deterioration of the building.

The ultimate constraint on the rewards the union can hope to win from the landlord is the rate of return the landlord requires to stay in the housing business. This required rate of return takes account of (1) the return presently available on safe investments, e.g., government bonds; (2) the probability that the property will continue to generate income; and (3) the property's liquidity (how easily it can be sold and the collateral value of the property). Uncertainty about a steady flow of income, about the eventual ease of selling the property, and about the effort required to run the building will cause an investor to demand a high rate of return. Investors regard all rental housing as a risky investment, and slum housing is not only the most uncertain market, but the social disapproval attendant upon the epithet of "slumlord" tends to push the necessary rate of return even higher. The tenant union, if it can reduce some of these risks and uncertainties by stabilizing landlord-tenant relations, may be the only institution capable of exerting a downward pressure on the rate of return necessary to keep landlords in business.

In many instances, however, the landlord's profits exceed the return necessary to keep him from abandoning his buildings. Housing markets


vary widely in different parts of the country.\textsuperscript{57} In some cities housing for the poor may be a dying industry,\textsuperscript{58} but in a substantial proportion of slum markets demand outruns supply.\textsuperscript{60} Even though the central cities have been losing their white population to the suburbs for nearly 20 years, in-migration of the poor—and chiefly the Negro poor—has replaced most of the fleeing middle class. Racial and social discrimination, as well as the more conventional disabilities of impoverished consumers, such as lack of knowledge, have kept the recent arrivals crowded into much smaller geographical areas than those deserted by middle-class emigrants.\textsuperscript{60}

Not only is the demand for low-cost housing high, but the supply of low-cost housing is limited. Given the rents low-income people can pay, it is not economically feasible to build new units.\textsuperscript{61} Additional housing for low-income tenants becomes available as higher-income households vacate older for newer housing units. The older units then "filter down" to low-income tenants.\textsuperscript{62} Even the limited housing made available by the filtering process is further restricted by "block pattern- ing" which allows only buildings on the fringes of already-existing slums to filter down.\textsuperscript{63} In such a tight housing market, landlords often

\textsuperscript{57} Vacancy rates, rent levels, and expenses vary wildly from region to region, and city to city. See INSTITUTE OF REAL ESTATE MANAGEMENT, 1967 APARTMENT BUILDING INCOME EXPENSE ANALYSIS 3, 6-9 (1967); W. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 100-03 (1965). Intensity of discrimination and the extent of substandard housing also fluctuate from city to city. See Nesbitt & Hoerber, The Fair Housing Committee: Its Need for a New Perspective, 41 LAND ECON. 98, 102 Table 11 (1965).

\textsuperscript{58} See, e.g., Sternlieb 88-92, 103-56. Newark may be a special case, however, since it has one of the highest ratios of public housing units to population of any city in the country. More than ten per cent of Newark's dwelling units are in public housing developments. Sternlieb 15-14. Despite a high vacancy rate rents in the slums do not fall. Rather they remain at the same high levels established when demand was high. A. Schorr, supra note 42, at 109; Sternlieb 84, 225-25.

\textsuperscript{59} The housing market is very fragmented; for example, large apartments able to house adequately the many large, low-income families of the slums are in terribly short supply in most slum housing markets. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967; interview with Elliott Segal, director, Division of Neighborhood Improvement, New Haven, Conn., in New Haven, Nov. 13, 1967. The vacancy rate in New York is still very low throughout the entire housing market. C. Rapkin, The Private Rental Housing Market in New York City, 1965, at 9 (1966).

\textsuperscript{60} J. Rothenberg, Economic Evaluation of Urban Renewal 44, 45-46 (1967) [hereinafter cited as Rothenberg]; M. Meyerson, B. Tercett, & W. Wheaton, Housing, People, and Cities 75-76 (1965); K. Taeuber & A. Taeuber, Negroes in Cities 24-25, 166-69 (1965). The substantial rate of homebuilding during the 1950's reduced the rate of increase of overcrowding, but did not halt it. K. Taeuber & A. Taeuber, supra, at 166-69. The high interest rates of the mid-1960's have severely reduced home construction, indicating that pressure on existing housing may increase again. Naylor, The Impact of Fiscal and Monetary Policy on the Housing Market, 32 LAW & CONTEMP. PROB. 384, 390 (1967).

\textsuperscript{61} M. Meyerson, B. Tercett, & W. Wheaton, supra note 60, at 254; Rothenberg 39; Sax & Hiestand, supra note 26, at 872-74; A. Schorr, supra note 42, at 98.

\textsuperscript{62} Filtering has become a much-debated concept. W. Grigsby, HOUSING MARKETS AND PUBLIC POLICY 84-139 (1963). As used in the text, filtering refers to a change in occupancy. See id. 86. See also Rothenberg 59-59; A. Schorr, supra note 42, at 108-10.

\textsuperscript{63} See B. Duncan & P. Hauser, Housing A Metropolis—Chicago 219 (1960) and
can increase rents without fear of losing tenants. Under these circumstances, the tenant union should be able to attack the "spread" between the required rate of return and the rent charges based simply on what the market will bear.

If the structure of the slum market creates one opportunity for landlord profiteering, the rhythm of housing deterioration creates another. When a building first enters the slum market, it is a prime candidate for "milking"; that is, while in later years the building will require significant repair expenditures to stave off actual collapse, during the period of descent the landlord need perform no maintenance work at all. The landlord may find it more profitable to collect the rents and milk the building as it deteriorates than to attempt to maintain his investment through repairs. In order to serve a low-income market, the landlord must be permitted to reduce services somewhat; however, when a landlord attempts to extract huge profits in a short period of time by a cataclysmic change in maintenance policy, permitting the building to deteriorate rapidly and totally, the tenant union can attempt to reverse the policy without driving the landlord out of business.

Central to the landlord's financial ability to increase maintenance expenditures are his own skill in managing the building, the extent of his personal resources, and his own attitude toward his holdings. Discussions of tenant unions too often typecast all landlords as fungible villains. Actually, landlords fall into three general classes whose motive for owning and techniques of managing slum properties differ: the owner-occupant, the absentee professional, and the absentee amateur.

1. The Owner-Occupant

Owner-occupants constitute the largest group numerically; they usually control from one-third to one-half the buildings in deteriorating

authors cited note 61 supra. Racial discrimination maintains a dual housing market even in buildings next door to each other. Sternlieb 71.

