

ALTERNATIVE APPROACHES TO HOUSING CODE REFORM

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Bachelor of Arts, Stanford University  
(1975)

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(1979)

SUBMITTED IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE  
DEGREE OF

MASTER OF CITY PLANNING

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

(August 1, 1979)

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ABSTRACT

Three recent studies attempt to explain the economic impact of housing code enforcement on the supply and price of rental housing. Landlords are able to pass the costs of code improvements to their tenants: where the landlord is unable to recoup such costs from current tenants by raising rents, attracting new tenants at higher rents or reducing operating expenses, code enforcement will encourage abandonment or conversion. On this assumption, concerning the impact of housing code enforcement on rents, four alternative proposals for reform are analyzed: (1) maintenance of a single standard code with increased administrative and enforcement mechanisms; (2) code enforcement coupled with rent control; (3) flexible code standards which correspond to the needs of designated housing code districts; and (4) enforcement of a minimum housing code through a certification program with reliance on private contractual rights to provide additional housing quality. The minimum code certification program buttressed with private contractual rights is the most feasible strategy. This proposal allows for a reduction of our present reliance on ineffective enforcement mechanisms while at the same time provides for market-defined standards of housing quality which enable tenants to seek only those housing services for which they are willing and able to pay.

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Michael O'Hare, Thesis Advisor

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION . . . . .	5
II.	ORIGIN OF HOUSING CODES . . . . .	9
III.	THE HOUSING CODE TODAY . . . . .	18
IV.	THE ECONOMICS OF HOUSING CODE REFORM . . . . .	20
	A. THE ACKERMAN MODEL . . . . .	21
	1. Inelastic Supply Conditions . . . . .	22
	2. Elastic Supply Conditions . . . . .	24
	3. Non-Market Considerations . . . . .	26
	B. THE KOMESAR MODEL . . . . .	28
	C. THE HIRSCH AND MARGOLIS MODEL . . . . .	30
	1. On the Demand Side . . . . .	32
	2. On the Supply Side . . . . .	33
	3. Empirical Findings . . . . .	33
	D. CONCLUSION . . . . .	36
V.	OBSTACLES TO COMPREHENSIVE CODE ENFORCEMENT . . . . .	39
	A. CONSTITUTIONAL QUESTIONS . . . . .	39
	B. THE INADEQUACY OF ENFORCEMENT MECHANISMS . . . . .	46
	C. ADMINISTRATIVE AND POLITICAL OBSTACLES . . . . .	49
	D. THE COST OF COMPLIANCE . . . . .	52
	E. THE ECONOMIC REALITY OF NON-ENFORCEMENT . . . . .	53
VI.	ALTERNATIVE PROPOSALS FOR REFORM . . . . .	56
	A. MAINTENANCE OF THE SINGLE STANDARD CODE WITH INCREASED ENFORCEMENT MECHANISMS . . . . .	58
	B. CODE ENFORCEMENT WITH RENT CONTROL . . . . .	59
	1. Adverse Anticipatory Reactions . . . . .	61

2.	Inequitable Distribution of Benefits . . . . .	62
3.	Abandonment and Conversion Effects . . . . .	63
C.	THE FLEXIBLE HOUSING CODE . . . . .	63
VII.	UNDERLYING FAILURES OF THE HOUSING CODE CONCEPT WHICH THREATEN THE EFFICACY OF HOUSING CODE REFORM . . . . .	70
A.	IMPROPER BENEFICIARIES . . . . .	70
1.	Building Materials . . . . .	71
2.	Labor Restrictions . . . . .	73
B.	INAPPROPRIATE HOUSING STANDARDS . . . . .	73
1.	Dubious Benefits . . . . .	73
2.	The Value Issue . . . . .	79
3.	Constitutional Considerations . . . . .	82
VIII.	A PROPOSAL: A MINIMUM CODE CERTIFICATION PROGRAM WITH PRIVATE CONTRACTUAL RIGHTS FOR ADDITIONAL HOUSING QUALITY . . . . .	85
A.	HOW AND WHY IT WORKS . . . . .	85
B.	MINIMUM CODE REQUIREMENTS BASIC HEALTH AND SAFETY CRITERIA . . . . .	91
C.	WHAT THIS PROPOSED REFORM CAN AND CANNOT DO . . . . .	99
1.	Successes . . . . .	99
2.	The Issue of Tenant Responsibility . . . . .	104
3.	The Problem of Discretion . . . . .	107
D.	THE FUTURE . . . . .	110
APPENDIX A	. . . . .	114

## I. INTRODUCTION

The escalating cost of housing across the nation threatens to render housing unaffordable for increasing numbers of middle income as well as low income families. Many observers have pointed to over-regulation of the housing industry, through zoning laws and building regulations, as a major source of the problem. One of the infrequently studied regulations on housing with respect to its impact on housing costs is the municipal housing code.

Housing codes and code enforcement have generally taken a back seat to more politically controversial issues of municipal government. Housing codes are considered to be dull, highly technical municipal regulations with which few citizens come into direct contact. Effective code enforcement does not produce highly visible improvements to which politicians can point as evidence of their accomplishments. Instead, when "a depressed neighborhood has been cleared of housing violations and has been freed of rodents, the inhabitants may live in more healthful and comfortable surroundings, but the buildings will still be old and the neighborhood will look only slightly less shabby."<sup>1</sup>

Another reason for the present lack of attention to housing code enforcement is the fact that housing codes have been successful in the past. Today, we have succeeded in eliminating, to a large extent, the substandard housing problems which existed as late as the 1940's and

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<sup>1</sup>Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Columbia Law Review 1254, 1257 (1966).

1950's. These successes have caused the focus to shift away from code enforcement to more currently explosive problems. Unfortunately, the accomplishments of the past have lulled us into a false sense of security.

The construction industry has not been able to keep pace with the growth in population. Moreover, social change has led to an increase in the number of young adults and elderly who have set up their own households. Thus, the demand for housing far exceeds the supply. This situation has been aggravated by the inflationary rise in the cost of land and financing along with increases in taxes and construction and repair costs. The result is that individuals and families are forced into housing which has long outlived its useful life expectancy.<sup>2</sup>

Although substandard housing exists in rural as well as in urban areas, the urban housing crisis has been exacerbated by demographic change, particularly since World War II, which accounts for the disintegration of the central city tax base as the middle class moved en masse to the suburbs. The poor were left behind with a municipal government unable to support their needs, including the need for adequate housing.

The purpose of housing codes is to insure that housing is utilized and maintained in a fashion which "reduces the risk to human life and safety to an acceptable minimum."<sup>3</sup> Housing that does not meet code standards<sup>4</sup> is generally occupied by persons at the lowest end of

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<sup>2</sup>O'Bannon, *Building Department Administration*, 509 (1973).

<sup>3</sup>*Id.* at 10.

<sup>4</sup>To avoid confusion as to terminology, "substandard housing" will be used to refer to housing which does not meet the standards set by current housing codes, even though these codes are not in actuality

the income scale. For the most part, members of the wealthier income groups can afford, and choose, newer units which meet code standards, or older units which have been maintained in compliance with code requirements. In contrast, unsubsidized new construction for the poor has long ceased to be economically feasible,<sup>5</sup> and thus lower income families, not housed in subsidized units, are forced to occupy old and frequently sub-code housing units. Since most low income families are unable to own homes, we will concern ourselves here exclusively with rental properties.

Acceptable housing is usually defined as that which meets minimum levels of habitability. Congress, in the Housing Act of 1964<sup>6</sup> defined a minimum standard housing code as "related but not limited to health, sanitation, and occupancy requirements." The boundaries of this "minimum" code were outlined by the U.S. National Commission on Urban Problems which recommended to Congress that housing code administration be used to protect and maintain minimum housing standards affecting personal health, safety, comfort and amenity in all areas of the city; prevent blight from spreading to areas of standard quality housing; and upgrade basically

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"minimum" in their requirements. "Minimum code housing" will refer to housing which meets only minimal standards of health and safety. "Maximum" or "optimal code standards" will refer to requirements which prescribe levels of housing quality above this minimum level.

<sup>5</sup>Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Distribution Policy*, 80 Yale Law Review 1093, 1117 (1971).

<sup>6</sup>*Housing Act of 1964*, Pub. L. No. 88-560, 78 Stat. 769, 785 (1968).

sound and restorable "gray" areas.<sup>7</sup> In accordance with these recommendations, many municipalities began developing housing codes which mandate far more than basic health and safety requirements and instead attempt to further more ambitious social goals.

While some housing codes may be criticized for requiring standards which bear little or no relationship to the public health or safety, others have been attacked on grounds that they are not stringent enough. The U.S. National Commission on Urban Problems writes: "A house can meet the legal standards set in a local code, pass a housing code inspection, and still be unfit for human habitation by the personal standards of most middle-class Americans."<sup>8</sup>

Our failure to reevaluate the efficacy of current housing codes has allowed the perpetuation of an inconsistent and often illogical set of housing regulations which have proven inadequate to either insure minimum health and safety requirements or to upgrade the urban environment. This paper will explore why existing housing codes cannot, under present market conditions, achieve what they were designed to do and review some alternative ways to correct the failures of the current system.

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<sup>7</sup>U.S. National Commission on Urban Problems, *Building the American City*, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 296 (1968).

<sup>8</sup>*Id.* at 274.



## II. ORIGIN OF HOUSING CODES

Since the beginning of communal living, man has sought to insulate private property from government interference. However, man has also recognized that the use of private property is not an absolute right and that property should not be used to injure others or the community.<sup>9</sup>

There is evidence that controls on the construction and use of buildings existed as early as 5,000 years ago.<sup>10</sup> The *Pentateuch*, the first five books of the *Old Testament*, contains laws which govern "not only man's relationship to God but also man's relationship to the community including specific provisions with respect to health, safety and sanitation."<sup>11</sup> The first building code known to be recorded appeared around 2,000 B.C. in the Code of Hammurabi, an early set of Babylonian laws. Contained within that code were the following provisions:

Section 229: If a builder has built a house for a man and his work is not strong, and if the house he has built falls in and kills the householder, the builder shall be slain.

Section 230: If the child of the householder be killed, the child of that builder shall be slain.

Section 231: If the slave of the householder be killed, he shall give slave for slave to the householder.<sup>12</sup>

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<sup>9</sup>O'Bannon, *supra* note 2, at 1.

<sup>10</sup>16 C.J.S. *Constitutional Law* 209 (1956).

<sup>11</sup>Taylor, *A Guide for Codes Adoption and Code Enforcement*, in *Southern Building Magazine* 3 [n.d.].

<sup>12</sup>O'Bannon, *supra* note 2, at 8.

Although current buildings codes do not carry with them such harsh penalties, the construction and maintenance of unsafe buildings has throughout history been viewed as a public crime.

Following the lead of the Babylonians, the Romans, under the reign and guidance of Emperor Nero, developed a master plan which called for sound construction and sanitation methods in the rebuilding efforts which took place after the burning of Rome.

The Anglo-Saxon world also experienced an early development of building regulations. In 1189 the Assize of Buildings, a document governing building construction with particular concern for fire safety, was enacted. Later, in response to the Great Fire of London which destroyed nearly two-thirds of the city in 1666, Parliament enacted the London Building Act which attempted to guide the rebuilding of the city according to safety standards. Unfortunately, the inexperience of code writers and the general nonenforcement of these new regulations led to reconstruction in a manner which resembled the London which existed prior to the fire.<sup>13</sup>

Building regulations appeared in this country as early as 1625. However, the size of the population at that time did not warrant comprehensive building controls. Instead, most of the early codes related to fire hazards such as wooden chimneys and thatched roofs.<sup>14</sup>

Following the devastating Chicago Fire of 1871, the development of modern building codes received a major push. In addition to the tremendous losses of life and property caused by the fire, the large financial losses sustained by the insurance companies prompted an

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<sup>13</sup>*Id.* at 2-3.

<sup>14</sup>O'Bannon notes that it was not until 1862 when the population reached 800,000 that building codes similar to those which now exist were developed. *Id.* at 5.

extensive campaign to enact building and fire codes. It is not unusual therefore that one of the first model building codes in this country was developed by the National Board of Fire Underwriters (now the American Insurance Association) to aid cities in eliminating fire hazards. The model code, published in 1905, was called the Recommended National Building Code. This code was the forerunner of the modern building code and still exists today, in revised form, as a continuing guide to fire prevention as well as general building safety.<sup>15</sup>

The Recommended National Building Code was the only nationally recognized model building code until 1927 when the Pacific Coast Building Officials' Conference (now the International Conference of Building Officials) published the Uniform Building Code which has been used by west coast as well as east coast cities.<sup>16</sup> From this beginning has sprung other model building codes including the Southern Standard Building Code developed in 1945 to serve primarily the southern states and the Basic Building Code, published in 1950 by the Building Officials Conference of America, which is used throughout the midwest and northeast.

Although the terms are often used interchangeably, building and housing codes are not the same. Building codes relate to the regulation of materials and methods in new construction to insure safety against fire and avoid other structural hazards. In contrast, housing codes are regulations which are applied to all housing to insure the maintenance

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<sup>15</sup>Taylor, *supra* note 11, at 3.

<sup>16</sup>Landman, *Flexible Housing Code - The Mystique of the Single Standard: A Critical Analysis and Comparison of Model and Selected Housing Codes Leading to the Development of a Proposed Model Flexible Housing Code*, 18 *Howard Law Journal* 251, 257 (1974).

and repair of existing housing in a manner which promotes health and safety.<sup>17</sup> Housing codes developed, in part, out of a recognition that the durable nature of structures required on-going supervision to insure that housing continued to meet health and safety requirements.

Housing codes did not take form in the United States until the mid-nineteenth century. Prior to this time, the common law generally relied on the private market to make adjustments in the level of housing safety and protection. The traditional common law landlord-tenant relationship has its roots in the feudal land system under which a tenant was obligated to the lord for the rents and profits of his labor on the land even if the land ceased to be profitable for the tenant.<sup>18</sup> From this historical relationship sprung the doctrine of caveat emptor. This doctrine provided that no warranties of habitability would be implied into housing contracts. The tenant took the premises subject to any patent defect, unless inspection was not possible, or to any latent defect unknown to the landlord. Moreover, the duty to repair and maintain the premises during the period of the lease usually rested upon the lessee and his failure to carry out this duty subjected him to

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<sup>17</sup>O'Bannon distinguishes building and housing codes as follows:

"Building and construction codes are basically technical standards dealing with inanimate objects. On the other hand, because housing codes regulate how people may live, there are important social, economic, cultural, and psychological aspects which pertain not only to the basic standards, but also to the administration and application of the provisions of the code." O'Bannon, *supra* note 2, at 544.

<sup>18</sup>Bross, *Law Reform Man Meets the Slumlord: Interactions of New Remedies and Old Buildings in Housing Code Enforcement*, 3 *Urban Lawyer* 609, 609-610 (1971).

liability for waste.<sup>19</sup> Even when the landlord did make certain covenants of repair and maintenance, such promises were considered to be independent of the tenant's promise to pay rent. Therefore, a tenant was obligated to continue rent payments even after the premises became uninhabitable.<sup>20</sup>

Housing code enforcement readjusts the common law rights and duties of both landlords and tenants. It allows government intervention into the bargaining stage of the rental process, usually with the goal of increasing tenant rights and landlord obligations. In general, housing codes require the landlord to assume responsibility for repair and maintenance while the tenant has a duty to keep the premises clean. A landlord's duty to comply with housing code provisions is frequently upheld even if the tenant has caused the violation.<sup>21</sup> Not surprisingly, the development of housing codes was resisted (and continues to be opposed) by landlords who stood to benefit from the traditional common law relationship of landlord and tenant. Thus, most early attempts to change housing conditions, especially for the indigent tenant who had no bargaining power under the common law system, were made by private individuals and philanthropic organizations.<sup>22</sup>

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<sup>19</sup>Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 Boston University Law Review 1, 9 (1976).

<sup>20</sup>Hirsch, *A Study of the Effects of the Legal Environment on Urban Housing Markets* 7 (1975).

<sup>21</sup>*Id.* at 8.

<sup>22</sup>For example, Jane Addams has been widely acclaimed for her work in the slums of Chicago. Alice Griffith has a similar reputation for her efforts to remove San Francisco's slums and Mary K. Simkhovich is known

One of the first housing laws in this country was enacted for New York in response to the unsanitary and unsafe conditions which had resulted from the proliferation of the tenement house. The Tenement House Law, enacted in 1867 and amended in 1901, became a guide for other cities interested in formulating health and safety regulations for existing housing. In 1914, the National Housing Association published the Model Housing Law which provided a broader base for housing regulations than did the 1901 law.<sup>23</sup>

Federal involvement in the betterment of housing conditions began when the U.S. Congress in 1892 commissioned a study of unsafe and unsanitary housing in American cities with populations over 200,000. Another study conducted in 1920 explored the inadequacy of building regulations and led to the formation of the Department of Commerce Building Code Committee which published a series of eight reports that served as a guide to local code preparation.<sup>24</sup> It was not, however, until the mid-thirties that the federal government became directly involved in the problems of inadequate housing supply and substandard conditions. The Great Depression forced the government into the business of financing and constructing public housing and with this new federal role came the creation of standards and criteria for both public and private housing.<sup>25</sup>

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for her work in New York City. Authors Lawrence Veiller and Jacob Riis were also instrumental in exposing the atrocities of slum housing to the public. Landman, *supra* 16, at 261.

<sup>23</sup>*Id.* at 263.

<sup>24</sup>O'Bannon, *supra* note 2, at 6-7.

<sup>25</sup>Parratt, *Housing Code Administration and Enforcement* at VIII (1970).

The proclamation of the goal to provide "a decent and suitable living environment for every American family" as contained within the Housing Act of 1949<sup>26</sup> prompted a broadening of federal involvement in urban problems to include slum clearance, urban redevelopment and the financing of public housing. The Housing Act of 1954<sup>27</sup> repeated this federal commitment and added direct incentives for the development of housing codes. Under the Workable Program requirements of the 1954 Act, federal assistance was contingent upon the formulation of a plan for community development which was to include a program for the creation of codes and code enforcement.

The 1960's brought about a realization that the urban renewal programs of the previous decade had not been the panacea which many expected. Thus, we experienced a policy shift away from a massive razing and rebuilding effort to one of conservation and rehabilitation. The monetary costs of clearance and redevelopment as well as the social costs of displacement and relocation were believed to be avoidable under the conservation policy articulated in the Housing Act of 1964<sup>28</sup>. This Act provided for the financing of intensive code enforcement programs designed to eliminate the first stages of slums and blight and thus prevent the need for subsequent clearance or rehabilitation. One year later, the Housing and Urban Development Act of 1965<sup>29</sup> provided for

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<sup>26</sup>*Housing Act of 1949*, ch. 338, 63 Stat. 413 (1949).

<sup>27</sup>*Housing Act of 1954*, Pub. L. No. 560, ch. 649, 68 Stat. 590 (1954).

<sup>28</sup>Landman, *supra* note 16, at 270.

<sup>29</sup>*Housing Act of 1965*, Pub. L. No. 89-117, 79 Stat. 451 (1965).

extensive code enforcement to combat blight in declining areas of American cities.

The Housing Acts of the past two decades have been successful in encouraging the passage of municipal housing codes. In 1955 only 56 cities had housing codes but this figure increased to approximately 5,000 communities by 1968.<sup>30</sup> More recently, the interest in housing code enforcement has been generated not so much by a desire to eliminate substandard housing as by the movement to revitalize central cities. Code enforcement as an instrument of revitalization is aimed at reversing the fiscal decline of central cities by attracting the middle class back into the city. The Housing and Community Development Act of 1974<sup>31</sup> reshaped the national housing goal "to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance in conjunction with the provision of adequate municipal services."<sup>32</sup> The goal of revitalization was reaffirmed three years later in the Housing and Community Development Act of 1977<sup>33</sup> which recognized the need to find ways to replenish declining urban tax bases.

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<sup>30</sup>Although there is no tabulation today on the number of jurisdictions which have housing codes, the trend of the past has probably continued. Abbott, *supra* note 19, at 44.

<sup>31</sup>*Housing and Community Development Act of 1974*, Pub. L. No. 93-383, 88 Stat. 633 (1974).

<sup>32</sup>*Id.* 801(2)(c), 42 U.S.C. 1441(c) (Supp. V 1975) (amending 42 U.S.C. 1441(a) (1970)).

<sup>33</sup>*Housing and Community Development Act of 1977*, 42 U.S.C. 5301-08, 5313, 5318 (West Supp. 1978).



Paralleling this development of federal commitment to improving housing conditions is an expansion of tenant rights by both courts and legislatures. This modification of the traditional landlord-tenant relationship in favor of new remedies for tenants is aimed at insuring enforcement of minimum levels of housing quality. "Repair and deduct" laws, rent withholding and abatement statutes, receivership laws and retaliatory eviction and just-cause eviction statutes are an attempt to give tenants new powers to enforce their rights under municipal housing codes.<sup>34</sup> The courts followed a similar trend by abandoning the common law rule of caveat emptor in favor of implying a warranty of habitability into rental contracts.<sup>35</sup>

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<sup>34</sup>Hirsch, *supra* note 20, at 2.

<sup>35</sup>*Lindsey v. Normet* 405 U.S. 56 (1972); *Javins v. First National Realty Corporation* 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

### III. THE HOUSING CODE TODAY

Today, building problems are not basically different from those prevalent hundreds of years ago. They are however, intensified by rapid population growth and by the concentration of that population in urban areas. The technical proficiency which makes the modern skyscraper possible also increases the potential for casualty and the need for more comprehensive building regulations.<sup>36</sup>

Modern housing codes<sup>37</sup> serve two basic functions. First, housing codes define the standards of health, safety, sanitation, light and ventilation, maintenance, occupancy and fire protection which must be met by each rental and owner-occupied dwelling unit. Generally, these codes relate to three main areas of regulation:

- (1) the supplied facilities in the structure (e.g., toilet, bath, sink, stoves and radiators);
- (2) the level of maintenance which includes both structural and sanitary maintenance (e.g., structural maintenance includes walls, ceilings, floors, roof, windows and staircases, while sanitary maintenance relates to heat, hot and cold water, sewage disposal and electricity); and

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<sup>36</sup>O'Bannon, *supra* note 2, at 13.

<sup>37</sup>There are four major model housing codes used in the U.S. today by local communities as guides to fulfill health and safety objectives. These model codes are: (1) Uniform Housing Code (International Conference of Building Officials); (2) Southern Standard Building Code Part IV: Housing (Southern Building Code Conference); (3) Basic Housing Code (Building Officials Conference of America, Inc.); (4) APHS-PHS Recommended Housing Maintenance and Occupancy Ordinance (American Public Health Association).

(3) occupancy, which concerns the size of dwelling units and rooms, the number of people who can occupy them and other issues concerned with the usability and amenity of interior space.<sup>38</sup>

And second, municipal housing laws contain the procedures and sanctions for the enforcement of these standards. Generally, this component of the housing code delineates the scope of the legislation by defining what classes of structures fall within its reach. The statute must also outline the relative obligations of both landlords and tenants under the code and provide penalties for the violation of such duties. Finally, the code will generally include the administrative procedures to be followed in carrying out the code.<sup>39</sup>

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<sup>38</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 274.

<sup>39</sup>Guandolo, *Housing Codes in Urban Renewal*, in *The Constitutionality of Housing Codes* 12 (1961).

#### IV. THE ECONOMICS OF HOUSING CODE ENFORCEMENT

There are two different effects of housing code enforcement. First, there is the housing effect. The goal is to provide better housing at the real cost of doing so. Tenants pay an additional sum, equivalent to the landlord's cost of providing code-improved housing. Thus, the housing effect involves no net transfer of benefits from landlords to tenants.

In contrast, there is an income effect of housing code enforcement. Implicit in this result is a transfer of income from the landlord who pays for the code improvements to the tenant who enjoys the benefits thereof without an increase in rent. In this manner, housing code enforcement becomes a type of in-kind subsidy in the form of coerced action by landlords. If this result can in fact be achieved, it is justified by a belief that landlords are better able to bear the costs of providing habitable housing than their tenants.<sup>40</sup> Housing codes are thus a means of enforcing the private subsidization of increased housing consumption.

There is much debate as to whether the enforcement of modern housing codes leads to a housing or an income effect. The opponents of housing code regulations claim that an income effect is not possible. Instead, these critics claim that code enforcement leads to a variety of problems including higher rents, disinvestment and abandonment. This next section will analyze three studies which attempt to explain the

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<sup>40</sup>*Javins v. First National Realty Corporation*, *supra* note 35, at 1079.

economic impact which housing codes have upon the supply and price of housing. The first two studies by Ackerman<sup>41</sup> and Komesar<sup>42</sup> are theoretical in approach while the third by Hirsch and Margolis<sup>43</sup> is empirical. The assumptions drawn in each of these studies and the results reached are very different. Thus, it is still unclear what impact housing code enforcement actually has upon housing markets. However, one feature is common to all three of these studies: Each makes the critical assumption that comprehensive code enforcement is possible. Yet observance of the real world shows that such an assumption could not be further from the truth.

#### A. THE ACKERMAN MODEL

The most detailed of the recent studies on the market impact of housing code enforcement is offered by Ackerman. Within this study, Ackerman details short run supply and demand reactions under two different market conditions. Beginning with a basic set of assumptions,<sup>44</sup>

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<sup>41</sup>Ackerman, *supra* note 5 [hereinafter cited as Ackerman].

<sup>42</sup>Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 83 Yale Law Journal 1175 (1973) [hereinafter cited as Komesar].

<sup>43</sup>Hirsch and Margolis, *Habitability Laws and Low Cost Housing*, in *Residential Location and Urban Housing Markets* (G.K. Ingram ed. 1977) [hereinafter cited as *Hirsch and Margolis*].

<sup>44</sup>For purposes of his model, Ackerman makes the following basic assumptions: (1) both landlords and tenants are rational and act to promote their own interests; (2) the market for rental housing is a competitive one; (3) tenants operate in a market in which information of price and quality is freely available; (4) all units in the affected neighborhood are of equal substandardness; (5) all tenants create equal amounts of damage to the units which they occupy; and (6) there is no significant amount of immigration or out-migration occurring within the community or its hinterland. Ackerman, *supra* note 5, at 1102-3.

Ackerman models the impact of code enforcement in an environment in which the supply of housing is perfectly inelastic. Ackerman then modifies this model to allow for the removal of some units from the market through either abandonment or conversion. Finally, he includes some other elements to further illustrate the reaction of the market to various non-market forces. These refinements demonstrate how greatly Ackerman's first model deviates from reality.

### 1. Inelastic Supply Conditions

Ackerman assumes that, under inelastic supply conditions, landlords will not remove their properties from the market when the costs of code improvement are imposed.<sup>45</sup> He then concludes that a comprehensive code enforcement program will not cause tenants to move since they will be no better off by moving when, after code enforcement, all housing within the area is of the same quality. Rents will therefore remain at pre-code enforcement levels. This result is possible according to Ackerman because increased demand for code-improved will not be created.

Landlords who attempt to pass the costs of code improvement on to their tenants will be unsuccessful because, within the community, there exists a class of tenants who believe that code enforcement will not significantly improve their lives. Consequently, in the wake of higher rents, these "lukewarm" residents will double up their occupancy of units

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<sup>45</sup>Underlying this general assumption is the belief that: (1) the rate of return on each rental property will exceed its return if used for purposes other than housing; (2) the imposition of code enforcement costs will not alter the relative economic advantage of the use of the property as residential as compared with other non-residential uses; and (3) code enforcement costs will not cause abandonment to become an economically preferred alternative. Ackerman, *supra* note 5, at 1103.

or move to areas where the rents are cheaper.<sup>46</sup> The reaction of these "lukewarm" residents to higher rents will produce a decline in occupancy, thereby forcing landlords to either reduce rents to pre-code levels or suffer high vacancy rates.

Ackerman's conclusion that code enforcement will not raise rents within a market with an inelastic supply is thus contingent upon the existence of two very critical elements: (1) a significant number of "lukewarm" families who are not willing to pay higher rents for code-improved units; and (2) a comprehensively enforced code program within the community.<sup>47</sup>

Where comprehensive code enforcement is not possible, Ackerman envisions a shift of renters from improved housing to unimproved housing

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<sup>46</sup>It is questionable whether this "doubling up" effect is a realistic response to code enforcement, and Ackerman presents no empirical evidence to support his reliance on this theory. In situations involving families, it is not clear whether doubling up is a legal, feasible or desirable alternative to relocation. Similarly, with regard to single individuals whose mobility is frequently greater than that of families, there is no indication that they would elect to double up rather than relocate.

<sup>47</sup>Ackerman's first assumption poses an important question: If there are a significant number of families who do not value code-improved units and who are unable or unwilling to pay for them, why is code enforcement imposed in the first place? From a purely cost-benefit perspective, code improvement of units occupied by such tenants does not seem correct. Thus, Ackerman may be suggesting that code improvement is necessary in such situations for health and safety reasons regardless of the harmful economic results such a policy would have on those it is intended to benefit.

The existence of a significant number of families who do not value code improvement perhaps strengthens the argument for the imposition of selective code enforcement. Under this scheme, codes would be enforced only to the extent that there are tenants who are willing and able to pay for the increased costs of code improvements.

and vice versa according to ability to pay. As a result, there will be some rent hikes in improved housing when landlords are able to demand higher rents as the competition for such units increases.<sup>48</sup>

Although selective code enforcement can lead to higher rents within an inelastic supply market, Ackerman suggests that this method should not be totally disregarded as a tool for redistributing income since its impact on rent levels is a function of the ratio between the code enforcement area and the entire housing area. He reasons that the smaller the code enforcement area is relative to the entire slum area the greater is the probable impact on overall rent levels in the housing area. This conclusion is reached because, under such circumstances, it will not be difficult for landlords to find enough families to pay the increased rents of the improved area. In contrast, where there are more code-improved units than there are tenants who are willing to pay for them, landlords will be forced to keep their rents down in competition for the limited number of tenants.

## 2. Elastic Supply Conditions

Ackerman modifies his first market situation so that some units are withdrawn from the market. Here, code enforcement will reduce the rate of return on some buildings to the point where these landlords will abandon their properties or convert them to some other use. Many of the dwelling units which are abandoned or converted as a result of code enforcement are those which were formerly occupied by low income tenants.

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<sup>48</sup>This result ofcourse requires that the number of renters seeking code-improved properties exceeds the number of such units on the market.



Thus, a reduction in the supply of low income housing causes an increase in competition for those units which remain and which are still affordable by the low income renter. Those who are unable to pay the higher rents induced by an increased demand for these remaining units are forced to double up their occupancy. This involuntary doubling up causes overcrowding and thus the condition of low income tenants as a whole is worsened by code enforcement.<sup>49</sup>

Ackerman suggests that the impact of comprehensive code enforcement under relatively elastic supply conditions may be moderated to some degree by the "trickling down" to the poor of housing occupied by lower-middle income groups. Lower-middle income families move into homes once occupied by the rich who in turn have moved into newly constructed units. Assuming that units that have "trickled down" are equal in number to units that have been withdrawn from the market, rents will not rise unless a portion of the community feels that the "trickled down" housing is better housing and are willing to pay for this additional quality. In contrast, if the number of "trickled down" units is not sufficient to replace the units removed from the market through abandonment or conversion, a shortage will exist and we are again in a rising-rents situation. Ackerman suggests that in this latter case, government subsidization of the low income housing market is necessary before we can expect to maintain a comprehensive code enforcement program which does not create rent increases for this

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<sup>49</sup> Moving to lower priced sub-code housing is not an available alternative here since code enforcement is presumed to be area-wide and therefore no such units exist.

segment of the housing market.<sup>50</sup>

From the above analysis, the conclusion that Ackerman reaches is that comprehensive code enforcement will not prevent rising rents unless government subsidization is available. Ackerman himself recommends that without such a subsidization program selective enforcement may be the "optimal strategy". Selective enforcement allows for the application of code enforcement only in areas where such enforcement will not affect profitability in a way that forces units to be withdrawn from the market.

### 3. Non-Market Considerations

To more closely approximate the real world, Ackerman removes the assumption that all of the area's housing is of equal quality before code enforcement. Ackerman suggests that the result of comprehensive code enforcement in the above situation is to raise all sub-code housing to code standards. Thus, through code enforcement, a sub-code unit formerly renting at \$60 will be in parity with a sub-code unit formerly renting at \$100.

Ackerman argues that comprehensive code enforcement will force rents in the \$100 unit down to \$60 since tenants can now pay \$60 for the

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<sup>50</sup> Ackerman asserts that such a subsidization program must consist of the government making up the difference between the number of units removed from the market and the number of units "trickled down". Ackerman, *supra* note 5, at 1097-8, 1115-19.

Within his article, Ackerman compares the redistributive impact of code enforcement when supported by a direct housing subsidy with the redistribution potential of a negative income tax plan. He concludes that a direct housing code enforcement subsidy is preferable, with respect to its benefits for low income tenants, to expenditures of the same amount on a negative income tax plan.

same quality unit which was formerly renting at \$100. Assuming that tenants do not yield to collusive attempts by landlords to raise rents after code enforcement, competition for the \$60 units will force rents to decline from \$100 to \$60 in the former \$100 units.

Ackerman complicates matters by adding non-housing amenities such as better transportation, superior education and improved access to recreational and commercial facilities. With the imposition of code enforcement, rents in areas offering superior neighborhood amenities will decline relative to rents existing in areas lacking such amenities to the extent that residents in the former areas find that \$60 rents are more attractive than the amenities which such areas offer. Conversely, residents in non-amenity areas may be willing to pay more rent for better community facilities and will therefore move to the amenity areas. An equilibrium will be reached when the number of amenity area residents who double up occupancy or move to the non-amenity area equals the number of non-amenity area residents who choose to move to the amenity area. Rents in the \$100 amenity area will continue to fall until this equilibrium is reached.<sup>51</sup>

Rents in the \$60 unit will increase according to Ackerman only where the \$100 unit area is inferior to the \$60 unit area with respect to non-housing amenities. In such a situation, residents in the \$100 units improved by code enforcement would be willing to move to the area

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<sup>51</sup>Rents will not fall below \$60 however, and if they do fall as low as \$60 this decline simply means that not enough amenity area and non-amenity area residents value neighborhood amenities as greatly as low rents.

The \$60 non-amenity area rent will not change provided that a significant number of \$60 residents are indifferent to code improvements.

with \$60 rents and better amenities. Existing \$60 unit tenants, obtaining a good deal for their money, will be unwilling to move until competition for such units raises the rents to a level which the \$60 unit renters can no longer afford. The extent to which \$60 unit rents will rise is a function of how greatly residents in both areas value non-housing amenities. The greater the influx of non-amenity \$100 renters into the \$60 area, the higher rents will rise in the latter. Rents in the former \$100 area will decline as \$60 residents who were displaced by rent increases move to the vacant \$100 units but will be unwilling to pay \$100 for such units. Ackerman summarizes the results of this latter situation as follows:

It would appear, then that in this last, most complicated and least likely case, comprehensive code enforcement will induce rents in [ the \$60 area ] to increase beyond [ that ] level and may indeed generate a rent level exceeding \$100 if enough [ ex-\$100 renters ] and old time [ \$60 renters ] value living in [ the amenity area ] very highly; in the meantime, rents will plummet in [ the \$100 area ] from \$100 to something below \$60 if there are a significant number of families among those emigrating from [ the \$60 area ] who are lukewarm about code enforcement.<sup>52</sup>

Thus, where the aggregate decline in the \$100 area exceeds the aggregate increase in the \$60 area, code enforcement will cause an overall decline in rents. However, overall rents will tend to increase where the reverse is true.

#### B. THE KOMESAR MODEL

Komesar takes a long run approach in an attempt to explain the impact of code enforcement on the supply of housing. In his severely

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<sup>52</sup>Ackerman, *supra* note 5, at 1137.

critical analysis of the Ackerman short run, inelastic supply model, Komesar asserts that housing supply is not fixed over time. Instead, rental housing, like all structures, will deteriorate over time. Thus, at some point each structure will require either rehabilitation or reconstruction. When units are no longer habitable, some will be removed from the market if the cost of improvement or reconstruction exceeds the return on the rehabilitation or rebuilding investment.<sup>53</sup>

Komesar concludes: "Thus, even if the immediate supply of rental units is constant, the supply will not remain constant as time passes, and its rate of change will depend on the costs of continued operation including those associated with code enforcement."<sup>54</sup>

Komesar's observation of a long run elasticity for housing supply leads him to conclude that the imposition of code enforcement will cause a significant number of landlords to abandon their properties. Removal of units from the low income housing market will continue until the increased demand for the remaining units pushes rents up high enough to cover the increased cost of improvement.

Housing abandonment however is only the most immediate result of code enforcement. Komesar believes that code enforcement may also affect the supply of low income housing by imposing increased costs

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<sup>53</sup>Code enforcement has the effect of speeding up the date at which such an investment must be made. Many structures may be in habitable condition but may not meet minimal code requirements. Thus, a landlord will be forced to make code improvements, or remove the property from the market, prior to the time in which he might otherwise have made such a decision in the absence of code enforcement.

<sup>54</sup>Komesar, *supra* note 42, at 1187.

on the construction of low income housing.<sup>55</sup> Similarly, the increased cost of constructing high income housing will have an indirect impact on the supply of housing for the poor through its limitation on the "trickling down" of deteriorated units from the rich to the poor. Komesar finally asserts that the long run supply of housing can be further reduced by the in-migration of lower-middle income families who are attracted to the community's newly code-improved housing.