64. A. SCHORE, supra note 42, at 109.
65. The decision to permit a building to deteriorate is often accompanied by a conversion of the building to Negro occupancy and a rise in the rent levels. In Chicago, one apartment complex displayed practically this process clearly. Service was substantially reduced, rents were increased, and the landlord actively advertised for Negro tenants.

areas. According to a ghetto cliché, the resident-owned structure is readily identified by the grass in the front yard in contrast to the barren dirt plot prickling with glass shards characteristic of the absentee-owned building. A recent study of Newark slums concluded that owner-occupancy is the best guarantee of a well-maintained building. The owner may be a white who has elected to remain in the building he owns or a middle-class Negro who finds that he can buy housing only in the slum; in either case, his presence in the building provides the interest in decent housing, constant supervision, and day-to-day maintenance that old housing requires. The resident owner's investment of money and labor often is substantial. As a result most owner-occupied tenements do not need tenant unions. The resident landlord already provides adequate maintenance; pride of ownership has motivated greater effort in screening and supervising tenants. Tenant response to concerned resident landlords, moreover, is typically good; resident landlords, in marked contrast to their absentee cousins, rarely feel that their tenants cause problems.

Slum residents attracted by the American dream of owning their own home can, however, be drawn over their financial heads by unscrupulous real estate operators. Often two- or three-flat homes in slums or fringe areas are sold on land contracts or are financed through second mortgages taken back by the seller. Although the details and precise legal effects of these transactions differ, their practical effect is similar: almost no down payment is required, and the purchase price is often double the actual worth of the building. Typically the seller has tailored the monthly payments to his buyer, which is to say as high as

66. Sternlieb 134. In the worst portion of Sternlieb's study area the percentage fell to 24 per cent, id., and in one of Chicago's worst slums some 18 per cent of the buildings were owner-occupied. Community Renewal Program, City of Chicago, Lawndale: Part One 11 (1964).
68. Id.
69. Id.
70. See W. Grisby, supra note 57, at 236.
74. Chicago Commission on Human Relations, supra note 72, at 5-6, 9; Sternlieb 116, 145. See H. Hoagland & L. Stone, supra note 72, at 99-100.
the buyer can conceivably afford to pay. Rarely does the purchaser have any money in reserve for adequate maintenance. Such transactions have another attraction for the seller: responsibility for maintenance and housing code violations shifts to the unwary buyer. Not even the most militant tenant union confronting a resident landlord who is no better off than his tenants can hope to accomplish much.

2. The Absentee Professional Landlord

The main target of tenant union activity will be the absentee landlord. At the furthest extreme from the owner-resident is the large-scale slum specialist. Besides owning many buildings, the slumlord, at least in larger cities, tends to own the biggest ones. Therefore, large landlords while owning only 20 or 30 per cent of slum buildings often control up to 40 or 50 per cent of the dwelling units. In dealing with the large landlord, the tenant union faces a businessman who, by virtue of his size, has access to capital, runs an integrated business, and is actively interested in improving his operation.

Financing in slum markets is notoriously difficult to obtain; most legitimate financial institutions are reluctant to loan money into the slums. When they do, they require the owner to sign personally. Thus approval of the loan often depends as much on the owner's personal credit as on the valuation of the property. The consequence of this practice is that large landlords, once they have established themselves with a bank, find it easier to obtain money—and on better terms—than owner-occupants. The large holder also employs his own work crew, writes his own insurance, and does his own capital improvements, thus realizing economies not available to the smaller owner. Finally,

75. Sternlieb 150; interview with Elliott Segal, director, Division of Neighborhood Improvement, New Haven, Conn., in New Haven, Nov. 13, 1967.
76. See Illinois Slum Housing Report 3.
77. Sternlieb 124, 137.
78. Most figures on ownership are, unfortunately, tabulated by number of parcels owned instead of number of dwelling units. In one Chicago neighborhood, one-quarter of the buildings contain one-half of the dwelling units. Community Renewal Program, City of Chicago, supra note 66, at 12. In most cases, these larger buildings are managed by large, professional landlords. Interview with Irving Gerick, Community Renewal Foundation, in Chicago, May 2, 1967; see letter from George Sternlieb to Yale Law Journal Dec. 6, 1967; cf. L. Winnick, supra note 55, at 85 n.3.
79. Rothenberg 51; Sternlieb 107-12; J. Jacobs, supra note 48, at 291-317. The credit that is available is more expensive than credit elsewhere. Massachusetts Commission 65; see Grigsby, Home Finance and Housing Quality in Aging Neighborhoods, in The Economic Problems of Housing 105 (A. Nevitt ed. 1967).
he is a businessman with an investment to protect; he is likely to respond with economic sophistication to sensible union proposals.\textsuperscript{82}

Limits to the ability of the large landlord to respond to tenant union demands do, of course, exist. The large landlord, like all real estate investors, wants to tie up as little capital as possible in any given building;\textsuperscript{83} he will seek to obtain 70, 80, or 90 per cent financing of the purchase price. Thus using the mortgage instrument as a leverage device, he can minimize his equity capital in any one structure and enable himself to multiply his holdings with a limited amount of capital. Nor is the practice by large-scale landlords of fully mortgaging their properties wholly undesirable from the tenant's point of view. Because debt capital carries an interest rate substantially less than the rate of return that an investor in the risky slum housing market demands on his own money, a high debt-equity ratio lowers the total rent the landlord must charge.\textsuperscript{84} But the heavily mortgaged landlord loses flexibility since he must meet regularly recurring mortgage payments; in addition, just as his equity investment in any single building is small, his expected profit is small in absolute terms for each building. This factor can cause trouble for the union; one hundred dollars will not go far toward rehabilitating a tenement no matter whether it represents a five or a fifty per cent return to the investor. Nevertheless, the large landlord remains a tempting target because of his powerful financial position.