All of these long run impacts were ignored or summarily dismissed by Ackerman. In Komesar's view, such impacts have a crucial affect on the long run supply of housing. Examination of these long run reactions to code enforcement leads him to conclude that, at least in the long run, code enforcement causes a reduction in housing supply which in turn can only lead to higher rents.<sup>56</sup>

### C. THE HIRSCH AND MARGOLIS MODEL

Hirsch and Margolis offer a detailed analysis of the impact of specific types of code enforcement programs (termed "habitability laws"<sup>57</sup> by the authors) on the cost of rental housing. Within their study,

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<sup>55</sup>Komesar asserts that code enforcement creates additional costs for the low income housing developer at both the construction stage and later at the maintenance stage. Unlike Ackerman, he believes that the investor calculates these present and future costs into his projection of the profitability of low income housing construction. Komesar, *supra* note 42, at 1188-90.

<sup>56</sup>Increased demand caused by in-migration of those attracted to newly code-improved housing is included within this analysis since its impact on the housing market, i.e., creation of a housing shortage, is the same as when the housing supply itself is reduced.

<sup>57</sup>Although "habitability laws" may not be perfectly synonymous with "code enforcement" since some laws within the former category are

Hirsch and Margolis stress the passage of time as the most important determinant of the market's reaction to housing code enforcement.

Like Komesar, Hirsch and Margolis criticize the short run approach taken by Ackerman. They contend that Ackerman's first model, which assumes that no units will be taken off the market as a result of code enforcement, "begs the question" since "if we assume no possible reaction by landlords, we have no trouble concluding that the landlords' reactions will not lead to higher rents."<sup>58</sup> Yet Hirsch and Margolis also criticize Komesar's long run model. They argue that Komesar's world of almost complete elasticity ignores the peculiar durability of the housing stock:<sup>59</sup>

Although conditions may render provision of housing a less profitable activity than expected at the time the building was constructed, its alternative uses may be quite limited, due to the particular attributes of its structure and location. Therefore, many units will remain in service even though net revenues have been reduced.<sup>60</sup>

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not directly concerned with bringing each dwelling unit up to code standards, the aim of habitability laws, like code enforcement, is to insure that all units meet minimum levels of quality and therefore the two terms will be used interchangeably for purposes of this paper.

The Hirsch and Margolis study includes repair and rent deduct laws, receivership, rent withholding laws and statutes forbidding retaliatory evictions against tenants who seek to enforce their right to housing which complies with code requirements.

<sup>58</sup>Hirsch and Margolis, *supra* note 43, at 188.

<sup>59</sup>Due to the durability of the housing stock, net revenues from residential use may continue to exceed the opportunity cost of maintaining the property in that use even though conditions result in revenues lower than those previously anticipated. Ofcourse the impacts of durability disappear in the extreme long run. Hirsch, *supra* note 20, at 30-31.

<sup>60</sup>Hirsch, Hirsch and Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 California Law Review 1098, 1117 (1975) (footnote omitted).

Hirsch and Margolis reject both the short and long run perspectives in favor of their own "quasi-long run" approach which attempts to describe a housing market in which landlords are free to manipulate either the quantity or quality<sup>61</sup> of housing services but not to change the number of housing units supplied. The authors find that differences in the supply and demand for housing account for a large degree of the variation in housing expenditures. However, they are not directly concerned with price. Instead, they believe that the amount of housing service which will be provided, given a particular set of supply and demand conditions, will lead to a determination of the relative value consumers place on such housing characteristics.<sup>62</sup>

#### 1. On the Demand Side

Hirsch and Margolis begin by assuming that information regarding market prices and varying quantities of housing service is not freely available to the consumer. Therefore, renters are not able to maximize the use of their rental dollars within a given budget constraint. Given this assumption, they formulate an equation that enables them to target "the solution to the choice of housing service . . . [at the] point at which the household's marginal rate of substitution for housing and other expenditures is equal to the bid value for an additional value unit of

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<sup>61</sup>Hirsch and Margolis define "housing quality" as the aggregate amount of housing service which comprises all the characteristics of a particular dwelling unit (e.g., size, location, plumbing, etc.). Thus, ". . . the decision by a landlord to provide high or low quality in a particular dwelling unit is equivalent to the decision to provide more or less housing service." Hirsch and Margolis, *supra* note 43, at 191-2.

<sup>62</sup>*Id.*



housing.<sup>63</sup> In other words, a consumer equilibrium is reached where a household's willingness to pay for increased housing services is equal to the price, "bid value", of these additional services. As Hirsch and Margolis explain:

Within the above setting, we regard the household's decisionmaking process as moving along an indifference curve as it exchanges housing services for nonhousing consumption. Doing so, the household pays according to its marginal rate of substitution of housing for other expenditures for each successive unit of housing service.<sup>64</sup>

## 2. On the Supply Side

On the supply side, a similar explanation is offered. As consumers reach an equilibrium where their willingness to pay for an additional unit of housing service equals the cost of obtaining such services, a supplier will also reach equilibrium where the marginal cost of producing that additional unit of housing service equals the marginal gain (price) he will receive for his efforts.

## 3. Empirical Findings

Using this theoretical framework as background, Hirsch and Margolis provide an empirical evaluation of the impact of various habitability laws on the housing market. The study includes repair and rent deduction laws, receivership, and rent withholding laws combined with statutes forbidding retaliatory evictions against tenants who attempt to enforce code compliance within the units they rent. Such

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<sup>63</sup>*Id.* at 194.

<sup>64</sup>*Id.* at 195.

laws reflect the wide variety of methods presently employed to combat the problem of substandard housing.

Utilizing housing characteristic and household description data taken primarily from the University of Michigan Panel of Income Dynamics (1972), a least squares regression model estimate is developed which relates rents to subsets of independent variables<sup>65</sup> for 154 observations in fifty SMSA's.

Among the various habitability laws studied, only under receivership laws were rents significantly higher than they were in the absence of regulation.<sup>66</sup> The lack of rent increases under other habitability laws can be interpreted as meaning that either landlords could not pass cost increases on to tenants or chose to bear the entire cost burden themselves.<sup>67</sup>

Hirsch and Margolis attribute this result, in part, to the nature of the receivership process by which the state or local government seizes the property of a landlord who has failed to comply with code requirements. All rents to the landlord are stopped and the government takes control of the repair process. This system of direct government code enforcement has two unique characteristics which are not present in the other two

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<sup>65</sup>See: Table 1, p. 35.

Note that statistical tests cannot determine causal relationships but merely show that a correlation between habitability laws and higher rents exists. Hirsch, *supra* note 20, at 50.

<sup>66</sup>"[R]ents in states with receivership laws were on average about 12 percent higher than those without such laws." *Id.* at 58.

<sup>67</sup>Hirsch asserts that this latter possibility is not likely. *Id.* at 50.

TABLE 1

Below is a table on the Description and Source of Variables used in the Hirsch and Margolis study.

<i>Description</i>	<i>Source</i>
Sum of annual household rent plus utilities paid in 1972	1972 Michigan survey
Number of rooms in the dwelling	-Do.-
Distance of housing structure to the center of the SMSA	-Do.-
Structural type	-Do.-
Average household income for a five-year period, 1968-1972	1968-72 Michigan survey
Average lot value of equivalent sites in SMSAs	FHA (1973)
Ratio: tenth percentile rental unit price to median rental unit price	Census (1970)
Median SMSA household income for renters	Census (1970)
Total per capita income for the SMSA	-Do.-
Costs of construction for brick-concrete apartments across cities	1972 Boeckh index
Average annual heating cost per room for rental units in an SMSA	Apartment building income, expense analysis (IREM 1972)
Identifies states with repair and deduct housing laws	Hirsch et al. (1975)
Identifies states with both retaliatory eviction and withholding laws	-Do.-
Identifies states with receivership laws	-Do.-
Number of vacancies below median divided by number of low-income renters	Census (1970)
Property tax per household, average for the SMSA	Census (1970)
Number of low-income tenants in the SMSA	Census (1970)

categories of habitability laws explored by Hirsch and Margolis. First, receivership generally places the control of initiation in the government rather than the tenant and thus subjects enforcement to the risk of being exercised in a manner which contravenes the best interests of the tenant.<sup>68</sup> Secondly, because repairs are made by the government, they are often made without regard to cost. Thus, landlords frequently incur greater costs which are passed on to the tenant under this approach than under other habitability laws which force the landlords to make the necessary repairs themselves at potentially less cost.

These statistical results show that "merely extending tenants' legal rights of action and thereby shifting some of the power away from landlords may not in fact enhance the tenants' welfare. The cost of providing habitable housing must be borne by someone. There is evidence that the cost imposed by receivership laws appears to be largely borne by tenants without their receiving fully compensating benefits."<sup>69</sup>

#### D. CONCLUSION

We are thus confronted with three divergent views regarding the impact of housing code enforcement on housing prices. Ackerman concludes that the increased costs of code enforcement cannot be passed on to tenants in the form of higher rents. In contrast, Komesar finds that code enforcement reduces the amount of affordable housing for low income

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<sup>68</sup>Hirsch points out that "[r]ecently, a number of states have granted standing to tenants to initiate receiverships of the buildings where they reside." *Id.* at 22 (footnote omitted).

<sup>69</sup>Hirsch and Margolis, *supra* note 43, at 209.

renters and thus increases rents in those units which remain. Hirsch and Margolis shown that at least one type of code enforcement program, receivership, raises rents.

Of the three conclusions, the Ackerman approach appears to be clearly erroneous in light of the other two analyses. Ackerman's assumption of a perfectly inelastic supply curve so dramatically departs from reality as to draw question to the accuracy of his conclusion. Regarding Ackerman's assumption, Hirsch, Hirsch and Margolis express the following reservation.

Although Ackerman's assumption of a perfectly inelastic supply of dwellings may be appropriate in the extreme short run, it is contradicted by both empirical evidence and the theories of supply of low income housing that have been advanced by economists.<sup>70</sup>

Ackerman sets up his own conclusion by the unrealistic assumptions which he makes in his first example. Although the assumptions in his second example may be more realistic, the conclusion he reaches is contrary to his hypothesis. That is, Ackerman finds that under elastic supply conditions comprehensive code enforcement leads to higher rents.

The Ackerman model is also incorrect in its assumption that comprehensive code enforcement is available. According to the Ackerman model, even given an inelastic supply situation, rents will increase unless comprehensive code enforcement is available. Ackerman admits that selective enforcement will lead to an increase in rents and he is further forced to concede that low income rents will rise when code enforcement is implemented within an elastic market. The Komesar and Hirsch and Margolis

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<sup>70</sup>Hirsch, Hirsch and Margolis, *supra* note 60, at 1116 (footnote omitted).

studies are equally flawed in their failure to recognize the difficulty, if not present impossibility, of comprehensive code enforcement given the current legal, administrative and economic climate of most localities which are burdened with the task of code enforcement.

## V. OBSTACLES TO COMPREHENSIVE CODE ENFORCEMENT

### A. CONSTITUTIONAL QUESTIONS

The enforcement of housing codes is a recognized component of the police power. The 10th Amendment of the U.S. Constitution reserves this power to the states. Thus, the power of a municipality to enact and enforce housing codes is granted only through a delegation of this state police power to the locality via statute, constitutional provision or charter.<sup>71</sup> Under this broad power, private property rights may be limited, restricted or impaired to promote the general welfare of the community.<sup>72</sup> This concept of general welfare is not limited to matters concerning the mere protection of health and safety but instead has been used to validate a number of municipal regulations aimed at promoting public morals and the general well-being of the community.<sup>73</sup> Given this broad definition of general welfare, the constitutionality of a wide variety of housing laws has been upheld.<sup>74</sup>

Claims that housing codes are ultra vires (beyond the power of the municipality to enact) and the argument that officials lack delegated

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<sup>71</sup>Guandolo, *supra* note 39, at 16.

<sup>72</sup>16 C.J.S. *Constitutional Law* 209 (1956).

<sup>73</sup>Guandolo, *supra* note 39, at 17.

<sup>74</sup>Guandolo suggests that "the infringement of property rights through the enforcement of housing codes will be governed not so much by the rule of precedent as by judicial cognizance of existing urban conditions and judicial deference to 'the strong and preponderant opinion' as to what is 'greatly and immediately necessary to the public welfare'." *Id.* at 18.

power to enact specific code standards have generally been unsuccessful.<sup>75</sup> However, as an exercise of the police power such regulations are subject to the same constitutional limitations imposed on the police power generally. Thus, each housing regulation must bear a reasonable relationship to the public health, safety, morals or general welfare. Although a presumption of validity may attach to a specific housing code requirement, such a presumption may be rebutted by a showing that the law bears no reasonable relationship to the public goals sought to be accomplished through the statute.<sup>76</sup>

The equal protection clause of the 14th Amendment further limits the scope of the police power. This clause requires that the regulation be applied equally to all property or persons similarly situated. Even when a housing code properly promotes the general health or safety of the community, it may be invalidated where it is applied arbitrarily to only certain persons or properties or where the result of enforcement is an unreasonable discrimination among such groups.<sup>77</sup> This limitation does not however prohibit the application of different rules to different classes of persons or property. The equal protection clause merely requires that the classification be based on reasonable distinctions in light of the public goals sought to be achieved and that there is uniform application of the law among members of the same general class.<sup>78</sup> Similarly, mere

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<sup>75</sup> Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 Urban Lawyer 577, 578 (1971).

<sup>76</sup> Guandolo, *supra* note 39, at 21.

<sup>77</sup> 16 C.J.S. *Constitutional Law* 493 (1956).

<sup>78</sup> 82 C.J.S. *Statutes* 162 (1956).



inequalities in result among persons or properties within a class will not alone invoke questions of equal protection. Some class members may be benefited or harmed more than others within that same class by the application of a particular regulation without violating the equal protection clause.<sup>79</sup>

Challenges to specific housing code provisions on equal protection grounds have been particularly successful with respect to occupancy standards. For example, in *Bailey v. People*, 190 Ill. 28, 60 N.E. 98 (1901), a housing code provision which restricted the number of occupants per room was invalidated on grounds that it discriminatorily applied only to lodging facilities and not to other types of hotels or rooming houses.<sup>80</sup>

Housing code enforcement is also limited by considerations of both procedural and substantive due process. The procedural aspects of due process require that those subject to regulation under a housing code be afforded proper protections with respect to notice, hearings, appeals, summary proceedings and similar procedural formalities.<sup>81</sup> It is however the inspection portion of the enforcement process which has caused the courts the most trouble.

Housing code inspections require the entry of officials into both interior and exterior areas of a property which poses serious questions of due process. After several years of confusion and contradiction over

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<sup>79</sup>*Id.*

<sup>80</sup>See also: *State v. McCormick* 120 Minn. 97, 138 N.W. 1032 (1912), and *Brennan v. Milwaukee* 265 Wis. 52, 60 N.W.2d 704 (1953).

<sup>81</sup>Guandolo, *supra* note 39, at 24.

the issue in both the U.S. Supreme Court and the lower courts,<sup>82</sup> the U.S. Supreme Court in *Camara v. Municipal Court of the City of San Francisco*, 387 U.S.523 (1967), laid to rest the question of whether a housing code inspection constitutes an unlawful search. In *Camara*, the Court, in balancing the 4th Amendment considerations inherent in the code enforcement process with the need to insure safe and habitable housing, decided in favor of protecting the rights of individuals to privacy and security as guaranteed by the Constitution. Thus, the warrantless code enforcement search was deemed unconstitutional and consent by either the landlord or tenant is now required before any warrantless search can be upheld.<sup>83</sup> Although the search warrant requirement represents a further step which must be taken before code enforcement can be achieved, it may not present a serious obstacle since, in most cases, consent is given without opposition and thus a warrant is not necessary.<sup>84</sup>

Finally, housing code enforcement may give rise to substantive due process problems concerning the taking of property without just

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<sup>82</sup>See, e.g.,: *Givner v. Maryland* 210 Md. 506, 124 A.2d 764 (1956); *Little v. District of Columbia* 62 A.2d 875 (1948), *aff'd*, 178 F.2d 13 (1949), *aff'd*, 339 U.S. 1 (1950); and *Frank v. Maryland* 359 U.S. 380 (1959).

<sup>83</sup>Tenant approval to the search is required where inspectors wish to enter an individual apartment and evidence of code violations discovered through tenant consent may be used against the landlord. Landman, *supra* note 16, at 302.

Note also that the *Camara* Court ruled that the showing of "probable cause" required for the issuance of a housing inspection search warrant is less strict than that required for a criminal investigation warrant. 387 U.S. 523, 538-9.

<sup>84</sup>Landman, *supra* note 16, at 304.

compensation. The 14th Amendment prohibits a severe restriction of use or the complete taking of private property for public purposes without compensation to the owner. There is no question that this protection exists where the power of eminent domain is exercised. It is less clear whether a property owner who suffers a similar loss under the police power is afforded the same constitutional protection. Generally, "compensation is not required for the deprivation of private property or the impairment of its value or usefulness resulting from the lawful exercise of the police power in the enforcement of a housing code" even though a property owner subjected to housing code enforcement may be deprived of his property to an extent equivalent to a loss of property occasioned by an exercise of the power of eminent domain.<sup>85</sup> Housing code enforcement may require extensive, yet uncompensable, actions ranging from major repairs to complete demolition.<sup>86</sup>

Several explanations have been offered in an attempt to reconcile the different treatment of losses created by the police power and the power of eminent domain. It has been suggested that the distinction lies in the fact that code enforcement is applied uniformly within a

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<sup>85</sup>*Richards v. City of Columbia* 227 S.C. 538, 88 S.E.2d 683, 690 (1955); Guandolo, *supra* note 39, at 27.

<sup>86</sup>For example, frequently demolition will be ordered where the cost of repairs exceeds 50% of the replacement cost. The validity of such an action as an exercise of the police power has been upheld and thus no compensation is afforded the property owner. See: *Perepletchikoff v. City of Los Angeles* 174 Cal. App.2d 697, 345 P.2d 261 (1959); *Springfield v. City of Little Rock* 226 Ark. 462, 290 S.W.2d 620 (1956); and Fordham and Upson, *Constitutional status of Housing Codes and Related Measures*, in *The Constitutionality of Housing Codes* 65 (1961).

designated area while the power of eminent domain is exercised only on a selective basis. It has been further suggested that the difference lies in the ultimate purpose of the exercise of such public powers. In the first instance, the power of eminent domain is exercised so that private property may be converted into public uses. In contrast, the exercise of the police power through code enforcement merely removes a public nuisance and does not transfer private property into public hands. As Justice Holmes suggested in *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922), the distinction may merely be one of degree. The idea is that regulations may result in uncompensable losses under the police power where a legitimate public purpose is shown. However, where the public purpose does not support such severe losses of private property, the power of eminent domain may be utilized to carry out such purposes but compensation must be provided to prevent unfair burdens on individuals for the benefit of the community.<sup>87</sup>

More recent cases have attempted to temper the harsh results created by the application of the police power. The courts have generally approached this problem by focusing on the reasonableness of the relationship between the purpose sought to be promoted by the regulation and the ability of the regulation to carry out such goals. Included within this calculus is a consideration of the cost such a law would impose on the individual property owner. Where the cost exceeds the benefits or where enforcement costs create adverse impacts such as abandonment or conversion, several courts have ruled in favor of a

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<sup>87</sup>Guandolo, *supra* note 39, at 28-9.

relaxation of strict code enforcement. The courts have been most willing to yield to the economic realities of the housing market in situations where the code requirements sought to be enforced relate to conditions which are concerned primarily with physical, rather than health or safety, aspects of a particular unit. For example, in striking down an order to repair torn wallpaper and cracked windows, the court in *Apple v. City and County of Denver*, 154 Colo. 166, 390 P.2d 91 (1964), acknowledged that although economic hardship alone is not sufficient to invalidate a law, the ordinance "must, in its application to the specific property, be such as not to be an unreasonable demand upon the individual for the benefit of the public welfare."<sup>88</sup> Similarly, the cost of compliance may be determinative in the invalidation of a housing code requirement where the court cannot find that the continued use of the property without repairs would "immediately and directly imperil the public health, safety or morals."<sup>89</sup>

A few courts have even refused to grant protection to certain hot

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<sup>88</sup>390 P.2d 9., 95.