3. The Absentee Amateur

By contrast, the small absentee amateur owning only a few buildings is often a landlord more or less by happenstance and typically manages his property with markedly less financial acumen than his professional counterpart. Often a marginal capitalist, the small absentee owner has few, if any, available sources of capital to put into the buildings;\textsuperscript{85} the building's operation will be the main source of funds for additional maintenance expenditures. But the unique position of many small amateurs may make this source of funds fairly lucrative. Often the small owner used to live in the building and, although he moved long ago, still holds title. He may have inherited his holdings or otherwise be-

\textsuperscript{82} See W. Nash, supra note 80, at 109.
\textsuperscript{83} See Sternlieb 79.
\textsuperscript{84} See L. Winnick, supra note 53, at 107-08.
\textsuperscript{85} Interview with Richard Rothstein, tenant union organizer, in Chicago, May 2, 1967; Sternlieb 188.
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come a fortuitous small-time investor. Due to his long continuous ownership, he may own the building outright with no outstanding mortgage; when this is true, the rental income from the building will be potentially available for maintenance expenditures since the landlord has no mortgage payments to meet. If, however, the title holder faces heavy mortgage payments, the tenant union faces a bleaker prospect of obtaining meaningful concessions.

Furthermore, the amateur is likely to manage his building ineptly, or to be bilked by large companies hired to repair or service the building for him. His primary desire is often for non-involvement; he wants only to collect the rent and wash his hands of the rest. The tenant union represents an excellent device to prevent such behavior and to insist that the owner reinvest some of the revenue generated by the building. The tenant union may, however, find the small owner less impressed by rational economic arguments than his large professional counterpart and therefore a harder individual to bargain with.

III. The Balance of Advantage in Landlord-Tenant Bargaining

A. Bargaining Power

Can the tenant union obtain housing improvements where more traditional legal remedies have failed? Even if the landlord has profits the loss of which will not drive him from the market, he will fight any effort to extract them. And even where the union seeks only to improve housing by lowering operating costs and contributing its own effort, it will have to convince the landlord that good faith bargaining is not against his interest. Whether the union will be able to lead the landlord to the negotiating table, and what it will obtain once there, will hinge on the strength of the union, the type of landlord, conditions in the housing market, and the building's state of deterioration. The union derives its strength from the only source available to it: collective action. To maximize its power, it must organize a significant proportion

86. L. GREBLER, EXPERIENCE IN URBAN REAL ESTATE INVESTMENT 183-84 (1953); STEINLIEB 124, 125.
87. Interview with Meredith Gilbert, tenant union organizer, in Chicago, May 2, 1967. One of the longest tenant union rent strikes in Chicago was against an aged woman who owned nine buildings free of any mortgage obligation. Id. In Sternlieb's study, more than 15 per cent of the sample parcels showed no mortgage outstanding. STEINLIEB 160-161.
88. See STEINLIEB 116; Steck, supra note 49, at 17.
89. Illinois Slum Housing Report 2-3; L. GREBLER, supra note 86, at 184.
90. STEINLIEB 124; interviews with Tony Henry and Meredith Gilbert, tenant union organizers, in Chicago, May 2, 1967.
91. STEINLIEB 124.
of the buildings owned or managed by the landlord it confronts.\textsuperscript{93} Unless it can do so, the union probably cannot obtain the leverage to bring the landlord to the negotiating table.

Widespread picketing and rent withholding are the most potent forces to convince the landlord to bargain. Even if both tactics encounter no resistance in the courts,\textsuperscript{93} how likely are they to be effective? The landlord has three major weapons at his disposal to break a recognition drive by the union. Chief among them is eviction. A tenant union may be unable, as a legal matter, to prevent eviction of tenants who withhold their rent.\textsuperscript{94} The tightness of the slum housing market is obviously a prime determinant of the landlord's enthusiasm for evicting tenants. But even if the market is tight, the tenant union's numbers may give the landlord pause. Turnover is expensive, and the landlord may be reluctant to evict a significant portion of his tenantry even if replacements are clamoring at the doors.\textsuperscript{95} The fact that the union is likely to include his more reliable and steady tenants should further stay his hand.\textsuperscript{96} Most potent, however, is the expense attendant upon evictions by legal process, running anywhere from $50 to $100 a tenant\textsuperscript{97} —a substantial deterrent to wholesale emptying of the building.

Second, the landlord may simply cease to service his building.\textsuperscript{98} The threat of such action in a middle-class building might be compelling; but in a slum tenement total discontinuance of services may represent virtually no change from the status quo, particularly if the tenants have

\textsuperscript{92} Organizing all the buildings owned by one landlord instead of organizing individual buildings or blocks represented a sharp departure from traditional community organizing techniques. This important shift in tactics was recommended by labor union officials. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967.

\textsuperscript{93} See part IV infra.

\textsuperscript{94} Even if the existence of a union rent withholding campaign would not constitute a valid defense to eviction for non-payment, the union may be able to halt any eviction on the basis of state laws.

\textsuperscript{95} Precise costs are not available for private landlords, but ten years ago public housing officials estimated the cost of turnover at about $100 every time one family moved out and another moved in. \textit{Public Housing Administration, Housing and Home Finance Agency, Mobility and Motivations} 5 (1958).

\textsuperscript{96} The tenants most likely to join and work actively for the union are those most interested in better housing; from the landlord's perspective, these tenants are often the most stable and reliable. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967.

\textsuperscript{97} The cost is calculated on the fees involved in cases where marshals must move a family out of an apartment. In Chicago, a landlord must pay eight dollars a room plus eight dollars a floor for every floor above the first. Fees for serving process and for mileage usually add another ten dollars per tenant to the total cost. Telephone interview with Evictions Section, Municipal Court of Chicago, May 3, 1967.

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already been paying for all heat and utilities themselves. Even so, the landlord's refusal to provide any service or to make any repairs places a substantial burden on the tenants, who must then arrange to replace whatever minimal service the landlord used to offer. Of course, neither landlord nor tenant can be enthusiastic about the cessation of all service for any substantial period of time; the building will only deteriorate all the faster.

Third, and most drastically, the landlord may threaten to abandon the building or to take it off the market—a threat made more credible if he has already stopped servicing the structure. Few landlords have carried through the threat to abandon, however, because such action not only forfeits all hope of profit, but also may entail a serious capital loss.

Against the tactics available to the landlord, the union can pitch its weapons of rent withholding and picketing. The former is likely to be the more potent; the landlord's need for a steady flow of rent money to meet mortgage payments will make him feel the pinch rapidly and painfully when his revenue is cut off. But picketing, although not so powerful a tool as in the labor context, will also have its impact. Besides the social and political pressures on the landlord that inevitably accompany a strike, the publicity and discord it generates, especially when accompanied by a rent-withholding campaign, may stimulate the threat of a code enforcement crackdown which might be more drastic in its impact than the tenants' demands.

Such pressures, however, will not have the same impact on large and small landlords. Along with the larger landlord's greater potential for significant response goes the correspondingly greater capacity to resist. Beyond his willingness to test the staying power of the union, the organizers may have trouble recruiting and holding large numbers of tenants in many scattered buildings. Small, highly mortgaged landlords, on the other hand, often acquiesce to union demands in fairly short order, though the concessions that the union wins may not be impressive. The small absentee landlord who owns his building free

100. While rent is withheld, the landlord confronts a steadily increasing enticement to settle from the growing escrow account of tenant rent payments.
101. Locating most of the buildings owned by the same landlord is itself a difficult task. In addition, creating an organization with many scattered subunits poses more difficulties. Usually the success of the union depends upon finding one or two tenants in a building who are willing to devote large amounts of time to organizing and maintaining the union. Interviews with tenant union organizers, in Chicago, May 2, 1967. See generally M. CLINARD, supra note 33, at 166-87.
102. See Steck, supra note 49, at 8, 10.
and clear is the one landlord who has been willing to let a union rent-withholding action drag on.\textsuperscript{103} His lack of personal or financial involvement in the building makes him the most difficult landlord for the union to bargain with.

Housing market conditions will be an important determinant of the landlord's willingness to settle. In a tight market the landlord may be more willing to evict unionized tenants; a weak market, conversely, can induce the landlord to keep his present tenants and, therefore, to bargain with the union in good faith. The nature of the market may also work in the opposite direction, however, and unions may actually fare better in healthy housing markets with strong demand, where landlords feel they can bargain and still earn a good, continuing profit, than in severely depressed markets where the owners look on themselves as the last holdouts in a dying industry.\textsuperscript{104}

The condition of the buildings will also determine the success or failure of union efforts. The building that has not yet deteriorated beyond hope of economically feasible rehabilitation holds the most promise. It does not require a major infusion of funds to provide decent, adequate housing for the tenants.\textsuperscript{105} Here the tenant union will seek to ensure constant and continued maintenance. Some observers think the situation considerably bleaker in badly deteriorated tenements;\textsuperscript{106} there the union will probably accomplish little more than improved daily maintenance and greater responsiveness to recurring tenant complaints, but major improvements will be financially impracticable. Nonetheless, walls are better without holes than with them; minor repairs can make a significant difference in the habitability of an apartment.\textsuperscript{107}

\textsuperscript{103} One rent withholding action dragged on for nine months before the landlord, who owned nine buildings without any mortgages, agreed to negotiate. Interview with Meredith Gilbert, tenant union organizer, in Chicago, May 2, 1967.

\textsuperscript{104} In either case, the landlord will not be eager to meet union demands. However, in a tight market, a landlord does not invest because he thinks it unnecessary, while in a weak market he fears for his investment. \textit{Sternlieb} 226. Therefore, in a tight market, a union could convince him that it was necessary to invest some of his profits in better maintenance.

\textsuperscript{105} Before a building has been allowed to deteriorate, the expense required to keep it in good condition does not appear to be significantly higher than the maintenance expense of a badly deteriorated building. \textit{Sternlieb} 77.


\textsuperscript{107} Some writers have speculated that a tenant union could not be held together unless it produced very substantial improvement. Note, \textit{Tenant Unions: An Experiment in Private Law Making}, supra note 106, at 118. However, success of a tenant union depends entirely upon the work and organization of the tenants involved. In some buildings, militant, hard-working tenants have made unions flourish with widely varying degrees of rehabilitation; elsewhere, tenants have lost interest when they realized that total rehabilitation was not possible. But easy generalizations are not possible. Interviews with Gilbert
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Perhaps the single most important element in the economics of tenant unions is the novelty of the institution and the attendant speculative nature of analysis. Many factors will determine the conditions under which the unions can function effectively. Without regard to theory, unions have sprung up in widely different circumstances across the country, from a low-income housing project in Michigan, to a middle-income complex in Chicago, from the badly dilapidated West Side slums of Chicago to a series of one-family, middle-class dwellings in suburban Harvey, Illinois. It is too early to conclude that tenant unions can exist only in certain economic environments but not in others; perhaps because their leaders forget to peruse the journals, they have so far defied all such limits.

B. Lessons from the Past

Even if the union's bargaining power brings the landlord to the conference table, the checkered history of legal efforts to improve slum housing might be thought to cast doubt on the tenant union's ability to obtain significant improvement of slum housing. But arguments based on the inadequacy of traditional legal remedies fail to note both the inherent limitations of earlier legal devices and the correspondingly greater potential of the tenant union.

The irreversible nature of housing deterioration makes the tenant union an especially promising tactic against the landlord intent upon milking a presently adequate building. The process of deterioration is asymmetrical: it is easy to let a building go, but virtually impossible to reverse the process. Once the building has deteriorated substantially because maintenance requirements have been ignored, the building may cost more to rehabilitate than it is worth. Traditional legal remedies for inadequate housing have not been able to prevent the landlord from carrying out the decision to allow his structure to deteriorate into a slum tenement. The landlord will make token efforts to mask the deterioration taking place. Particularly because of the haphazard enforcement of such laws, by the time the building has clearly fallen below the minimal standards set by the housing code it will be too late. The landlord has milked the building of the profits in it;


108. See authorities cited notes 7 & 9 supra.


110. Both administrative and equal protection problems have prevented housing code enforcement agencies from achieving completely effective code compliance. Note, Enforcement of Municipal Housing Codes, 76 Harv. L. Rev. 801, 810-11 (1963).
only the badly deteriorated husk is left; the damage has been done with crushing finality. Legal action after the fact cannot force restoration of the building.\textsuperscript{111}

The tenant union, in contrast, can act early enough to prevent the landlord from profiting by his own inaction; before the structure is fatally blighted,\textsuperscript{112} the union can negotiate for an acceptable standard of maintenance based on rent paid and earnings withdrawn.\textsuperscript{113} Moreover, the tenant union builds on its own success. It creates machinery to bring continuing pressure to bear on the landlord, unlike traditional legal remedies where enforcement is intermittent at best and the time and effort involved in bringing a second code prosecution or rent-withholding action are the same as in the first.\textsuperscript{114}

Even where the building has deteriorated to the point that it cannot generate enough income to bring it up to code requirements, the tenant union enjoys an advantage over traditional legal remedies. Code prosecutions and welfare receiverships set unrealistic goals for many buildings.\textsuperscript{115} Invoking administrative remedies precludes a strategy of flexibility and gradualism;\textsuperscript{116} to avoid the threatened sanction, the landlord must bring his building up to code requirements. Yet demanding all or nothing too often gets nothing. When the structure has already been milked, capital investment to meet requirements is simply uneconomical: the landlord will abandon the building rather than waste money upon it. Serious penalties, such as jail terms or high fines, have never materialized to deter this type of behavior.\textsuperscript{117} The tenant union, on the other hand, can tailor its demands to the possible. Many tenant

\textsuperscript{111} See N.Y. Times, April 20, 1968, at 19, cols. 3-5.