<sup>89</sup>*Gates Co. v. Housing Appeals Bd. of City of Columbus* 10 Ohio St.2d 48, 225 N.E.2d 222, 225 (1967). Here, the court held that a landlord did not have to construct additional bathrooms as required by the housing code where noncompliance fines would exceed \$9,000 annually and the cost of compliance would be greater than 50% of the fair market value of the property before improvement.

*But cf.:* *Rubin v. Hervo Realty Corporation*, 84 Misc.2d 1074, 376 N.Y.S.2d 834 (1975), where the court did not compel a landlord to correct and repair electrical violations which constituted immediate hazards to life, health and safety since the cost of such repairs would exceed \$1,250,000. The court did however demand that the landlord pay to the tenants amounts representing reasonable relocation costs incurred as a result of discontinuance of electrical service within the apartment building by the city.

water and bathroom ordinances where the cost of compliance would present a serious hardship to the landlord.<sup>90</sup> In such cases, the courts have struck down housing laws requiring the installation of bathrooms and hot water heaters on grounds that such a requirement as applied to the defendant-landlord was an unconstitutional deprivation of property without compensation. This result has been reached on grounds that the regulations bore no substantial or reasonable relation to the public health, welfare or safety. In all of these cases, each court relied heavily upon the economic hardship which enforcement would impose upon landlords and the concomitant rent increases for tenants, resulting in "vacancies, vandalism and probably a total loss of the buildings."<sup>91</sup> However, both the reasoning and the results of such decisions have been severely criticized. Critics feel that the courts' reliance, in striking down these laws, on arguments concerning the severe economic hardship of code enforcement may encourage landlords to contest a variety of housing code standards on similar grounds of landlord hardship or discourage the enforcement of comparable laws by municipal officials.<sup>92</sup>

#### B. THE INADEQUACY OF ENFORCEMENT MECHANISMS

Although a variety of code enforcement mechanisms exist such as

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<sup>90</sup>See: *Dente v. Mt. Vernon* 50 Misc.2d 983, 272 N.Y.S.2d 65 (1966); *Safer v City of Jacksonville* 237 So.2d 8 (1970); *City of St. Louis v. Brune* 515 S.W.2d 471 (1974).

<sup>91</sup>515 S.W.2d at 476; see also: 237 So.2d at 10.

<sup>92</sup>See: T.E. Morris, *Housing Codes: Court Determination of Reasonableness*, 23 University of Florida Law Review 195, 200 (1970); Chalfen, *Economic Inequity and the Housing Code*, 10 Urban Law Annual 335, 343 (1975).

rent withholding laws, receivership, and repair and deduct laws, the most frequently used mechanism remains the criminal remedy.<sup>93</sup> Criminal sanctions, including imprisonment or fines, however, have in general proven to be unsatisfactory means with which to accomplish code enforcement.<sup>94</sup>

The major problems besetting the criminal remedy are the result of imperfections within the judicial system itself. The criminal remedy focuses upon the culpability of the defendant rather than the substandard condition of the building.<sup>95</sup> Thus, personal jurisdiction over the landlord is required before the criminal court can proceed. Unfortunately, true ownership of a building can be easily concealed, through the corporate form or other types of ownership. Therefore, officials may be required to spend large amounts of time tracking down the real owner and serving him with process.<sup>96</sup> Also, the sheer volume of inspections produces an overwhelming number of cases which overcrowds court dockets and results in lengthy delays. Overcrowded dockets appear to exist even in jurisdictions where many cases are disposed of

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<sup>93</sup>Grad, *supra* note 75, at 577.

The criminal remedy has generally been preferred to the civil remedy since the civil suit involves more detailed pleadings than does the criminal suit. Moreover, collection of a civil judgment is confined to the traditional mechanism of execution upon the property of the defendant. U.S. National Commission on Urban Problems, *supra* note 7, at 287-8.

<sup>94</sup>Diamond, *Rehabilitation of Low Income Housing Through Cooperative Conversion*, 25 American University Law Review 285 (1976).

<sup>95</sup>Gribetz and Grad, *supra* note 1, at 1277.

<sup>96</sup>Abbott, *supra* note 19, at 50.

summarily.<sup>97</sup> In addition to clogged dockets, criminal prosecutions require high standards of proof and complicated procedural safeguards which increase the amount of time lawyers and code inspectors must spend on trial preparation and in court.<sup>98</sup>

The lack of adequate penalties for code violators presents another obstacle to successful code enforcement. Although many jurisdictions allow imprisonment for code violators, such statutes are rarely used.<sup>99</sup> Fines have been imposed with similar laxity. In many states, code enforcement violation fines are so small that they are more properly considered licensing fees rather than penalties.<sup>100</sup> In many instances, an owner may find it more economical to pay repeated fines than to comply with code requirements. He will merely treat the payment of such small fines as a cost of doing business.<sup>101</sup>

Laxity in the imposition of sanctions is, in many cases, the result of judicial attitude. Courts have been reluctant to treat

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<sup>97</sup>Levi, *Focal Leverage Points in Problems Relating to Real Property in Housing In America: Problems and Perspectives* 477 (Mandelker and Montgomery eds. 1973).

<sup>98</sup>Lieberman, *The Administrative Process: Housing Code Enforcement*, 3 *Urban Lawyer* 551, 552 (1971).

Levi points out that where code inspection officials are required to spend many hours in the courtroom, the effectiveness of code enforcement will be "correspondingly reduced". Levi, *supra* note 97, at 477.

<sup>99</sup>Listokin, *The Dynamics of Housing Rehabilitation: Micro and Macro Analysis* 53 (1973).

<sup>100</sup>Levi, *supra* note 97, at 477.

<sup>101</sup>Listokin, *supra* note 99, at 53.

Note that fines are not considered allowable business deductions for income tax purposes.



delinquent landlords as criminals, partly because criminal court judges do not generally consider housing code violations as serious crimes.<sup>102</sup> Housing code violations are frequently viewed as "social welfare" or administrative offenses, which constitute a violation against the community only because the community has set certain standards of conduct which must be met.<sup>103</sup> More importantly, judges are usually reluctant to impose harsh penalties on landlords who are "respected members of the community" and generous contributors to many important social causes. Similarly, the public does not respond well to a program which attempts to place prominent community figures in the role of criminals.<sup>104</sup>

#### C. ADMINISTRATIVE AND POLITICAL OBSTACLES

A host of administrative problems decrease the efficiency of housing code enforcement. One of these is a lack of sufficient "patrolling" mechanisms. Routine code inspections are rare, particularly in slum areas. Thus, violations are generally processed only after a private complaint has been received<sup>105</sup> and criminal sanctions are used

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<sup>102</sup>Grad, *supra* note 75, at 579.

<sup>103</sup>Lieberman, *supra* note 98, at 552.

<sup>104</sup>Office of Regional and Community Development, Department of Health, Education and Welfare, Washington, D.C., *Housing: A Source Book for State Social Service Agencies* at IV-I [n.d.] .

<sup>105</sup>Fishman, ed., *Housing for All Under the Law: New Directions in Housing, Land Use and Planning Law* 555 (1978).

Diamond suggests that in many localities these complaints are handled on an ad hoc basis. "This approach to enforcement . . . results in limiting the kinds of complaints that can be handled and in creating severe backlogs for those complaints which are handled, [ and ] is often

only after administrative remedies have failed to compel voluntary compliance. Once a criminal remedy is necessary, however, most jurisdictions require the municipality to institute proceedings and forbid tenants from filing their own actions.<sup>106</sup> In any case, code enforcement is usually applied only to structures that pose immediate threats to health or safety.<sup>107</sup>

Ironically, code enforcement is not necessarily concentrated in the worst parts of a city.<sup>108</sup> Not only is it common for the level of code enforcement to be low in areas of the city that need it the most, but there is also considerable variation in the enforcement standards which are applied to different sections of a city. The U.S. Health Service has blamed this lack of uniformity in code enforcement on the institutionalization of criminal rather than civil penalties which it claims has resulted in a lack of attention to the administrative problems of implementing a uniform standard of housing.<sup>109</sup> Others have blamed the lack of code conformity on the scarcity of properly trained housing

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a function of the demand for enforcement increasing at a much greater rate than the localities' capability to enforce." Diamond, *supra* note 94, at 290 (footnote omitted).

<sup>106</sup>Fishman, *supra* note 105, at 555.

<sup>107</sup>*Id.*

<sup>108</sup>The inadequacy of code enforcement within the oldest and most dilapidated areas of a city is frequently due to a realization that the cost of bringing many of the structures within such areas up to code standard would exceed the value of the structures themselves. Moreover, the present tenants of such housing are likely to be unable to afford the increased rents necessary to finance such improvements.

<sup>109</sup>Office of Regional and Community Development, *supra* note 104, at IV-I.

inspectors. These critics claim that this personnel shortage is caused by the inadequate recruitment of qualified individuals into code enforcement careers.<sup>110</sup>

Further problems are generated by the bureaucratic structure within which housing codes are enforced. Housing codes are generally administered and enforced by county or municipal agencies. Implementation by local officials renders the enforcement process particularly vulnerable to local political pressures. Moreover, the tremendous personal discretion frequently vested in local building inspectors increases the opportunity for abuse.<sup>111</sup>

The local organization of code enforcement agencies has also been blamed for the present ineffectiveness of code enforcement programs. Although one recent trend in municipal reform has been the consolidation of code enforcement into a single agency, many localities still maintain a system whereby several local agencies or departments are responsible for code enforcement, with little or no coordination among these entities.<sup>112</sup> As Levi describes:

City building departments, whose historical emphasis has been on original construction, are now faced with the necessity of making countless inspections upon existing housing; inspections which are often complicated by overly-bureaucratic practices and inter-agency conflicts.

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<sup>110</sup>Listokin, *supra* note 99, at 53. See also: Gribetz, *Housing Code Enforcement in 1970 - An Overview*, 3 *Urban Lawyer* 525, 528 (1971).

<sup>111</sup>Field and Rivkin, *The Building Code Burden* (1975).

Where the price of a bribe is less than the cost of compliance, and where an inspector is receptive to graft, the temptation for corruption is strong.

<sup>112</sup>Fishman, *supra* note 105, at 555.

For example, most municipal building departments are organized into bureaus, whose jurisdiction is patterned on trade union lines. Thus, one of the plumbing bureau's inspectors will inspect the plumbing, while another inspector, sent out by the electricity bureau will check the electrical wiring. Moreover, should the plumbing inspector find a defective wiring system, he cannot issue a notice of violation, but may only inform the proper bureau of his discovery.<sup>113</sup>

The budgetary impact of code enforcement frequently presents an additional obstacle to local code improvement efforts. The budgetary inadequacies of code enforcement may be attributable, in many communities, to a scarcity of municipal revenues and the political decision to allocate the bulk of these limited resources to other government programs.

Finally, state governments must take part of the blame for inadequate local code enforcement. The U.S. National Commission on Urban Problems notes that once the state delegates its police power to localities to enable local code enforcement, it generally takes no additional steps to monitor the adequacy of the local use of this delegated power nor offers needed assistance in the formulation of local code administration policy.<sup>114</sup>

#### D. THE COST OF COMPLIANCE

Many policymakers assume that landlords are "better able to bear the costs of code improvements" than are their tenants. This assumption, however, is generally not correct, particularly when applied to the landlords of low-rent properties. There is evidence that low-rent housing yields moderate profits at best. For example, Sternlieb

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<sup>113</sup>Levi, *supra* note 97, at 477.

<sup>114</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 288.

discovered that the average "actual return on investment in terms of the overall parcel value is clearly in the neighborhood of 10 to 12 percent."<sup>115</sup>

The cost of code improvements may in fact present the most formidable obstacle to code compliance from a landlord's perspective. Many owners find it impossible to obtain even conventional financing for dwellings for which the cost of code enforcement cannot be recouped by rent hikes<sup>116</sup> or decreases in operating costs or would be disproportionately high relative to the value of the property.<sup>117</sup>

A landlord faced with the prospect of loss due to the cost of code enforcement may view selling as the only way out of this unprofitable investment. However, the market for substandard buildings is likely to be soft, where codes are diligently enforced and where the new owner will be faced with the costs of improvements before he can derive income from the property.<sup>118</sup> Some landlords, unable to sell, either abandon or convert the property to another use when housing code enforcement renders continued operation economically infeasible.

#### E. THE ECONOMIC REALITY OF NON-ENFORCEMENT

Officials attempting to enforce housing codes face a formidable

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<sup>115</sup> Sternlieb, *The Tenement Landlord* 88 (1966).

<sup>116</sup> Rarely are low income tenants in a financial position to pay the higher rents of improved units. This fact has been the source of the movement to provide income transfers, (e.g., rent subsidies), to indigent tenants who are affected by code enforcement. Hirsch and Margolis, *supra* note 43, at 208.

<sup>117</sup> Listokin, *supra* 99, at 54.

<sup>118</sup> *Id.* at 54-5.

dilemma since in enforcing such codes they frequently make housing unaffordable for those at the bottom of the market.<sup>119</sup> These displaced families must live somewhere and thus the enforcement of housing codes merely increases the demand for substandard, affordable housing. As more families are forced to search for substandard housing and as the supply of such housing is increasingly diminished, owners of these remaining sub-code units are able to ask for higher rents.<sup>120</sup> Thus, as competition for these remaining units increases, the overall economic position of the very poor is worsened.

Where code enforcement leads to higher rents or abandonment, many localities have no choice but to decrease or eliminate code enforcement in areas where its implementation causes adverse economic impacts.

The U.S. National Commission on Urban Problems points out that:

Assuming the best intent, funding and prosecution, code enforcement may be purposely blunted by local government in a situation of short housing supply in order to avoid the loss of dwelling units that might be vacated on court order and then held vacant by the owner to avoid the cost of repairs.<sup>121</sup>

Displacement is viewed as a greater harm than sub-code housing. Thus,

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<sup>119</sup>I accept Komesar's argument that landlords are able to pass the increased cost of code enforcement on to their tenants through higher rents or will abandon such housing where continued operation becomes infeasible.

<sup>120</sup>Rents in substandard housing will not however increase to a level equivalent to those charged for units meeting code specifications.

<sup>121</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 286.

Moreover, where code enforcement may result in abandonment, city officials may prefer to avoid the problems of vandalism and arson which are associated with vacant buildings by opting for nonenforcement of the code. *Id.* at 286.

localities are frequently given no choice but to ignore housing code violations, since bad housing is better than no housing at all.

Finally, in certain situations, evasion of the law is actually encouraged by the market consequences of nonenforcement. Where an apartment building is old and deteriorated its continued operation may yield substantial profits. High profits earned by the operation of sub-code housing is dependent on enforcement of the code in other parts of the area. Landlords of sub-code housing who avoid the costs of code improvement can maintain occupancy by attracting tenants who are forced to move out of housing where rents are raised by code enforcement. These landlords continue to attract tenants and also escape the costs of code improvement. Larger gains can be made if the number of tenants who desire the low rents of sub-code housing exceeds the number of sub-code units available. However, rents in these sub-code units will not rise to the rent levels of code-improved units since tenants will not be willing to pay the same amount for sub-code housing as they are forced to pay for code-improved housing, unless a severe housing shortage leaves them with no alternative.

## VI. ALTERNATIVE PROPOSALS FOR REFORM

The U.S. National Commission on Urban Problems reported as its single most important finding concerning housing codes "that minimum standards, while enforceable, are often unenforced."<sup>122</sup> Although housing code enforcement has been successful in some communities, such successes are usually found where the regulations are so vague, or the tenants so prosperous, that they represent virtually no constraint on ownership.<sup>123</sup> More meaningful codes cannot be administered effectively enough to achieve full compliance even with minimum requirements of health and safety.<sup>124</sup> Levi asserts that the expectation of nonenforcement has long been an accepted fact within the housing market. She suggests that "unit rentals, gross rent rolls, capital asset value - in fact the complete market system function on the assumption that the municipality either cannot or will not enforce housing or zoning codes in slum areas."<sup>125</sup>

In recognition of the failures of comprehensive housing code enforcement, alternative programs for reform are offered. One such proposal is the maintenance of the single standard housing code with increased administrative and enforcement mechanisms. This scheme would require continued use of a uniform standard applied throughout the

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<sup>122</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 274.

<sup>123</sup>Nason, *Municipal Interventions in the Building Process*, (1977) (unpublished M. Arch. thesis, Massachusetts Institute of Technology).

<sup>124</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 275.

<sup>125</sup>Levi, *supra* note 97, at 476.



enforcement area and replacement of criminal sanctions for noncompliance with a cumulative civil penalty. Gribetz and Grad supported such a view and also encouraged abandonment of our present reliance on criminal sanctions.<sup>126</sup> Code enforcement coupled with rent control has also been proposed as a means of insuring code improvements while at the same time restricting rent increases. The flexible housing code is another reform proposal which has gained considerable attention in recent years as a possible alternative to the single standard housing code. The flexible housing code allows for the application of variable standards which correspond to the maintenance and repair needs of housing within designated code enforcement districts. This proposal may however run up against constitutional obstacles since, in essence, it is a selective enforcement scheme in the form of varying code standards applied to different sections of the city.<sup>127</sup> A fourth alternative is the enforcement of a minimum housing code through a certification process with reliance on private contractual rights to provide additional housing quality. This last alternative is the most realistic since reforms which continue to rely on current code enforcement mechanisms fall victim to the same problems of enforcement abuse as do traditional types

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<sup>126</sup>Gribetz and Grad, *supra* note 1.

In 1970, Gribetz modified his earlier position and suggested that the answer lies not in the need for reform in code enforcement mechanisms but instead in the need for more funding to administer existing enforcement sanctions. Gribetz, *supra* note 110, at 531.

Grad, however, maintained his earlier position in an article also written in 1970. Grad, *supra* note 75.

<sup>127</sup>See: Landman, *supra* note 16, for an explanation of the flexible housing code scheme.

of housing codes.

A. MAINTENANCE OF THE SINGLE STANDARD CODE  
WITH INCREASED ENFORCEMENT MECHANISMS

The existence of a minimum housing code does not insure that all housing will be maintained in compliance with such standards. Thus, some observers find that the major flaw of our single code system lies in the use of present enforcement mechanisms. They suggest administrative and enforcement reforms rather than abandonment of the single standard code.

The major attack is on the widespread reliance on the criminal sanction that neither guarantees that repairs will be made nor serves as a deterrent to other noncomplying landlords.<sup>128</sup> Instead, the solution suggested is the formulation of a new civil remedy which has as its goal the improvement of substandard buildings rather than the punishment of noncomplying landlords.<sup>129</sup> The thrust of this proposal is to place economic sanctions on housing code violations since they are "basically economic offenses".<sup>130</sup> Gribetz and Grad suggest that a cumulative civil penalty, buttressed by receivership and direct repair programs, is preferable to tenant self-help remedies. This penalty would be instituted by the municipality and the amount of the fine would relate to the period over which the landlord fails to comply with code requirements.

Unfortunately, the Gribetz-Grad proposal corrects for only one

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<sup>128</sup>Gribetz and Grad, *supra* note 1, at 1276.

<sup>129</sup>*Id.* at 1281.

<sup>130</sup>*Id.*

of the problems of current code enforcement. The issue of whether tenants are willing to pay for the real cost of better housing is not addressed. Similarly, their scheme does not address the failures of the inspection process, including the inadequacy of code enforcement personnel and the potential for political graft; the inability of landlords to meet the costs of code improvements and the issue of the development of appropriate standards.

#### B. CODE ENFORCEMENT WITH RENT CONTROL

A likely response to the criticism that code enforcement leads to rent increases would be a scheme which combines the beneficial effects of code enforcement with a method which prohibits a concomitant increase in rents. One possible way to accomplish this goal would be the introduction of rent control legislation which would prevent the landlord from passing the costs of code enforcement to his tenants. Unfortunately, combining two systems which are presently ineffective when applied singularly, does not, in this case, produce one system which is effective.

Rent controls have been instituted in response to rapidly escalating rents that result from housing shortages caused by population increases, removal of housing from the market, and/or changes in housing tastes.<sup>131</sup>

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<sup>131</sup>Lett, *Rent Control: Concepts, Realities, and Mechanisms* 38 (1976).

For example, the first rent control legislation which appeared in this country was passed in response to the housing shortages created during World War I. These shortages were caused by a shift of labor and materials from domestic construction to defense production and by the rapid migration of workers to centers of defense production. *Id.* at 1.

Persons of low and moderate incomes as well as persons on fixed incomes, particularly the elderly, are those most in need of controls in times of inflationary rent increases. However, as housing costs have increased at a faster rate than real spendable income, particularly since 1970, rent control has become a form of rent subsidy to middle income tenants as well.<sup>132</sup>

The primary goal of rent control is to maintain current prices of housing without a decrease in quality. Therefore, tenants in rent-controlled housing will pay less than they would in an uncontrolled market. Some proponents of rent control have suggested that a successful rent control program cannot only maintain but even reduce current rents without decreasing housing quality. In these situations, rent control would have the effect of increasing the amount of disposable income available for the consumption of non-housing goods.<sup>133</sup>

However, one of the major criticisms of current rent control programs is their adverse effect on housing quality. Critics argue that expenditures on repair and maintenance are of the few variable costs associated with the operation of housing.<sup>134</sup> A landlord who is prevented, by rent control, from raising rents in times of rising operating costs will be forced to either absorb the losses or cut his expenses. The first option may be either unavailable or unattractive to a landlord since

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<sup>132</sup>*Id.* at 38-9.

<sup>133</sup>*Id.* at 44.

<sup>134</sup>Lett notes that other operating expenses such as real estate taxes, fuel and utilities charges, payroll costs, management and administrative fees, insurance costs and debt service requirements are all relatively fixed costs. *Id.* at 46.

his profit margin may already be severely limited due to the pressures of inflation or he may be unwilling to reach into his own pocket to compensate for the deficiency. Thus, he may turn instead to a reduction in repair and maintenance expenditures. When this option is chosen, the net result is a decrease in the quality of housing service, without a similar decrease in rent levels, and stepped-up deterioration of the housing stock.<sup>135</sup>

If rent control could successfully maintain rents, then a combination of rent control and code enforcement would stabilize rents while also prevent landlords from reducing maintenance and repair levels in response to rent freezes.<sup>136</sup> However, there are some persuasive arguments to suggest that rent control is not an effective means with which to control rents.

#### 1. Adverse Anticipatory Reactions

When landlords are threatened with the possibility of rent control, some react by immediately increasing rents to protect themselves

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<sup>135</sup>It may be argued that a decrease in rent levels is not warranted because tenants are already paying below-market-rate rents for a given quality of housing. Therefore a decrease in repair and maintenance merely stabilizes the level of rent paid with the amount of housing service received.

<sup>136</sup>Through code enforcement, landlords would be prevented from lowering maintenance and repair standards only below those levels required by the housing code. Nothing in this scheme prohibits landlords from reducing their maintenance from levels which already exceed minimum code requirements. This effect may not be significant however, since many rent control statutes have "pass-through" provisions which allow landlords to pass on to tenants the costs of improvements which exceed the minimum standards set forth within the housing code.

once the rent freeze is instituted.<sup>137</sup> These anticipatory rent increases thwart the goal of rent control, yet there is little which can be done to prevent this reaction.

Similarly, the imposition of rent control may have a secondary effect of reducing new construction. As Lett explains:

Although new construction is generally exempt from controls, the housing industry is often wary of possible future extensions of controls. Consequently, opponents of rent control maintain that investors may turn to communities without such controls or abandon the rental market entirely and focus on the construction of fee-simple, owner-occupied housing, particularly since there has been increased demand for condominiums.<sup>138</sup>

## 2. Inequitable Distribution of Benefits

The redistributive goals of rent control are diluted by the inability of the system to accurately target intended beneficiaries. Generally, rent control is applied without regard to the income levels of present and prospective tenants.<sup>139</sup> Therefore, those who benefit from rent control may not be poor or on fixed incomes. Moreover, once rent control is imposed, current tenants are discouraged from moving since in so doing they may forfeit their rent control benefits if they cannot find replacement housing under similar controls. This restraint which rent control places on tenant mobility decreases the number of potential beneficiaries of the law.

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<sup>137</sup>Where tenants have entered into leases which prevent rent increases during the term of the lease, the ability of the landlord to raise rents in anticipation of rent control is temporarily limited until expiration of the lease period.

<sup>138</sup>Lett, *supra* note 131, at 45.

<sup>139</sup>*Id.* at 47.

### 3. Abandonment and Conversion Effects

Although a program of code enforcement with rent control may prevent a landlord from reducing maintenance and repairs below the minimum level required by the housing code, this scheme does not address the economic problems which beset a landlord when his profit margin is suddenly reduced by the imposition of code improvement costs and, because of rent control, he is unable to pass these costs on to tenants. If a landlord's profits are so decreased, such that continued operation results in a deficit, the only alternative available is abandonment or conversion. When this occurs, the supply of housing is reduced and those tenants not lucky enough to reside in existing rent-controlled units will suffer rent increases as additional demand is placed on the housing stock by tenants displaced by abandonment or conversion.<sup>140</sup>

#### C. THE FLEXIBLE HOUSING CODE

The concept of a flexible, zoned housing code developed as early as 1927.<sup>141</sup> This type of housing code developed in part out of a recognition that one result of the present system of code enforcement is the selective application of a single standard housing code.<sup>142</sup>

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<sup>140</sup>The authors of one article suggest that to prevent abandonment or conversion, rent control and code enforcement should be coupled with subsidies to landlords for code improvement costs. Hartman, Kessler, and LeGates, *Municipal Housing Code Enforcement and Low-Income Tenants*, 40 J. Am. Inst. Planners 90 (March 1974).

<sup>141</sup>Landman, *supra* note 16, at 305.

<sup>142</sup>One supporter of the flexible housing code states that "in reality, there is little, if any, housing code enforcement; there is

De facto selective code enforcement is a response to the differing maintenance requirements of housing. Some neighborhoods have housing for which only minimal repairs and preventive maintenance procedures are needed, while in other areas, extensive rehabilitation measures may be necessary to bring housing up to habitable levels. Finally, there are some neighborhoods where code enforcement would do little or nothing for structures which are so deteriorated that demolition is the only economically rational solution.

In deriving its existence from the unsuccessful application of the single standard code, the flexible housing code is in actuality a codification and legitimization of selective enforcement. It provides for a variety of maintenance standards which are applied to correspond to the needs of designated housing code districts. Thus, the proposal for a flexible housing code is targeted toward reform of the enforcement mechanism of the present system and is not a reframing of the current concept of housing codes.

Although the flexible housing code does no more, in fact, than the present selective enforcement system, this proposed zoned code presents greater constitutional questions of equal protection. Under the present selective enforcement system there are no equal protection problems since mere nonenforcement of a regulation is not generally viewed as an equal protection problem. Instead, an equal protection violation is found only where this nonenforcement is coupled with a showing of intentional discrimination rather than discrimination which

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flexible, or selective, enforcement of the single standard housing code." Landman, *supra* note 16, at 255.



is merely the result of laxity in enforcement.<sup>143</sup> By definition, the flexible housing code requires an intentional differentiation among housing. Thus, the question becomes whether these distinctions are valid under the equal protection clause.

The equal protection clause requires that all persons or property similarly situated be accorded substantially equal and uniform treatment. This provision does not prohibit the regulation of private property but it does require such regulations to be reasonably related to legitimate public interests in protecting health and safety and that the means used to foster such goals are not based on classifications which are not germane to the prevention of the stated public evil. In short, the equal protection clause safeguards against intentional and arbitrary discrimination in the application of public regulations.

The crucial question in cases which raise equal protection issues is whether a legitimate public interest is furthered by differences in treatment among persons or property. A reasonable test of the validity of a classification is whether any substantial benefit or burden, conferred upon one class as compared with other classes, bears a reasonable relationship to the goals of the regulation:<sup>144</sup>

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<sup>143</sup>*Dalton v. Van Dien* 339 N.Y.S.2d 378, 382, 72 Misc.2d 287, 292 (1972); *City of Murtle Beach v. Mayor* 256 S.C. 130, 181 S.E.2d 265 (1971).

See also: *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), where the U.S. Supreme Court found that the conscious exercise of selectivity in enforcement was not itself a violation of the equal protection clause where the selection was not deliberately based upon an unjustifiable standard such as race, religion or arbitrary classification.

<sup>144</sup>16A C.J.S. *Constitutional Law* 505 (1956).

The prohibition against denial of equal protection does not preclude a state or municipality from resorting to classification for purposes of legislation and confining the legislation to a certain class or classes prescribing different sets of rules for different classes or discrimination in favor of, or against a certain class, provided the classification is reasonable, rather than arbitrary and rests on a real or substantial difference or distinction which bears a just and reasonable relation to the legislation or subject or object thereof and *provided also the legislation operates equally, uniformly and impartially on all persons or property within a class.* (emphasis added).<sup>145</sup>

By its very nature, a single standard housing code creates classifications of housing types and applies different standards to meet the public health and safety needs of each. It recognizes that the requirements for single family residences may be different than those for apartment buildings or for rooming houses. In contrast, the flexible housing code appears to make distinctions within classes of housing types on the basis of the conditions of the neighborhood where the housing is located. Different code enforcement strategies are applied to housing in neighborhoods which have been classified by some subjective assessment into one of three categories of "hopless" (demolition), "improveable" (rehabilitation) or "currently acceptable" (conservation). By virtue of this classification, some landlords will be forced to improve while landlords owning property of the same type and condition but located within a different neighborhood will escape the costs of such improvements. Landlords who are not forced to make code improvements will enjoy an economic advantage over those who are required to improve their properties. Differentiation on the basis of location alone is not

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<sup>145</sup>*Id.* (footnotes omitted).

reasonably related to the goal of public health and safety and thus serious questions of the validity of the flexible housing code, in light of equal protection clause limitations, are raised.

The cases which proponents of the flexible housing code cite in support of the constitutionality of such a scheme appear to be based on classifications related to the nature of the housing structure itself and not to the general condition of the neighborhood. For example, in *City of Chicago v. Miller*, 27 Ill.2d 211, 188 N.E.2d 694 (1963), the Supreme Court of Illinois upheld an ordinance which exempted one- and two-family units from the code requirement of a single bathroom facility per unit despite equal protection arguments that such a classification was arbitrary and improper. This ruling allowed tenants residing in two-family units located in the same dwelling to share a single bathroom. Underlying the court's decision appears to be a recognition that tenants of smaller units, (e.g., a single family dwelling unit which has been converted into a two-family unit) may have different health and safety needs than those residing in larger buildings. Therefore, the decision merely allows classifications based on differences in housing size and does not reach the question of the validity of classifications based solely on housing location.

Similarly, the cases in which the courts have struck down structurally-based classifications, and which flexible housing code advocates attempt to distinguish, shed little light on the issue of location-oriented classifications. For example, in *Brennan v. Milwaukee*, 265 Wis. 52, 60 N.W.2d 704 (1953), the Wisconsin Supreme Court struck down an ordinance requiring the installation of a bathtub or shower in

apartments containing three or more rooms. The court recognized that the ordinance distinguishing apartments with fewer than three rooms from apartments with three or more rooms was based on concerns over the number of persons using a bath. Although this classification may be appropriate with regard to rooming houses, the court found that it was not appropriate with respect to the classification of apartment houses since these ordinances improperly "assume or imply that there are fewer occupants in a three-room apartment than in a four-or five-or six-room apartment."<sup>146</sup> The court concludes:

[I]t is . . . admitted that there may be as many occupants in a three-room apartment as in a six-room apartment. If personal cleanliness is the purpose to be attained and the number of rooms is not a rational index to the number of people who occupy them, then the differentiation cannot be reasonably based on the number of rooms.<sup>147</sup>

What the court appears to be saying is that it is not improper to require bathtubs or showers but if the housing code does require such facilities, then housing, regardless of size, must be subject to the regulation.<sup>148</sup>

One supporter of the flexible housing code scheme attempts to get

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<sup>146</sup>60 N.W.2d. 704, 707.

<sup>147</sup>*Id.*

<sup>148</sup>See also: *Stallings v. City of Jacksonville*, 333 So.2d 70 (Fla. App. 1970), where the court found that units containing central heating furnaces and air conditioning could not be exempted from the screen door requirements of the housing code. Since screen doors prevent the infiltration of disease-carrying insects, the court found that the danger is equally great in artificially ventilated dwellings as it is in naturally ventilated dwellings. "Entrance doors to centrally air conditioned dwellings must be opened and closed for ingress and egress the same as an entrance door to non-centrally air conditioned dwellings." 333 So.2d 70,72.

around the *Brennan* decision by suggesting that "[w]henver slums are eliminated, sound areas rehabilitated and the good areas conserved the community is benefited and the public welfare enhanced."<sup>149</sup> But this argument is insufficient since there is no evidence that the elimination of slums is a greater public good than their rehabilitation. Some may argue that the displacement and disruption of family and neighborhood ties occasioned by urban renewal is a harm sufficient to warrant a policy against the total razing of slum areas. Moreover, since the goal of housing codes is to protect health and safety, and not necessarily to achieve other public goals, the flexible housing code does not guarantee that it can better promote health and safety standards than can a uniformly applied single standard housing code.

Although the flexible housing code does not correct for the underlying failures of the current housing code system, it does come closest to recognizing that people have different housing needs and that these differences should be reflected in varying housing code standards. However, the flexible housing code does not define housing standards such that the benefits which they provide outweigh the costs which they impose on tenants.

<sup>149</sup>Landman, *supra* note 16, at 309.

VII. UNDERLYING FAILURES OF THE HOUSING CODE CONCEPT  
WHICH THREATEN THE EFFICACY OF HOUSING CODE REFORM

Housing codes are capable of successful enforcement. Unfortunately, given the present administrative, economic and political environment in which they exist, the cost of enforcement generally outweighs the benefits. Even if the problems of enforcement could be corrected, there are two important failures which underlie the housing code concept and threaten the efficacy of any reform measure which is aimed primarily at improving the enforcement of the present system.

Housing codes derive validity from their relationship to the promotion of health and safety goals. However, some municipal code provisions go beyond the mere assurance of these minimum requirements and instead promote certain materials and construction industries or specific values of housing quality. Therefore, the underlying problems of the present system are ones of improper beneficiaries and the inappropriateness of housing standards.

A. IMPROPER BENEFICIARIES

A significant, yet rarely publicized, beneficiary of housing code enforcement is the construction industry. Codes are powerful means through which certain rehabilitation construction methods and materials are favored, thus causing a limit on competition and a concomitant rise in code improvement costs.<sup>150</sup> Similarly, the more complex repair and maintenance standards become, the less opportunity there is for the

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<sup>150</sup>Field and Rivkin, *supra* note 111, at 2.

landlord to make repairs himself. In some instances, e.g., wiring and plumbing, it may be illegal for the landlord to make such repairs. Thus, members of the construction industry have a direct stake in the content and enforcement of housing codes and powerful lobbying groups have developed to protect those interests.<sup>151</sup>

There are two primary ways in which the construction industry benefits from strictly-enforced, maximum housing code requirements: through specific building material requirements and labor restrictions.

### 1. Building Materials

Restrictions in the use of building materials in some cases are important to the promotion of health or safety.<sup>152</sup> However, the purpose of other specific building material requirements in the promotion of health and safety is more tenuous.

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<sup>151</sup>For example, at least one court has allowed an association of plumbing contractors standing to review the governing body's decision barring the use of plastic piping. In so holding, the court found that the state building code permits local variation with respect to plumbing materials. *Association of Employing Plumbing Contractors of Nassau County, Inc. v. Gaynor*, 48 A.D.2d 892, 369 N.Y.S.2d 787 (1975). On review, the Supreme Court Special Term found that where the town had voluntarily adopted the state building code which permitted the use of plastic pipes in certain structures, the town was without authority to promulgate an order contrary to the state rule. 84 Misc.2d 990, 378 N.Y.S.2d 241 (1975).

It is questionable whether this case involves concern over the true differences in local physical or environmental conditions or merely the relative lobbying powers of state and local unions and materials producers. Interestingly, a proprietor of a local plumbing and heating firm testified that "plastic pipe is cheaper, easier to install and would eventually eliminate the use of licensed plumbers." 378 N.Y.S.2d 241, 247.

<sup>152</sup>For example, the use of fire retardant materials.