\textsuperscript{112} Ironically, of course, this type of building may be the most difficult to organize because tenants may not perceive the necessity for organizing. In one large apartment complex in Chicago, however, the tenants responded well to organizers since they clearly saw the buildings begin to deteriorate. See note 65 supra. Furthermore, middle-class tenants may prove easier to organize than very low-income families in badly deteriorated buildings.

\textsuperscript{113} The analogy to the labor union here is striking; if an employer claims economic inability to meet the union's demands, the Court has held that the employer must substantiate his economic hardship. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956); Yakima Frozen Foods, 130 N.L.R.B. 1269 (1961).

\textsuperscript{114} In old buildings, there must be constant supervision and maintenance. Even if court action produces repairs, the building may rapidly deteriorate to its pre-repair condition unless maintenance is continuous. If the tenants have to go to court following each deterioration, the expense and trouble may not prove worth the result. See Note, Tenant Initiated Repairs: New York's Article 7-A, 2 Harv. Civ. Rights-Civ. Lib. L. Rev. 201, 207 n.48 (1967).

\textsuperscript{115} See Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 811-12 (1965); Sternlieb, Slum Housing: A Functional Analysis, 32 Law & Contemp. Frogs 349, 354-55 (1957).

\textsuperscript{116} Interview with Irving Gerick, Director, Community Renewal Foundation, in Chicago, May 2, 1967; cf. N.Y. Times, April 20, 1968, at 19, cols. 3-5.

\textsuperscript{117} Authorities cited note 21 supra.
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complaints fall far short of an insistence upon major repairs; they look only for a few trash containers, janitorial service, locks on doors, mailboxes, or patching for the walls. Rehabilitation may be the ideal, but where it is unattainable a formalized procedure for handling complaints which the landlord can afford to remedy represents considerable progress.

IV. The Law of Tenant Unions

Most landlords have stoutly resisted tenant-union organization from the time the first leaflet was slipped into the tenant's mailbox until just before they signed on the dotted line; several have turned to the courts for help in resisting tenant organizing. Generally, the cases have been settled before a decision came down. Consequently, few opinions have indicated the tenor of judicial reaction to tenant unionism. But several lines of precedent exist to which courts are likely to turn for guidance in adjudicating the conflicts that arise between union and landlord at the various stages of union organization.

A. Organizing: the Foot in the Door

At the outset union organizers canvass door-to-door and distribute leaflets to inform tenants of the union's activities and to recruit tenants for union meetings. The tenant's right to possession should protect such organizing activities from the landlord's attack on grounds of trespass or invasion of privacy. Unlike the laborer who has no right to possession in the company-owned factory, the tenant in an apartment building has the right to receive anyone he desires in his leased premises; in addition, he holds an easement or right-of-way over the common hallways even though the landlord retains possession there. Either an implied license arising from the existence of a bell in the front hallway or the "habits of the country," or an actual invitation to enter extended by the tenant will defeat the landlord's charge of trespass.

120. The tenant has the right to possession of the leased premises. 1 AMERICAN LAW OF PROPERTY § 3.38 (A. Casner ed. 1952).
123. Id.
124. Nor can the landlord rely on any blanket anti-solicitation statute to keep organizers...
B. Recognition: Purposes, Picketing, and Strikes

Once organized, the union typically has demanded that the landlord recognize it as the sole bargaining agent for the tenants and negotiate an agreement. With equal consistency, the landlord has refused, thereby precipitating a union campaign of picketing and rent withholding. Judicial scrutiny of such tactics is likely to be extensive, and courts will undoubtedly turn to the labor precedents for guidance.

The broad first amendment right to picket enunciated in *Thornhill v. Alabama*\(^{125}\) sprang from the utility and effectiveness of picketing as a means of conveying and publicizing information.\(^{126}\) In the cases following *Thornhill*, however, the Supreme Court realized that picketing involved more than just communication; the physical presence of patrolling pickets produced not only traffic problems such as the blocking of sidewalks or entrances to buildings, but also coercion.\(^{127}\) Under proper circumstances, the Court held, the state could regulate both the traffic\(^{128}\) and coercion aspects of picketing despite its usefulness as a means of communication.

Even where picketing generates coercion—as it almost always does when the union pickets a business establishment—the Supreme Court has carved only a specific exception to the scope of first amendment protection. The state may enjoin the picketing only where the object sought by the picketers violates a legitimate, clearly defined state law or policy. Provided the state law is valid, a state court may enjoin the picketers either from breaking the law themselves or from coercing a third party to break it. In upholding injunctions against labor picketing, the Supreme Court has consistently based its decisions on a finding below either that the union was violating a law or that it was attempting to force an employer to violate it.\(^{130}\)

away. The organizers can claim a strong first amendment right to be heard—a proposition dating back to the leaflet and doorbell cases of the 1940's. Martin v. Struthers, 310 U.S. 141 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940). There the Supreme Court upheld the speaker's right to intrude on the privacy of an unwilling listener, at least for non-commercial purposes; cf. Breard v. Alexandria, 341 U.S. 622, 622-43 (1951). Some writers have thought that problems of recognition and stranger picketing would plague tenant unions. See Note, supra note 106, at 130. But tenant unions are unlikely to picket buildings unless they can gain some tenant support. And if the union has tenant support, the problems posed by stranger and recognition picketing are irrelevant.

125. 310 U.S. 88 (1940).
126. *Id.* at 104.
129. See cases cited note 127 supra.
130. See, e.g., Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1977); Teamsters Local
In *Hughes v. Superior Court*, the Supreme Court extended the analysis beyond the labor arena to a situation historically and analytically relevant to tenant unionism. Hughes, a Negro, picketed a grocery store, demanding that a specific quota of Negro clerks be hired based on the percentage of the store's Negro customers. The California Supreme Court assumed, without deciding, that if the store had refused to hire Negroes, "picketing to protest it would not be for an unlawful objective." But the controlling question in the case was different; it was whether "the discriminatory hiring of a fixed proportion of Negro employees," urged by the picketers, was itself lawful. Under earlier California case law, the court said, an employer's agreement to hire only Negroes in a fixed number of positions would be illegal. It followed that the lower court's injunction of the picketing was proper, and that Hughes' willful disobedience of the court order was properly punishable as a contempt. On certiorari the Supreme Court accepted the California court's determination of state public policy and held that free speech considerations did not protect the picketing. "We cannot construe the Due Process Clause," wrote Justice Frankfurter for the majority, "as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy." Both the California court and the Supreme Court assumed, without deciding, that if the object of the picketers had differed ever so slightly—if they had sought to prevent discrimination rather than to establish a Negro quota—the state could not have enjoined the picketing since the objective sought would not have violated a clear state law or policy.

Recognition picketing of a landlord's building and offices by a tenant union does involve economic coercion. Its purpose is to force the landlord to the bargaining table. The courts will consequently face the question whether the purposes of the picketing are lawful. They may retrogress to the "unlawful object" and "prima facie tort" doctrines formerly invoked in criminal conspiracy and business interference cases against the labor unions. But unlike the older courts, which had...
few legislative pronouncements to guide them in their handling of early labor disputes, the judges today can look to the Housing Act of 1949, state housing statutes, and municipal housing ordinances for relevant policies to define their treatment of tenant unions. By picketing, the tenant union seeks to force the landlord to bring his building up to the legal minimum prescribed by the housing code, to create orderly machinery for the resolution of tenant grievances, and to improve substantially the quality of his tenement housing. Such objectives, far from being unlawful or against public policy, parallel the statutory purposes enunciated by Congress and state legislatures. Even if the tenants' demands exceed the minimum requirements of the local housing code, the more general legislative policy should lead the courts to conclude that the picketing is lawful in its purpose. Congress has committed the nation to "the goal of a decent home and a suitable living environment for every American family," and to "the policy of . . . opening to everyone . . . the opportunity to live in decency and dignity." State and municipal housing laws imposing minimum standards on multi-family dwellings coincide even more exactly with the tenant union's aim of improving existing housing stock.

Consequently, the courts should not enjoin tenant union picketing on the ground of unlawful purposes. They may instead question whether the tenant union represents an appropriate means of accomplishing the end sought. Here the union's greatest burden will be its novelty. But tenant unions are no more novel than congressional desire for the participation of the poor in many recent government programs. In specifying the conditions under which federal aid is available through the Economic Opportunity Act of 1964, Congress has given priority for community action grants to "programs which give promise of effecting a permanent increase in the capacity of individuals, groups, and communities to deal with their problems without further assistance"; and Congress has specified that community action programs generally should be conducted "with the maximum feasible participation of the residents of the areas." In states where the legislature has authorized the welfare department to withhold rent or

140. Id.
where statutory remedies have otherwise come to recognize the value of tenant-initiated remedies,146 courts should find no justification for enjoining tenant union activity per se.

One lower court, however, has found that the existence of housing codes and their enforcement agencies cuts against tenant unions. One New York supreme court in *Springfield, Bayside Corp. v. Hochman*147 suggested that available statutory schemes should provide the exclusive remedy for the aggrieved tenant. It is doubtful that such exclusiveness was within the contemplation of the enacting legislature. The policy of the argument is even more dubious; the widespread existence of slums demonstrates that code enforcement and other remedies have not been sufficient. Perhaps the court could reasonably suggest that tenants in a middle-class neighborhood with isolated housing code violations should pursue an alternative remedy. But a similar suggestion to the slum tenant means as a practical matter that he can do little about his living conditions in the immediate future.148 A second New York court has recently rejected the reasoning in *Hochman* and upheld tenant picketing.149

In addition, code enforcement is irrelevant to the tenant union’s basic demand of union recognition and negotiation of a collective agreement. Such demands violate no law or policy of any state but instead further the policy of self-reliance enunciated in the *Economic Opportunity Act*.150 In labor disputes the early common-law courts, recognizing the possible improvement in wages and working conditions to be as valid an economic concern as the avoidance of possible harm to employers, never laid down a per se law outlawing labor unions.161 Tenant unions offer the state the potential of a self-regulating system to ameliorate housing conditions in the cities. Such considerations should prevent the courts from subordinating the tenant union’s potential for improving housing to the protection of a landlord’s pocketbook.152

Many tenant unions, however, have found that picketing alone does not bring the landlord to the bargaining table, and have also resorted

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146. See authorities cited notes 23 & 30 supra.


148. The tenant, after all, is interested in better housing, not in seeing that his landlord pays a fine or goes to jail. *See Tenants’ Rights* 10.


150. See p. 1392 supra.


152. At least courts should relegate the contending parties to the marketplace—assuming peaceful behavior on both sides—until the legislature directs otherwise.
to rent withholding. Without statutory authorization, the withholding stands on more uncertain ground than picketing. Landlords have a medley of theories on which they can seek to enjoin such union conduct: intentional tort, conspiracy in restraint of trade, and interference with contractual relations.\(^{163}\) Such doctrines underlay the notorious labor injunctions of the first third of the century, and they share a tortured common-law history. In all of them, the landlord's claim for relief will rest, as did that of his employer counterpart, on the injury intentionally inflicted by the union.\(^{184}\) And in both situations, "the damage inflicted by combative measures of a union—the strike, the boycott, the picket—must win immunity by its purpose."\(^{166}\) In defending rent withholding, the tenant union will find itself back in the thicket of the "unlawful purpose" doctrine and means-ends analysis prevailing in the picketing cases, but with no first amendment considerations to weigh in the balance.