The net effect of building material restrictions is twofold. First, is cost. Building material restrictions allow the producers of such materials to enjoy a monopoly of sorts. The result is that where "building materials are produced by industries with high degrees of concentration . . . [it is not unlikely] that production is inefficient prices are above marginal cost and innovation is restrained."<sup>153</sup>

The second effect of building material restrictions is a resistance to technological change. The benefits which accrue to the building industry via building material restrictions result in an understandable reluctance on the part of producers to promote technological innovations. Although such innovations may reduce costs in terms of materials and labor for landlords, their introduction will also have the effect of reducing the economic benefits currently enjoyed by producers of code-required building materials.<sup>154</sup> Thus, the building industry has an

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<sup>153</sup>Alonso, Hassid, Smith, *Information on and Evaluations of Innovations in Housing Design and Construction Techniques as Applied to Low-Cost Housing* 51 (1969).

Although the authors speak primarily with reference to building codes, the same principles are applicable to housing codes.

Alonso suggests that some industry concentration may have the opposite effect and may in fact produce positive results. For example, major cost-reducing innovations, in plywood and wallboard, aluminum window sashes and exterior finishes, have been produced by oligopolistic industries. *Id.* at 51.

<sup>154</sup>Although Alonso suggests that the cost-reducing potential of code reform has substantially decreased because most major cost efficient reforms have already been instituted, this recognition does not diminish the fact that some building industry members continue to benefit from the specification of building materials within housing codes. These material requirements allow some producers to reap substantial profits which might not otherwise be gained, if landlords were free to choose among varying types of materials.



interest in preventing changes in code requirements which in turn may discourage technological innovation. As Alonso explains:

Within the existing set of rules they [business people] have some modest scope for innovation, but the pace is tedious, and the process moves mostly in the direction of cost-raising rather than cost-reducing innovations .  
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## 2. Labor Restrictions

Labor restrictions have a direct impact on the cost of housing code improvements. And the construction industry has been successful in limiting labor through both union and code regulations. For example, work quotas are often set by shinglers', masons' and bricklayers' locals and in some jurisdictions certain labor-saving tools, such as paint rollers and automatic nailers, have been prohibited.<sup>156</sup> Similarly, municipal codes may themselves restrict labor by, for example, requiring that only licensed plumbers do plumbing.<sup>157</sup>

## B. INAPPROPRIATE HOUSING STANDARDS

### 1. Dubious Benefits

There is no question that a lack of basic housing services has a great impact on health and safety. An early study on the affect of housing quality on health found that inadequate bathroom facilities, poor heating and ventilation, and improper sleeping arrangements contributed to acute respiratory infections and the transmission of

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<sup>155</sup>Alonso, Hassid, Smith, *supra* note 153, at 65.

<sup>156</sup>Little, *Housing: Expectations and Realities* 96 (1971).

<sup>157</sup>Field and Rivkin, *supra* note 111, at 41.

certain infectious childhood diseases. Poor bathroom facilities were also linked to minor digestive diseases, enteritis and infectious and noninfectious skin diseases. Finally, household accidents were associated with crowded or inadequate kitchens, bad electrical connections and poorly lit and structurally unsound stairways.<sup>158</sup>

In the United States today we have succeeded in eliminating, to a large extent, those substandard housing conditions which present real threats to personal health and safety.<sup>159</sup> As Glazer notes: "[A]lmost all urban dwellings have running hot and cold water and toilet facilities, are connected with sewers and are relatively uncrowded. Most are covered by public health services and building regulations which prevent the worst abuses."<sup>160</sup> Therefore, many, if not most, modern housing code provisions are not based on health and safety criteria but instead are "essentially matters of comfort, morality or convenience and amenities."<sup>161</sup>

Since we have virtually eliminated serious health and safety hazards, the question becomes whether "better" housing<sup>162</sup> produces social and economic gains for the tenant as well as for society. Alonso points out that during the 1940's and 1950's there were attempts made to

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<sup>158</sup>Wilner, Walkey and Tayback, *How Does The Quality of Housing Affect Health and Family Adjustment*, 46 *American Journal of Public Health* 736-44 (June 1956).

<sup>159</sup>See: Table 2, p. 75; Table 3, p. 76.

<sup>160</sup>Glazer, *The Effects of Poor Housing in Housing in Urban America* 165 (Pynoos ed. 1973).

<sup>161</sup>Parratt, *supra* note 25, at 171.

<sup>162</sup>"Better" housing is defined as that level of quality which exceeds minimum standards necessary to protect health and safety.

TABLE 2

## TRENDS IN PHYSICAL ADEQUACY 1940-1976\*

Criteria of Physical Adequacy (% of all occupied units)	1940	1950	1960	1970	1976
Lacking Some or All Plumbing Facilities	44.6	34.0	15.2	5.1	2.5
Dilapidated**	18.1	9.1	5.8	3.7	NA
Lacking Some or All Plumbing Facilities and/or Dilapidated	48.6	35.4	17.0	7.5	NA
In Need of Rehabilitation***	NA	NA	NA	NA	7.8

\* Source: Background Paper, *Federal Housing Policy: Current Programs and Recurring Issues* (1977).

\*\* The U.S. Bureau of Census definition of "dilapidated" has varied over time.

\*\*\* "In need of rehabilitation" is defined as having at least one of the following conditions: (1) absence of complete plumbing facilities; (2) absence of complete kitchen facilities; (3) the absence of either a public sewer connection, a septic tank, or cesspool; (4) 3 or more breakdowns of 6 or more hours each time in the sewer, septic tank or cesspool during the prior 90 days; (5) 3 or more breakdowns of 6 or more hours each time in the sewer, septic tank or cesspool during last winter; (6) 3 or more times completely without water for 6 or more hours each time during last 90 days; (7) 3 or more times completely without flush toilet for 6 or more hours each time during prior 90 days and/or if the unit had two or more of the following conditions: (1) leaking roof; (2) holes in interior floors; (3) open cracks or holes in interior walls or ceiling; (4) broken plaster over greater than one square foot of interior walls or ceilings; (5) un-concealed wiring; (6) the absence of a working light in public hallways for multi-unit structures; (7) loose or no handrails for multi-unit structures; (8) loose, broken or missing steps in public hallways in multi-unit structures.

TABLE 3

## TRENDS IN OVERCROWDING 1940-1976\*

Criteria of Overcrowding ** (% of all households)	1940	1950	1960	1970	1976
More Than 1.5 Persons Per Room	9.0	6.2	3.6	2.0	1.0
More Than 1.0 Persons Per Room	20.3	15.7	11.5	8.0	4.6

\* Source: U.S. Department of Commerce, *Social Indicators: 1976 - Annual Housing Survey, Part A, General Housing Characteristics* (1976).

\*\* Note that the rooms counted include whole rooms used for living purposes, such as living rooms, dining rooms, bedrooms, kitchens, furnished attic or basement rooms, recreation rooms, permanently enclosed porches suitable for year-round use, lodgers' rooms, and rooms used for offices by a person living in the unit.

show a correlation between housing and the quality of schools, welfare, fire and police protection. It was hypothesized that neighborhoods consisting of poorer quality housing consumed more public services than they contributed to the urban coffers.<sup>163</sup> This hypothesis merely states an obvious reality: Poor people consume as many, if not more, social services as persons within higher income groups yet are unable to contribute proportionate amounts in taxes as do members of this latter class. This conclusion has nothing to do with housing quality. Instead, the issue is one of incomes.

There have been numerous, later studies done which attempted to link poor housing to maladies such as stress, poor self-perception, lack of control over children, and family disorganization in general. Perhaps one of the most famous of these studies was done by Alvin Schorr, entitled *Slums and Social Insecurity* (1963). Although Schorr does present some very persuasive arguments in favor of the proposition that poor housing has a strong impact on the psychological well-being of the individual and the family, he is forced to admit that there is a lack of "solid evidence of a causal relationship between housing and health."<sup>164</sup> In recognizing that a mere correlation between poor housing and physical and mental health may not signal a causal relationship, Schorr targets the difficulty of separating housing from a multitude of other environmental and social factors as one of the major problems associated with measuring the impact of housing on health. Thus, there is no clear

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<sup>163</sup>Alonso, Hassid, Smith, *supra* note 153, at 11.

<sup>164</sup>Schorr, *Slums and Social Insecurity* 8 (1963).

evidence that improving housing quality, while holding all other factors constant, will actually make poor people healthier.<sup>165</sup>

It must be concluded that society's choice of putting money into housing rather than jobs, schools, direct consumption, or research about housing is more attributable to tradition in this area of income redistribution and to the visibility of slums than to an objective determination that this is a particularly effective form of aid.<sup>166</sup>

Although housing improved beyond a certain minimal health and safety standard may not make tenants healthier, better housing may be beneficial to tenants if they believe that such housing will improve their general well-being. Unfortunately, there is no evidence that code improvements are valued by tenants in an amount equivalent or in excess of the rent increases which follow.

It should be clear that whenever the costs of a social program exceed the benefits, continued administration of such a program makes neither economic sense nor good social policy. In searching for some justification for continuing our present housing code system, Hirsch presents the following question:

Since tenants do pay the full costs in those situations in which the program is a beneficial one, why have tenants not volunteered to pay the higher costs in order to receive these improvements in service? Or, to put it differently, if habitability laws are to be regarded as a socially desirable program for the poor, the costs to the individual landlord must be smaller than the tenant's evaluation of the benefits that the law provides. But, if this is true, why have the parties not transacted voluntarily, paying the landlord some amount greater than his costs of improvement, but less than the tenant's

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<sup>165</sup>Wood, *Introduction to Housing: Facts and Principles* 50 n.d. .

<sup>166</sup>Alonso, Hassid, Smith, *supra* note 153, at 12.

evaluation of the benefits, in order to make both parties better off?<sup>167</sup>

Hirsch concludes that since tenants have not volunteered to pay for code improvements, the benefits must be less than the costs.<sup>168</sup> He argues that tenants who value improved housing will make certain sacrifices in other consumption areas so that they can afford better housing. Although it is recognized that not all low income tenants will be able to adjust their budgets in this fashion, the conclusion remains "that indigent tenants are spending as much on housing as they consider to be in their best interest."<sup>169</sup> Thus, under the present system of housing code administration, neither a housing effect nor an income effect is achieved.<sup>170</sup> The result leaves all parties worse off. The landlord is strapped with the burden of making improvements and takes the risk that the costs he is forced to advance cannot be totally recouped through rent increases, and the tenant is forced to pay for improvements which he most likely neither values nor can afford.

## 2. The Value Issue

It has just been argued that above certain minimum standards, there is no evidence that requiring better housing will improve peoples' lives.

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<sup>167</sup>Hirsch, *supra* note 20, at 44-5.

<sup>168</sup>*Id.* at 45.

<sup>169</sup>*Id.* at 59.

<sup>170</sup>The housing effect requires tenants to pay only for the actual value such improvements have in relation to their well-being while the income effect allows a transfer of resources from landlords to tenants by preventing the landlord from passing the costs of code improvement to his tenants.

But how do we determine even that minimum standard?

The concept of minimum standards is difficult to determine in part because our values are constantly changing. These changing values have been reflected in a continual upgrading of housing code standards. For example, it was not until 1956 that New York City imposed central heating as a general housing code requirement. Today, a unit without proper heating facilities would be considered substandard.<sup>171</sup> Similarly, technological innovations have allowed our perceptions about conditions which were once considered inadequate to change. Early observers attacked dark, unventilated units as health hazards.<sup>172</sup> Today, due to the availability of electricity, rooms lacking natural light and open air ventilation are not considered to be substandard.<sup>173</sup> One New York court, in recognizing the problems of changing standards expressed the following:

Each owner of property and particularly of multi-tenanted dwellings must . . . be deemed to have purchased . . . with a consciousness of the possibility (if indeed, in these volatile times, of the probability) that new technological developments and sociological advances would insistently and inescapably require the installation of newly perfected protections of life and limb.<sup>174</sup>

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<sup>171</sup>Gribetz and Grad, *supra* note 1, at 1268-9.

<sup>172</sup>Veiller, *Tenement Housing Reform in New York City, 1834-1900* in *The Tenement Housing Problem* 82 (DeForest and Veiller eds. 1903).

<sup>173</sup>Hawkes, *Building Bulk Legislation: Description and Analysis* 8 [n.d.] .

<sup>174</sup>*People v. Halpern* 60 Misc.2d 873, 304 N.Y.S.2d 183, 188 (1969).

Housing code requirements have generally been held to be retrospective in their application. Therefore, the date of construction is not relevant to the applicability of new code requirements. *City of Chicago v. Miller* 27 Ill.2d 211, 188 N.E.2d 694 (1963); *Kaukas v. City of Chicago* 27 Ill.2d 197, 188 N.E.2d 700 (1963).



Housing standards are also culture bound. Many societies throughout the world have housing conditions which by American standards would be substandard yet which pose no serious questions or problems of family living within those societies.<sup>175</sup> Theoretically, if we are concerned merely with minimal standards of health and safety, the minimum housing standard would be free of any cultural bias and instead would be an absolute standard based on minimal levels necessary to preserve life and health. However, expectations developed within this country have caused the definition of "minimal standards" to mean more than the mere protection of health and safety. Therefore, American housing must be judged by its adequacy within our system. The question thus becomes: What group formulates our housing codes and to what extent are their values reflected in the housing standards set forth?

In this country, it is the planner, architect, contractor, tradesman, manufacturer of materials, politician and government official who formulate housing standards. These people are generally members of the middle or upper income groups and therefore it is the values of these groups which are represented in housing codes. However, it is clear that concepts of privacy, space, social contact and a variety of other lifestyle factors important to housing structure and design differ greatly, not only among people, but particularly among income groups.<sup>176</sup>

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<sup>175</sup>Glazer, *supra* note 160, at 159.

<sup>176</sup>Alonso, Hassid, Smith, *supra* note 153, at 7.

One study shows that low income persons consider proper room temperature control, room size, exterior appearance and backyards to be more important than features such as cross-ventilation, carports and

If the poor do not desire certain living conditions which reflect middle class values, then we are forcing the poor to pay for standards which are not only of no benefit to them, but also which they can rarely afford. Thus, our housing standards should relate not to the desires of the middle classes, but instead to the minimally acceptable standards of lower income groups.<sup>177</sup> Members of other income groups can then purchase housing which accommodates their values and which can be provided through the marketplace, without need for government intervention.

Redefining our housing standards in a manner which corresponds to the needs of the poor does not require that we readjust our culturally based standards of acceptable living. Rather, it merely suggests that we refrain from imposing middle class conceptions of habitability on all groups within the society. Higher income groups are able to have their living standards translated through the marketplace into housing which meets their needs; lower income persons cannot. By imposing standards which are higher than is desired or affordable by the poor, we are leaving them without a choice.

### 3. Constitutional Considerations

In addition to the policy considerations which favor the reduction of current housing codes to minimum standards, there are constitutional questions which may arise where codes are found to reach beyond minimal

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separate dining areas. Sanoff and Sawheny, *Residential Liveability: A Sociophysical Perspective* 38 (1971).

<sup>177</sup>This assumes ofcourse that minimum health and safety objectives will be met. Such an assumption is based on a belief that housing hazards, which produce potential threats to life or safety, are not only wasteful of human resources but also drain the public treasury.

standards of housing enforceable under the police power.<sup>178</sup> As

O'Bannon explains:

The primary intent of building regulations is to provide reasonable controls for the construction, use, and occupancy of buildings, and all of their various components. Thus, such codes are minimum in nature, and under the provision of the police power cannot legally be made to require construction of a quality excessive of that which is necessary to furnish a degree of safety.<sup>179</sup>

Where codes are found to be more than minimum standards of health and safety courts have not been reluctant to invalidate those provisions which bear no relation to health or safety. For example, in *Boden v. City of Milwaukee*, 8 Wis.2d 318, 99 N.W.2d 156 (1959), the court found that the relationship between public health and safety and the requirement for exterior paint was too remote, if it existed at all, to allow condemnation for its violation. Thus, the owner was allowed to pay a fine for noncompliance rather than make the repair.<sup>180</sup> A more recent court has found that air conditioners do not constitute an "essential service" which landlords can be compelled to maintain.<sup>181</sup>

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<sup>178</sup>Boggan, *Housing Codes as a Means of Preventing Urban Blight: Constitutional Problems*, 6 Wake Forest Law Review 255, 257 (1970).

<sup>179</sup>O'Bannon, *supra* note 2, at 10.

<sup>180</sup>See also: *Columbus v. Stubbs*, 225 Ga. 765, 158 S.E.2d 393 (1967), where the court struck down an order requiring a landlord to make repairs including exterior painting, installation of at least two electrical outlets per room, heating in bathrooms, repairing of cracks in ceilings and walls, and weatherproofing windows and doors. *But see: Berberian v. Housing Authority of City of Cranston*, 112 R.I. 768, 315 A.2d 747 (1974).

<sup>181</sup>*Samson Management Corp. v. Reichman* 63 Misc.2d 238, 309 N.Y.S.2d 838 (1970).

This case presents the interesting question of whether the courts will view air conditioners as a necessity in the future.

Although the courts are not in agreement as to what constitutes minimum health and safety standards, it is clear that they do look with skepticism upon regulations mandating repairs which promote solely aesthetic goals. The police power has generally not been so broadly defined as to include the regulation of conditions which are visually offensive.<sup>182</sup> However, a regulation which results in the elimination of an unaesthetic condition will not be invalidated where the regulation also has some purpose in promoting public health or safety goals. For example, in *People v. Greene*, 264 Cal.App.2d 774, 70 Cal.Rptr. 818 (1968), the court allowed an ordinance requiring the clearing of trees, weeds and unsightly growth from private property even though the purpose of the regulation was not only to reduce fire hazards but also to preserve the attractiveness of the neighborhood.<sup>183</sup>

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<sup>182</sup>O'Bannon, *supra* note 2, at 10.

<sup>183</sup>See also: *Thain v. City of Palo Alto*, 207 Cal.App.2d 173, 24 Cal.Rptr. 515 (1962), where a city ordinance requiring owners to remove weeds from the premises and adjacent sidewalks or streets was ruled to be valid.

VIII. A PROPOSAL: A MINIMUM CODE CERTIFICATION PROGRAM  
WITH PRIVATE CONTRACTUAL RIGHTS FOR  
ADDITIONAL HOUSING QUALITY

A. HOW AND WHY IT WORKS

Before we blindly follow those who advocate new cures, we must move cautiously to avoid selecting reforms which are merely old methods disguised with new labels. As a first step, we must define our goals. If we value quality housing over the costs of providing such housing, then our strategy must be different than if we are concerned with housing costs and the restraints it creates on the freedom of tenants to make consumption decisions.

The first goal requires a maximum standard housing code. Yet, there are a variety of reasons why the current system of maximum standard housing codes has failed to produce "better" housing. Some of these failures are inherent to the concept of housing codes and some are generated by present methods of code enforcement. First, there are a myriad of administrative, political, legal and economic problems which threaten the efficacy of present enforcement procedures. Second, the current concept of maximum standard housing codes is inherently defective in that it allows certain groups, particularly the construction and materials industries, to improperly benefit from the implementation of specific code requirements. And third, the current system of government-defined standards seems hopelessly hindered by our inability to develop standards which are valued by all who must pay for them.