Still, the tenant union does stand in a better position than the early labor union, insofar as the economics of rent withholding differ from those of the labor strike. In the withholding action the union collects the rent from tenants and places it in an escrow account. Unlike the irretrievable loss caused an employer by a labor strike, the economic "harm" inflicted on the landlord by rent withholding is temporary and conditional solely upon his continued recalcitrance. To the extent that the tenants stay on in the building, the landlord suffers no business loss analogous to that incurred by the struck employer. The landlord has a right of action against the tenants (and probably against the union as well) for rent accruing from use and enjoyment of the premises.\(^{166}\) It should be emphasized that the union's promise to repay the funds at the end of the dispute is no fiction: in many instances the union has furnished the landlord with an accounting of its rent collections and has not intervened to prevent the eviction of tenants who paid their rent to neither landlord nor union.\(^{157}\) The tenants are not after free apartments; they want their money's worth in better housing.\(^{168}\)

Courts, therefore, should find no justification for injecting their power of injunction into such a situation. The landlord cannot satisfy

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153. F. Frankfurter & N. Greene, supra note 138, at 2-5, 24, 38-37. Where there is statutory authorization for rent abatement or rent withholding, the tenant union can be on much firmer ground. The union can then bargain with the landlord on the basis of the tenants' right to invoke the statutory procedures. See Note, supra note 106, at 122-23.
154. See Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894).
156. 1 American Law of Property § 3.64 (A.J. Casner ed. 1932).
158. See 'Tenants' Rights' 10.
equity's requirement of irreparable harm as a prerequisite to the issuance of an injunction.159 With no immediate, irreparable harm in prospect, the landlord should be remitted to his existing, adequate legal remedies. Meanwhile, as the lease actions or summary eviction proceedings drag on, both tenants and landlord come under strong pressure to reach an agreement. Neither can find the uncertainties and disadvantages of the strike situation attractive. Self-interest should move each side to negotiate, compromise, and settle on the basis of a realistic appraisal of the other party's economic strength.

C. The Collective Bargaining Agreement

The final negotiation of a collective agreement with the landlord represents the fruition of the tenant union's efforts. The contracts vary widely in sophistication, specific terms, and the number of buildings covered. The typical agreement contains the following provisions:

Substantive promises:
- a union commitment to encourage and oversee tenant efforts in responsible apartment maintenance;
- a landlord commitment to make certain initial repairs and to meet basic maintenance standards thereafter;
- a maximum rent scale for the life of the contract;
- a union commitment not to strike;

Enforcement provisions:
- machinery for the regular transmission of tenant complaints and demands to the landlord;
- an arbitration board to resolve disputes over grievances with power to compel repairs;
- a procedure for rent withholding if the landlord fails to comply with the agreement;

Landlord-union relations:
- landlord recognition of the union as exclusive bargaining agent;
- a landlord commitment not to discriminate against union members;
- a requirement that the landlord inform the tenant union of the addresses of all buildings owned and managed by him, and of the names of all new tenants as they move in.160


160. See contracts on file at the Yale Law Journal.
Increasingly, collective bargaining agreements provide for a dues checkoff by the landlord.  

Most important to the union is the landlord’s acceptance of binding arbitration and the private enforcement mechanism of the rent withholding provision; their combined effect produces considerable economic pressure on the landlord to make necessary repairs rather than delay or take the matter into court. A Chicago tenant union that failed to include the enforcement provisions in its contract found itself little better off than if it had no contract at all. Under present common law the tenant can sue for damages for breach of a covenant to repair, but the expense and delay of legal action often deter litigation. A collective agreement with no private enforcement provisions simply trades one lawsuit for another. The landlord is under no incentive to act and may simply await litigation, knowing that it is unlikely to come.  

In exchange for his promises the landlord receives a union commitment to encourage responsible tenant maintenance of apartments. The union’s promise is not empty, and in fact landlords have placed great reliance upon it. The potential for reducing vandalism and turnover played a large part in convincing several landlords to sign their first collective bargaining agreement with a tenant union. One landlord estimated that he could increase maintenance expenditures by 20 per cent if vandalism and turnover were reduced. It is still too soon to evaluate the union’s effectiveness in promoting tenant responsibility, but after extended dealings with the unions, several landlords have come to look favorably on the prospect of their continued existence. As the union increases its control over the buildings, the

163. See 1 AMERICAN LAW OF PROPERTY § 3.79, at 351-52 (A. J. Casner ed. 1952). The collective bargaining contract might be considered an elaborate and cumbersome substitute for making the tenant’s obligation to pay rent dependent on the landlord’s fulfilling a promise to repair. The agreement, however, has two advantages over dependent covenants. First, the rent money continues to be collected and to be available to make repairs. The landlord is not only suffering from the loss of rents, but also is encouraged to make repairs by the money accumulating in escrow. Second, dependent covenants would affect only individual tenants. Presumably, the doctrine would be grounded on the landlord’s material breach of the individual lease. If the landlord failed to make repairs that affected only one or two tenants, only those one or two tenants would be entitled to cease paying rent. As in the case of statutory reforms affecting only individual tenants, the amount of pressure on the landlord is likely to be insufficient to convince him to make the necessary repairs.  
165. Speech by Herbert Cohen to Yale Law School seminar, Nov. 16, 1967.  
166. See note 8 supra.
tenants, adopting a more proprietary attitude toward their apartments, may take better care of them.\textsuperscript{167}

 Courts are likely to approach the collective agreement as warily as the once-burned child the kitchen stove, but painfully acquired familiarity with the labor agreement should encourage acceptance of the landlord-tenant arrangement.\textsuperscript{168} The judicial eye should experience little trouble in discerning sufficient consideration to validate the agreement in the exchange of promises between landlord and tenant. Consideration has moved to the landlord in the union's promise to attempt better tenant maintenance. True, tenants are already under a legal duty to maintain their apartments imposed by most housing codes and the terms of their leases.\textsuperscript{169} Still, the union's promise should not come within the pre-existing legal obligation rule.\textsuperscript{170} In the expectations of the parties tenant vandalism, no matter how illegal, is a fact of life in the slum housing market.\textsuperscript{171} Landlords budget for it, municipal code enforcement agencies despair over it, and no one can cope with it. As an empirical matter the landlord attaches value to the commitment of the union \textit{qua} organization to encourage tenant responsibility. The union's promise gives rise to a new obligation along with a cause of

\textsuperscript{167} Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967.