The second strategy therefore becomes not only the most feasible alternative but the most beneficial one as well. Recognizing that it is

unrealistic to assume that any system of code maintenance can be carried out without some form of administrative or enforcement mechanism,<sup>184</sup> an appropriate reform measure should attempt to reduce reliance on an elaborate enforcement mechanism while at the same time provide for market-defined standards of housing quality which allow tenants to pay only for those housing services which they value and are willing and able to pay for. The institution of a minimum housing code certification program with reliance on private contractual rights to provide additional housing quality offers the means to achieve both these goals.

The certification of residential properties is not a new concept. However, certification requirements have been generally limited to special forms of multi-unit dwellings such as hotels and lodging or rooming houses.<sup>185</sup> Each of the model building codes includes a procedure for the periodic inspection of all required safety and sanitation requirements.<sup>186</sup> Yet, some cities require certification only under certain conditions, e.g., in advance of reoccupancy when property is transferred, a new mortgage is issued, or when property has been completely vacated.<sup>187</sup> Thus, the use of certification to provide continuous supervision of basic health and safety requirements in all existing structures has not been implemented on a broad scale.

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<sup>184</sup> Even within a perfect society where all landlords wish to comply with code requirements, some mechanism is needed to check for inadvertent violations and to guide landlords in their attempts to comply.

<sup>185</sup> Slavet and Levin, *New Approaches to Housing Code Administration* in U.S. National Commission on Urban Problems, Research Report No. 17 (1969).

<sup>186</sup> Taylor, *supra* note 11, at 31.

<sup>187</sup> Slavet and Levin, *supra* note 185, at 46.

Under a certification program, each multiple family dwelling unit would be required to comply with minimum housing code requirements.<sup>188</sup> Without certification, the building could not operate.<sup>189</sup> Thus, the tenant who is unable or unwilling to pay for housing which is maintained in a level above this minimum code is not required to do so, yet he is afforded the protection of a certificate of operation. Although, in theory, no unit should operate without a certificate, a tenant can be guaranteed that the unit does comply by merely requesting to see the certificate prior to renting the premises.<sup>190</sup>

Beyond certification, a landlord is required by law to do nothing more than maintain his building at a level which lives up to certification requirements. Thereafter, the burden is on the tenant, as a consumer, to contract for additional housing quality. The contract could be incorporated into a standard lease form. Under this contract, the landlord would be required to state his current and future obligation to comply with minimum code provisions and then itemize those additional housing

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<sup>188</sup> Certification should be for a fixed period - renewable upon reinspection and verification of compliance.

<sup>189</sup> Although this appears to be a harsh penalty, it is not since certification relates only to minimum code requirements with which most landlords presently comply. Moreover, for those landlords who do not currently comply, a leeway period should be allowed to enable them to comply without a total shutdown of operations. A compliance period would not only enable landlords who are able to comply to do so, but it would also protect tenants from premature evictions due to closings for non-compliance. Buildings for which compliance is financially infeasible should be removed from the market altogether.

<sup>190</sup> It is recognized that city-wide certification would be a gradual process. Perhaps its initial implementation should occur on a district-wide rather than city-wide basis. Where even district-wide certification is not initially feasible, a voluntary certification program could be instituted until compulsory certification is possible.

services which he intends to provide.<sup>191</sup> Both landlords and tenants will be apprised of their rights and obligations under the contract at the time in which they enter into the agreement. Once a breach occurs, a civil suit for damages may be brought.

A strategy which focuses upon minimum levels of health and safety in housing reduces to a minimum the opportunities which current failures have to corrupt the system by relying on a market-defined standard of housing quality. Above these minimum levels of housing service required by the code, people are free to choose whatever level of housing for which they are both willing and able to pay. Although the proposal does provide an opportunity for the reduction of our reliance on current enforcement mechanisms, it requires some degree of government intervention. Thus, the question immediately arises: If this minimum code certification program requires some type of enforcement mechanism and if comprehensive enforcement of this system cannot be achieved, aren't we back where we started? The simple answer is no, because the minimum code certification

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<sup>191</sup>To prevent landlords from including housing services which should not properly be considered in determining housing price, the landlord's list should be limited to a category of housing services developed by the municipality which add to the increased habitability of a unit.

It is also possible that higher levels of certification can be implemented. Thus, for a fee paid to the locality, so as not to create an additional public burden for what is essentially a private benefit, a landlord could get a certificate of "high quality" if he meets a given set of housing standards which exceed minimum standards. Arguably, the potential for graft with this "high quality" certificate is great. However, the benefit to the tenant, i.e., a guarantee by a technical expert that the landlord's representations are correct, thereby reducing the burden on the tenant to discover and check for himself any discrepancies, should warrant consideration of its implementation.



program, unlike the present system, has a constituency.

Returning to the Ackerman-Komesar debate, tenants would benefit if Ackerman were correct and rents did not in fact rise with the imposition of code enforcement. Conversely, landlords benefit if they are able to pass on the costs of code improvement to tenants as Komesar predicts. In reality, both tenants and landlords believe in the results reached by the Komesar analysis. Thus, tenants fearing an increase in rents do not want code enforcement,<sup>192</sup> while landlords are indifferent at best to the prospect of code enforcement. Therefore, the present system has no constituency. All other things remaining equal, neither tenants nor landlords will benefit.

In contrast, a minimum housing code will have a constituency. Except for basic standards, landlords do not have to bring their properties into compliance with code requirements for which their tenants are unable or unwilling to pay. Without the threat of rising rents, occupancy rates will remain stable<sup>193</sup> and landlords will not risk being unable to recoup code improvement costs by an inability to raise rents sufficiently or to attract higher rent paying tenants. Similarly, tenants will benefit from a minimum code since it provides them with the opportunity to choose between increasing their housing consumption or increasing their consumption of other goods.

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<sup>192</sup>Tenants will only favor code improvement if the increase in rents is less than the benefit which they receive from such improvements.

<sup>193</sup>Landlords will not have to fear falling occupancy rates or incur the transaction costs associated with a shifting of tenants - i.e., a movement out of tenants who cannot afford rent increases and a movement in of those who can.

Some may argue that reliance on the market enforcement of housing quality will lead to housing which is unsanitary, uninhabitable and unaesthetic. However, the minimum code certification program with private contractual rights does not suggest that minimum standards of health, sanitation and safety need not be met. Such standards continue to be important not only for the individual but for the protection of the community as well against preventable disease and fire and safety hazards. Moreover, the market itself has generally insured that certain housing basics are provided. Usually, housing requirements are not incorporated into the housing code until the market is already providing such services on a widespread basis.<sup>194</sup> And, it is doubtful whether many landlords, even in the absence of code regulations, would offer units which fail to provide even minimal plumbing and sanitary facilities, since most of even the lowest quality housing already meets these standards. As one court notes:

Economic self interest - the incentive to obtain the higher rentals which might be exacted of those able and willing to pay adequately for increased comfort and safety - would doubtless, be a force sufficient, even without legislative compulsion, to induce the erection of some buildings which would embody the latest improvements and the most advanced ideas in safety and construction.<sup>195</sup>

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<sup>194</sup> DeForest and Veiller, *The Tenement House Problem*, in *The Tenement House Problem* 24 (DeForest and Veiller eds. 1903).

There are very practical reasons for this phenomenon. If a municipal housing code were to suddenly mandate a requirement for which a large proportion of the housing stock was in noncompliance, the total costs of compliance would be prohibitive. Moreover, it is likely that landlords would either fight for its repeal or refuse to comply.

<sup>195</sup> *People v. Halpern*, *supra* note 174, at 185-6.

The minimum code becomes important only "where economic self-interest ceases to be a sufficiently potent force for the promotion of the general welfare, or, indeed, becomes a force which may actually injure the general welfare."<sup>196</sup> At this point, regulations are required to insure that "tenement houses or multiple dwellings shall conform to minimum standards which may be reasonably regarded as essential for safe, decent, and sanitary dwelling places."<sup>197</sup>

B. MINIMUM CODE REQUIREMENTS -  
BASIC HEALTH AND SAFETY CRITERIA

The certification of minimum code compliance requires a definition of "minimum standards". Although we have an abundance of elaborate federal regulations and model, state and local housing codes which set forth maintenance and occupancy standards, no clear concept of minimum health and safety can be derived from this broad array of legislative material. The U.S. National Commission on Urban Problems conducted a comparative analysis of the four model housing codes, nine state housing codes, and sixteen city or county housing codes. The goal of this study was to determine whether a consistent definition of substandard housing could be found throughout this sample. The Commission's findings were not surprising:

[T]hese standards showed that there are wide variations among them, that they are often in conflict; that the variations are so great that by definition they could not be based on scientific or objective standards; that many provisions are couched in subjective language - "adequate",

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<sup>196</sup>*Id.* at 186.

<sup>197</sup>*Id.*

"in safe condition", or "in good repair"; that many of the objective standards are based on a combination of tradition, rule of thumb, or personal experience; and that they differ in emphasis from structure to health, depending upon the code adopted.<sup>198</sup>

With similar difficulty the courts have grappled with a definition of substandard housing. The need for a precise definition of minimum housing requirements became even more critical with the development of the doctrine of implied warranty of habitability. An attempt to reach such a definition was made by the court in *Javins v. First National Realty Corporation*:

Where American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services - a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and proper maintenance.<sup>199</sup>

However, the improvement of housing defects such as malfunctioning venetian blinds, water leaks, wall cracks and a lack of painting were called "amenities" by another court and therefore were not included within the category of "uninhabitability".<sup>200</sup>

In the final analysis, we find that the definition of substandard

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<sup>198</sup>U.S. National Commission on Urban Problems, *supra* note 7, at 277.

See generally: Sutermeister, *Inadequacies and Inconsistencies in the Definition of Substandard Housing*, U.S. National Commission on Urban Problems, Research Report No. 19 (1966).

<sup>199</sup>428 F.2d 1071, 1074.

<sup>200</sup>*Academy Spires, Inc. v. Brown* 111 N.J. Super. 477, 268 A.2d 556 (1970).

See also: *Green v. Superior Court*, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal.Rptr. 704 (1974), where habitability was defined as "substantial compliance with those applicable building and housing code standards which materially affect health and safety."

housing is a highly variable one and is dependent in large part upon community values as to what the level is below which housing quality must not fall. Unfortunately, subjective formulations of substandard housing have led to overbroad, ineffective and frequently unenforceable maximum codes. What is needed is a return to a more objective definition of substandard housing which is rooted in basic health and safety requirements.

The development of a minimum housing code derived solely from basic human requirements of health and safety requires an evaluation of the relationship between housing characteristics and health and safety. Ideally, such an evaluation would be based on the most current and accurate scientific information available concerning this relationship. Unfortunately, much about the impact which the built-environment has upon man's physical and psychological well-being remains unknown.

The most comprehensive information on this subject is contained within *Basic Health Principles of Housing and Its Environment* which was prepared by the American Public Health Association (APHA) in 1971. This study is based upon an earlier edition first published by the APHA in 1938, entitled *Basic Principles of Healthful Housing*. This 1971 study, as well as the earlier version, are not restricted to mere health and safety considerations. Instead, each includes several chapters relating to the psychological needs of people and the importance of the physical environment in meeting these needs. However, most of these psychological factors are ambiguous and the validity of such provisions is unclear. For example, included within the list is the "Provision of opportunities for normal family life" (1938), and "Design, facilities, surroundings,

and maintenance to produce a sense of mental well-being" (1971). The concepts of "normal family life" and "mental well-being" are left undefined and virtually no scientific evidence is offered to support their importance. Similarly, little guidance is given on how to fulfill these mandates.

If these psychological criteria are omitted, the APHA studies do provide a guide for outlining those characteristics of housing which are important to the promotion of the fundamental physiological needs of people. These needs can best be categorized under two headings: Health and Sanitation Maintenance, and Safety and Injury Prevention.

#### Health and Sanitation Maintenance

1. Shelter Against the Elements: This requirement is concerned with the structural soundness of the dwelling unit. To provide minimum conditions, each unit must provide adequate protection against the elements: cold, heat, wind, rain, snow, and other severe weather conditions. Since climatic conditions vary among regions, the degree of protection and the methods required to provide such protection will necessarily differ in accordance with these regional climatic variations.
2. Maintenance of a Controlled Thermal Environment: This requirement is inextricably related to the requirement of structural soundness. In essence, the maintenance of a controlled thermal environment requires that the structure be protected against the extremes of heat and cold. At a minimum it "calls for reasonable nonconductivity of walls, ceiling, and floor, and an appropriate means of supplying the amount of artificial heat in winter and the local

climate demands."<sup>201</sup> The converse requires that adequate cooling through either natural ventilation or artificial means be available.

3. **Acceptable Levels of Indoor Air Quality:** It is recognized that many air pollutants are caused by external sources and are thus beyond the control of the individual landlord. Therefore, the requirement of indoor air quality is not concerned with factory, automotive or other harmful environmental exhausts. Nor is it concerned with air contaminants caused by the tenant himself such as cigarette smoke and aerosol sprays. Instead, indoor air quality requires the provision of proper ventilation systems and the proper installation and maintenance of heating and cooking facilities to prevent dangerous concentrations of smoke, noxious fumes, and carbon monoxide.
4. **Design and Maintenance to Exclude and Facilitate the Control of Rodents and Insects:** Because rodents and insects are carriers of diseases and infections which affect human health, it is important that housing be designed and maintained in a manner which reduces to a minimum the infiltration of vermin.
5. **Provision of a Sanitary Water Supply:** Basic health and sanitation requires that a pure drinking water supply be provided within each dwelling unit.
6. **Provision of Sanitary Bathroom Facilities:** There has been considerable controversy over whether bathroom facilities, particularly a bathtub, shower and sink, is necessary to promote health and safety. The APHA

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<sup>201</sup>Wood, *supra* note 165, at 29.

concludes that such requirements are basic to "adequate personal and household hygiene."<sup>202</sup> A similar debate surrounds the issue of whether both hot and cold water need be provided. While it may be argued that the absence of hot water does not in itself pose a serious threat to health or safety, the benefits which hot water may have in encouraging personal hygiene and household sanitation may warrant its inclusion in the list of basic health requirements. At any rate, the provision of sanitary bathroom facilities requires that such facilities be part of a plumbing and drainage system which is designed, installed and maintained to protect against contamination, leakage, stoppage, overflows and the escape of noxious odors.

7. Facilities for the Sanitary Preparation and Disposal of Food: Where a kitchen is provided, facilities should include a sink with hot and cold water and a proper system for the disposal of food wastes which protects the unit from the breeding and spreading of insects and rodents.

#### Safety and Injury Prevention

1. Maintenance of Structural Stability: The building code is designed to insure that the dwelling unit is constructed in a structurally sound manner. Periodic monitoring is necessary to insure that the building can withstand anticipated environmental impacts. Therefore, continued maintenance of structural safety should be mandated through the housing code. It should be noted that minimum structural safety

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<sup>202</sup>American Public Health Association, *Basic Health Principles of Housing and Its Environment* 25 (1971).



requirements will vary according to the environmental hazards present within a particular area. For example, in the west, concern over seismic safety will necessitate stricter standards than would be required in areas where the potential for major earthquake damage is not very great.

2. Maintenance of Fire Safety: Provisions regarding the construction, installation and materials necessary to minimize fire hazards are contained within the building or fire code. Comprehensive codes relating to fire prevention design and construction have been developed by several groups including the American Insurance Association which developed the National Building Code.<sup>203</sup> It is the function of the housing code to insure that these basic building and fire code requirements are maintained in working order.
3. Control of Hazardous Materials: As the industry becomes more sophisticated in its methods for testing the health and safety aspects of building materials, some materials which have been applied on a wide scale in the past may prove to pose serious health or safety hazards. The connection traced between lead-based paint and lead poisoning in children is a grim example of how our ignorance about building materials may develop into a serious health problem. It is essential that materials which have proven to cause serious health conditions be explicitly banned.<sup>204</sup>

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<sup>203</sup>These codes include requirements such as fire stops, automatic sprinkler systems, and the provision of adequate fire exits.

<sup>204</sup>See: Appendix A, p. 114, for a translation of these basic health and safety principles into a Proposed Minimum Housing Code.

This list of basic health and safety requirements covers a significantly narrower class of housing characteristics than is generally found within a local housing code. Perhaps the most significant exclusion, here, is that of occupancy standards. Occupancy standards are frequently calculated by the "minimum density function of persons per room, including all rooms in the house, minus bathrooms, or as number of persons per sleeping room."<sup>205</sup> Overcrowding is usually set at the point where person per room rates equal or exceed 1.5.

Although overcrowding is not generally cited as a major cause of health or safety hazards, occupancy standards are frequently included within the municipal housing code. Overcrowding is claimed to be linked to stress, anti-social behavior, and poor study habits in children. However, no strong empirical data is available to validate such claims.<sup>206</sup> One observer, in commenting on the difficulty of measuring the impacts of overcrowding, states that the "[h]azard costs from overcrowding are long term in impact and psychological in nature and are thus exceedingly difficult to monetize."<sup>207</sup> Measurement of the impacts of overcrowding is also difficult to accomplish because overcrowding may be just one factor which contributes to psychological problems and family disorganization.<sup>208</sup> Occupancy standards are also difficult to enforce because it is

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<sup>205</sup>Greenfield and Lewis, *An Alternative to a Density Function Definition of Overcrowding in Housing in Urban America* 167 (Pynoos ed. (1973)).

<sup>206</sup>Alonso, *supra* note 153, at 11.

<sup>207</sup>Abbott, *supra* note 19, at 122.

<sup>208</sup>American Public Health Association, *supra* note 202, at 170; Glazer, *supra* note 160, at 163-4.

hard to determine how many persons are actually residing within a given unit.<sup>209</sup> Therefore, since the impact of overcrowding on physical or mental health remains largely unproven, "a basis is lacking for overruling the preferences of housing consumers who would rather be overcrowded by forcing them instead to pay increased rents or move to cheaper and doubtless more deteriorated units in order to meet occupancy limits."<sup>210</sup>

C. WHAT THIS PROPOSED REFORM  
CAN AND CANNOT DO

1. Successes

Except for major deficiencies, it is doubtful whether the average low income tenant considers the habitability of a dwelling unit. Instead, he is concerned with finding affordable housing. "Either he is evicted from or he has abandoned a prior uninhabitable apartment, and he must house his family as soon as possible."<sup>211</sup> The minimum housing code addresses this problem of affordable housing. The tenant is protected only to the extent of minimal levels of health and safety. While those tenants who desire better housing and who are able to afford it, will be protected by contractual rights. In short, the minimum code certification program with private contractual rights for additional housing quality provides the best of both worlds. It allows for the deregulation of housing code standards in favor of private market incentives yet it also

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<sup>209</sup>Abbott, *supra* note 19, at 122.