\textsuperscript{168} Collective agreements have long been confusing phenomena to fit into the law's tidy pigeonholes. Lenhoff, \textit{The Present Status of Collective Contracts in the American Legal System}, 59 Minn. L. Rev. 1109 (1941); Witmer, \textit{Collective Labor Agreements in the Courts}, 49 Yale L.J. 185, 196 (1938); Note, \textit{The Present Status of Collective Labor Agreements}, 51 Harv. L. Rev. 520 (1938). Despite the heavy debt that today's labor agreements owe to legislative endorsement, pre-NLRA case law and subsequent decisions under the federal labor laws have greatly enhanced understanding of the nature of collective bargaining, apart from statutory provisions. See Cox, \textit{The Legal Nature of Collective Bargaining Agreements}, 57 Mich. L. Rev. 1 (1958). Corbin has concluded that "[t]he collective 'bargain is certainly enforceable as a 'contract' against the parties thereto . . . by the ordinary remedies of law and equity in contract cases." 6A A. Corbin, \textit{Contracts} § 1420, at 346 (1962). Most courts have dealt with collective agreements in contract terms, though some observers have sharply criticized them for doing so. Sumner, \textit{Judicial Review of Labor Arbitration or Alice Through the Looking Glass}, 2 Buffalo L. Rev. 1, 17-18 (1952). Most objections to courts viewing collective bargains as contracts were provoked by increasing judicial willingness to venture deeply into the complex administration of a labor contract—a trend which the Supreme Court curtailed in 1960. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Worrall & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). No contract theory, it is true, will account for all the complexities of the relationship governed by collective agreements; in fact, early courts vacillated among at least three different theories in their attempts to accommodate collective bargains under existing doctrines. See Note, supra. Nonetheless contract doctrine is useful in analyzing many aspects of collective agreements. See Cox, supra, at 5-20. Therefore, courts will probably evaluate the threshold question of the validity of landlord-tenant agreements according to traditional contract doctrines.


\textsuperscript{170} For a discussion of the pre-existing legal obligation rule, see 1A A. Corbin, \textit{Contracts} § 171 (1962).

\textsuperscript{171} Cf. Sax & Hiestand, \textit{supra} note 26, at 873.
action that the landlord did not have before the contract. The promise bears no relation to the situation that the pre-existing legal obligation rule is designed to meet. The union is not engaging in a hold-up, unless every pressure for contractual advantage is defined as such. Furthermore, the union has committed itself to encourage more than the minimal maintenance duties the tenant is already obligated to perform. The union’s promises not to withhold rent and to abide by decisions of the arbitration board also constitute consideration moving to the landlord. In the labor context the courts have long recognized that the promise not to strike was good consideration for company undertakings. To the extent that the bargaining agreement also induces present tenants to remain in the building and new tenants to move in, the collective contract should further bind the landlord by virtue of third-party detrimental reliance.

To inspire judicial confidence in the value of its commitments, the tenant union will do well to develop a formal operating structure of its own. The first court to grant specific enforcement of a collective bargaining agreement to a plaintiff union noted that the organization had backed up its promises by the apparent ability to make good on them:

Two organizations, one composed of employers and the other of employees, have entered into an agreement. Each had power through the consent of its members to enter into a binding obligation in their behalf. By the constitution or by-laws of each, power is given to the organization to enforce, through disciplinary proceedings which have been demonstrated to be effective, compliance with the terms and conditions to which it has subscribed. This contract has mutual obligations binding on the parties thereto. Each party knows the obligation that it has assumed . . . . Through its control of its members it can compel performance.

The courts have traditionally had far less difficulty in detecting the movement of valuable consideration from employer to labor union, and it is unlikely that anyone will challenge the validity of the landlord’s consideration. His promises to repair and to submit to binding arbitration constitute sufficient consideration in exchange for the undertakings of the tenant union.

172. See A. Corbin, Contracts § 171, at 105-06 (1962).
Tenant Unions

A second difficulty in contract analysis arises if the landlord claims that he signed the agreement under duress. In Sampson v. Davis the landlord pointed to the union-organized rent withholding and picketing. Since every bargaining situation entails some degree of compulsion, the landlord asserting duress must demonstrate that he really had no choice, and that he was compelled to manifest his assent "without his volition." If the tenant union's conduct is lawful, the labor cases holding that a lawful strike cannot constitute legal duress should control. If the tenant union's conduct is unlawful, though, the landlord may still not prevail. Some labor cases have held that under such circumstances the employer should seek legal relief in the courts. Moreover, even if the landlord establishes that he signed under duress, he still must show that he repudiated the agreement at the earliest opportunity after removal of the duress. If the landlord accepts any of the benefits arising from the agreement, remains silent for a considerable time after he has had the chance to repudiate, or acts on the provisions of the agreement, he ratifies the contract.

* * *

Tenant unions do not represent a panacea for the country's low-income housing problem. No solution can be advanced without provision for large-scale infusion of money—either public or private—for rehabilitation and new construction. But even the most ambitious government proposals do not envision the construction of an adequate housing supply within a decade; realism suggests a considerably longer period before the country approaches its housing ideal. Interim steps are required, and the tenant union represents an alternative which may be beneficial in a variety of situations. There are, of course, circumstances where tenant unions will be of little use, as, for example, where the landlord is as destitute as his tenants. But even where unions fail to attain their housing objectives, they have an equally important potential for creating better community organization in the slums.

While the tenant unions may be able to emerge intact from judicial scrutiny, legislation probably represents the best method of structuring the growth and formation of tenant unions. The real growth of labor

176. 66 CH 4327 (Cook Cty., Ill. Cir. Ct. 1966).
177. RESTATEMENT OF CONTRACTS § 492 (1932).
178. E.g., Lewis v. Quality Coal Corp., 270 F.2d 140, 143 (7th Cir. 1959), cert. denied, 361 U.S. 929 (1960).
unions did not take place until the Wagner Act had given labor organization the stamp of legislative approval.\textsuperscript{181} Undoubtedly legislative endorsement of tenant unions and settlement of housing disputes through collective bargaining would provide a substantial stimulus to the organization of tenants. Passage of landlord-tenant relations laws might go far to minimize the strife and friction so characteristic of present relations between the low-income tenant and his landlord.

\textsuperscript{181} Congressional endorsement was, of course, not the only reason for the rapid rise of labor unions since 1935. See H. Faulkner & M. Stark, \textit{Labor in America} 209-12 (1957).