<sup>210</sup>*Id.*

<sup>211</sup>Garrity, *Redesigning Landlord-Tenant Law for an Urban Society in Housing in Urban America* 76 (Pynoos ed. 1973).

insures, through the certification process, that no unit falls below those standards necessary to protect life and health.

Implicit in the present system of housing codes is an assumption that the poor are unable to make wise choices about the consumption of their limited resources. This view is not only an incorrect one, but also a paternalistic one. There is nothing to suggest that poor people are less capable of choosing between various consumer goods than persons with higher incomes. To be equitable, we should devise a system which controls everyone's freedom of consumption (clearly not a democratic view) or control no one's. Under the present proposal, tenants will be allowed to rearrange their budgets in a fashion which maximizes their enjoyment, without government interference.

In addition to the fact that a minimum code certification program with private contractual rights would provide benefits to both tenants and landlords, this scheme also eliminates some of the underlying failures associated with the present system. By its very nature, this system dispenses with the problem of inappropriate standards since housing quality is defined not by an individual group of officials but rather by the market. In this way, each consumer defines what level of quality is adequate for his needs and budget. Similarly, the problem of improper beneficiaries is reduced since, because standards are kept to a minimum, the construction industry will not be encouraged to lobby for provisions aimed solely at promoting certain materials and labor methods. Although the construction industry will continue to benefit from housing improvements, the opportunity for the promotion of improper standards will be substantially reduced.

The minimum code certification program with contractual rights proposal also enables us to avoid some of the systemic failures of the enforcement mechanism which presently exist.

Constitutional Questions. The concept of a minimum code is virtually free from the equal protection arguments associated with selective enforcement schemes and the constitutional considerations raised where codes mandate standards which bear little or no relation to health and safety. Moreover, the contractual component of the proposal is premised upon the private right to contract and therefore is limited only by contractual notions of adequacy of consideration and fairness in bargaining.

Inadequate Enforcement Mechanisms. The substitution of present housing codes with a simple minimum standard code will dramatically decrease the amount of money and manpower presently necessary to enforce housing codes. Except for basic requirements, standards are voluntary. Therefore, there is no need for elaborate patrolling and punishment mechanisms.

A reduction in our reliance on complex administrative and enforcement systems not only produces cost savings but also abandons the perspective that noncompliance with present maximum standard housing codes is a crime. Currently, some landlords are being punished or are in fear of being punished for violating standards for which there is no real victim.<sup>212</sup> Tenants can be considered victims only to the extent

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<sup>212</sup>Potential victims are created only where housing is maintained at a level which threatens health or safety. .

that they are forced to pay for services which they do not necessarily value.

Administrative and Political Obstacles. No system which requires government intervention can be totally void of administrative and political inefficiencies.<sup>213</sup> However, a system which relies primarily on private, voluntary methods of enforcement allows for a reduction of reliance on government intervention and thus minimizes the opportunity for some administrative and political abuses. Moreover, the costs of bureaucratic delays will be reduced under a system which does not require extensive administrative procedures.

The Cost of Compliance. Under a minimum code, the financial problems associated with compliance are virtually eliminated for the majority of landlords. Standards are so minimal that few landlords would not already be in compliance or would be required to make only minor repairs to bring their properties up to code.

Admittedly, the minimum code certification scheme is aimed at relieving the present economic burden of landlords forced to comply with housing codes which exceed basic levels of quality. There is, however, that class of landlords who would be faced with a tremendous burden, or the alternative of abandonment, in the wake of minimum code enforcement.

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<sup>213</sup> Although the implementation of a new system will give way to new types of enforcement and administrative procedures, unless we feel comfortable with no government intervention or spend inordinate amounts of time and money in supervision, some failures will continue to exist since no system existing within the present political structure can escape all of the traditional abuses inherent within the democratic process.

Landlords who cannot afford minimum standard maintenance and repair costs are not helped by the minimum code. In situations where it is economically infeasible or inefficient to bring a building up to basic code condition, such a structure should be targeted for conversion to some more efficient use or demolished.

The Economic Reality of Nonenforcement. By eliminating the enforcement of housing codes which meet optimal levels of health and safety, rent increases are avoided for those low income tenants who are most in need of affordable housing. Since the supply of housing, currently labeled "sub-code" yet sufficient in terms of health and safety protections, is not reduced through code enforcement, a shortage is avoided and those tenants who can afford only substandard housing are protected against enforcement-induced rent increases.

Finally, the market consequences which either force evasion of the law by government officials or encourage violations of it by profit-minded landlords are minimized. Since the failure to make improvements above minimum code levels will no longer be considered a violation of the law, government officials will not be placed in the awkward position of ignoring code violations where they know that code enforcement would only serve to raise rents. Similarly, landlords who do not wish to maintain their properties at levels above minimum health and safety requirements will not be required to do so. However, neither will they benefit from their ability to avoid code improvement costs because such costs will not be imposed on other landlords either.

## 2. The Issue of Tenant Responsibility

Transforming housing quality into a contractual relationship requires tenant responsibility. Yet this may not be such a bad thing. Today, tenants make many incorrect assumptions about the housing code enforcement process and the protections it offers. When in fact, due to the current enforcement process, which is generally selective at best and nonexistent at worst, present housing codes are not providing tenants with the protections which they believe exist. The contractual scheme removes tenants from this false sense of security. Tenants will be required, as are all other consumers, to make sure that the product meets their expectations. For example, a purchaser of a new car is afforded certain protections under government controls which insure that the car meets basic safety standards. However, beyond this, each purchaser has the burden of selecting the car with the desired level of "extras" at a price at which he is willing to pay. The same principle should be applied to the housing industry.

I will concede that the tenant does not have the technical expertise to analyze structural soundness and other technical factors which concern habitability. Most tenants do not presently know whether their buildings meet code standards and, with improper enforcement, many defects probably go unnoticed. Under this proposal, minimum code requirements will insure that conditions which threaten health or safety do not exist. Therefore, it will be unnecessary for the tenant to acquire the skills to check for major health or safety violations. Yet, tenants do have the skills to inspect for amenity conditions. Services and conditions which presently distinguish a low-rent unit from a high-



rent unit are certainly visible to the common tenant. This is how the market currently works. A landlord would be unable to rent a unit for \$400 per month unless the tenant were able to readily ascertain the additional housing services which such a unit offers as compared with a lower priced unit. The expectation of maintenance levels and amenities are quite different in a \$400 per month unit and a \$40 per month unit. The landlord of the \$400 unit would continue to maintain his building at a level desired and expected by his tenants even in the absence of code enforcement. Otherwise, he would risk losing tenants.

In short, the government should protect all tenants against conditions which threaten health or safety. Yet, beyond this, tenants, as consumers, should be accountable for their own welfare. Unfortunately, placing a substantial part of the burden for code enforcement on tenants is not without its problems. Certainly, some tenants will be negligent in securing and protecting their rights under a private landlord-tenant contract.<sup>214</sup> However, granting new responsibilities to tenants, who are concerned with the opportunity to choose housing consumption levels, frees them from reliance upon the adequacy of the government administrative process to promote their best interests.

Along with tenant responsibility, the proposal also provides the tenant with protections which are currently available to him under our present housing code system. Through the certification process, all tenants will be granted the protections of a minimum housing code.

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<sup>214</sup>Reliance on private enforcement of housing quality requires some form of public education so that tenants, as well as landlords, are made aware of their rights and obligations under this system.

Neither the landlord nor the tenant can insulate himself from the minimum housing code through a contractual relationship.<sup>215</sup> Landlords have generally been denied the right to collect rents from tenants who leased units which were in violation of housing regulations.<sup>216</sup> Moreover, the freedom to contract for services above minimal levels of health and safety is not absolute. The liberty to contract is limited not only by the police power but also by notions of fair dealing - free from fraud, deception and undue influence.

It is conceivable that some landlords may attempt to take advantage of the tenant whose ability to contract is impaired by age, mental incompetence or physical handicaps. Special protections, perhaps in the form of harsh penalties for landlords who take advantage of those who are not in a position of equal bargaining, should be applied. It is also recognized that in times of short housing supply, the ability of the tenant to bargain for additional services may be more limited. However, this is a problem of housing supply which can only be cured by

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<sup>215</sup>It is well accepted that a statute which governs the maintenance of health and safety standards cannot be invalidated simply because enforcement of the statute requires the impairment of contractual relationships.

In *300 W. 154th St. Realty Co. v. Dept. of Building*, 55 Misc.2d 37, 284 N.Y.S.2d 203 (1967), the court upheld a statute which compelled repairs in leased premises which were reasonably directed toward eliminating a health nuisance and correcting the problem of substandard housing, even though such an action might impair the obligation of the landlord's contract. This case was affirmed, 30 A.D.2d 351, 292 N.Y.S.2d 25 (1968), but later modified, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970), to disallow withholding of rents in excess of repair costs.

See also: *Manhattan Club v. Landmarks Preservation Comm'n of City of New York*, 51 Misc.2d 556, 273 N.Y.S.2d 848, 852 (1966).

<sup>216</sup>Hirsch, *supra* note 20, at 18.

increases in the housing stock and not by any mechanism which tampers with the landlord's right to set prices freely.<sup>217</sup>

In recognizing the potential for unequal bargaining power between landlords and tenants under the contractual rights scheme, the economic disadvantage which low income tenants face under this proposal cannot be ignored. Implicit in these arguments in favor of contractual rights is a recognition that, although in-kind transfers of housing subsidies are infeasible, general income subsidies are not only feasible but necessary to increase the bargaining and purchasing power of those currently unable to pay for minimum code housing without a substantial sacrifice in their consumption of other necessary goods.

### 3. The Problem of Discretion

This minimum code differs from the traditional housing code in that it does not prescribe the specific manner in which health and safety standards must be met. For example, there are no requirements that each room have a minimum number of windows, that the heating unit provide for a room temperature above a certain level, or that specific materials be used. Codes which detail quantities, dimensions, materials and methods of assembly are called "specification codes".

In contrast, codes which prescribe objectives to be accomplished rather than specific methods or materials are called "performance codes". Often language used in performance codes includes terms such as

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<sup>217</sup>The application of rent control in such a situation would only serve to exacerbate some of the problems already associated with a tight housing market such as anticipatory rent increases and decreases in maintenance and repairs.

"reasonable" or "adequate". Such language allows broad discretion on the part of owners, contractors, designers and code enforcers to select the methods and materials which will achieve the goals of the code. In this way, performance codes can be tailored to the unique features of a given building, neighborhood, or environmental condition. Moreover, the performance code is more easily adaptable to changes in technological methods and moral and political values.

While some argue that the use of performance codes encourages "healthy and competitive innovation",<sup>218</sup> others see performance codes as a threat to the efficacy of code enforcement. Specification codes are favored by those who contend that the vagueness and indefiniteness of performance standards increases the difficulty of criminal prosecution. Moreover, such critics also claim that the broad discretion allowed the code inspector under a performance code leads to confusion as to what constitutes compliance and facilitates discriminatory application of the code.<sup>219</sup>

Where housing laws are imprecise or the language used is vague or indefinite, such standards may be constitutionally impermissible as an unlawful delegation of legislative authority. This rule does not however require the elimination of all discretion on the part of local officials in setting the boundaries of housing standards. It does require that where such discretion is allowed the limits of this

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<sup>218</sup>O'Bannon, *supra* note 2, at 89.

<sup>219</sup>Parratt, *supra* note 25, at 148-9.

discretion is clearly set forth.<sup>220</sup> In *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955), the Supreme Court of South Carolina found that certain provisions of the housing ordinance were invalid in that they did not contain a "sufficiently definite standard or yardstick" and thus constituted an unconstitutional delegation of legislative authority.<sup>221</sup> However, other courts have been less willing to find a transgression of this limitation even in cases where the standards are anything but clear. For example, in *Petrushansky v. State*, 182 Md. 162, 32 A.2d 696 (1943), a Maryland court found that a housing standard referring to the elimination of "filth" was not impermissibly vague since the court failed to see how "filth could be classified, graduated or standardized except as filth."

Although performance codes are not invalid per se, the potential for an abuse of discretion under such codes is a recognized threat to the workability of these statutes. Unfortunately, the problem of discretion is present in almost every regulatory scheme. Where the regulations are extremely narrow, a person may find it more cost efficient to bribe the regulatory official than to comply with the terms of the statute. In contrast, where the regulatory scheme affords the enforcement official

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<sup>220</sup>O'Bannon, *supra* note 2, at 490.

<sup>221</sup>The regulations in question provided the following:  
A dwelling or dwelling unit is unfit for human habitation if conditions existing in such dwelling or dwelling unit are dangerous or injurious to the health, safety or morals of the occupants of such dwelling or dwelling unit, the occupants of neighboring dwellings or other residents of the City . . . or if there are defects therein increasing the hazards of fire, accident, or other calamities, conditions making the structure unsafe, unsanitary, or failing to provide for decent living or which are likely to cause sickness or disease. 88 S.E.2d 683, 686.

broad discretion in finding violations, the official may demand a bribe before he certifies compliance. Where codes encourage code enforcement officials to demand bribes, there is at least some incentive on the part of landlords to report these attempted extortions. In the former situation, however, there is no need for either the landlord or the code inspector to report the infraction since both benefit from the abuse.

Perhaps some may view a system which encourages the landlord to offer a bribe to be less offensive than one which allows the code enforcement official to demand money from the landlord. Nevertheless, since the potential for abuse exists in both instances, the choice between either a maximum code or a minimum code should not be determined by the relative degree of discretion allowed in either scheme. This is not to suggest that the problem of abuse should not be addressed. It merely suggests that the problem should be reflected in administrative and enforcement mechanisms designed to minimize these abuses and should not be an overriding factor in choosing among basic policy alternatives.<sup>222</sup>

#### D. THE FUTURE

It appears that our efforts to provide every family with a decent home through code enforcement have actually harmed those toward which these efforts were directed. Hirsch best summarizes the failure as follows:

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<sup>222</sup>The ultimate solution may lie in increasing the quality and salaries of code enforcement officials through more rigorous qualifying requirements and increased municipal appropriations to code enforcement agencies. Additionally, the availability of appellate review procedures with harsh penalties for code inspectors who abuse the system might aid in deterring and punishing abusers.

Attempts to deal with the housing quality problem via legal sanctions alone cannot hope to be entirely successful. Rents tend to increase, and . . . given that indigent tenants do pay at least part of the cost increase, it is possible that they end up worse off than before habitability laws were enforced. Some may not avoid living in substandard conditions.<sup>223</sup>

Substandard housing has never been a goal nor is it a goal under the minimum code certification program with contractual rights proposal.<sup>224</sup>

Obviously, the ultimate goal is quality housing for all. However, the private market has not freely entered into the lowest segment of the market since profitability is limited at best. Moreover, the public sector has been ineffective in producing enough public housing and alternative forms of housing subsidies for the poor. Thus, the problem of "bad housing" may be one of "not enough housing". In which case, the long term answer is to increase the supply of low income housing<sup>225</sup> through economic incentives for private sector production with support through public sector construction.

At present, however, we are faced with the reality that many of the poor live in inadequate housing.<sup>226</sup> The minimum housing code

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<sup>223</sup>Hirsch, *supra* note 20, at 62.

<sup>224</sup>Similarly, the minimum code certification program with contractual rights does not ignore the fact that there is a class of housing which is dangerous and where the imposition of code improvement costs would be economically inefficient. Such housing should be removed from the housing market completely.

<sup>225</sup>A more ambitious solution is to decrease the number of persons with low incomes by providing employment and training opportunities.

<sup>226</sup>Landlords provide substandard housing either because they have no choice, since the location and/or present condition of their buildings make them rentable only to persons with low incomes, or they are able

attempts to bring such properties up to basic health and safety requirements. Yet, at the same time, it recognizes that more stringent controls, while perhaps socially desirable, can actually be counter-productive by forcing needed units off the market. Thus, the most immediate solution (until sufficient supplies of low rent housing can be produced to meet current demand) is to create a system where, although the poor may be living in substandard (but not dangerous) housing, they are required to pay only the competitive market price for such housing. Therefore, tenants who wish better housing may increase their housing consumption relative to other goods. Yet those who do not value housing quality as much as other goods, are free to reduce their consumption of housing services to a minimum level.

The implementation of a minimum standard housing code marks a policy choice between quality housing and the need for maintaining housing supply. It is in no way suggested as a permanent solution; it is an interim measure only. It must be realized that no one program can singularly reverse a pattern of blight which has taken decades to develop. The establishment of minimum standards of health and safety will not insure "a decent home and suitable living environment for every American family" as mandated by the Housing Act of 1949.<sup>227</sup> Minimum standards "cannot inject into the deteriorated neighborhood the vitality and healthy glow of a decent environment and cannot fundamentally change

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to avoid code enforcement and are thus at a competitive advantage relative to other owners of substandard housing who are unable to escape code improvement costs.

<sup>227</sup> U.S. National Commission on Urban Problems, *supra* note 7, at 275.



the character of a blighted area."<sup>228</sup>

A major problem is that we expect too much from housing codes. It is doubtful whether the substandard housing problem can be solved with the mere imposition of code enforcement without addressing the underlying social and economic conditions which generate slum housing. The failures of the present system of housing code administration is but one of the causes for our current housing problems. It alone cannot be blamed for our present slums nor can housing code reform be viewed as the total cure. Yet, in conjunction with other programs designed to address the underlying social and economic conditions which generate slum housing, code enforcement may become an effective means of preserving existing, adequate housing and rehabilitating deteriorated housing. By establishing more realistic ideas about the capacity of housing codes to ameliorate inadequate housing conditions, our disappointments surrounding the efficacy of housing code enforcement can be greatly reduced.

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<sup>228</sup>Guandolo, *supra* note 39, at 37.

## APPENDIX A

### PROPOSED MINIMUM HOUSING CODE\*

#### Health and Sanitation Guidelines:

1. Every foundation, roof and exterior wall, door, skylight and window shall be reasonably weathertight, watertight and dampfree, and shall be kept in sound condition and good repair. Floors, interior walls and ceilings shall be in sound and good repair.
2. Toxic paint and materials shall not be used where readily accessible to children.
3. Every premise shall be graded, drained, and free of standing water, and maintained in a clean, sanitary and safe condition.
4. Every dwelling shall have heating facilities which are properly installed, maintained in safe and good working condition and capable of safely and adequately heating all habitable rooms, bathrooms, and water closet compartments located therein under ordinary minimum winter conditions.
5. No owner or occupant shall install, operate or use a heating system employing a flame that is not vented outside of the structure in a manner which promotes fire safety and air quality.
6. Every habitable room\*\* shall be ventilated by openable areas or by equivalent mechanical ventilation.
7. Every chimney and smoke pipe, and all flue and vent attachments thereto, shall be maintained in such condition that there will be no leakage or backing up of smoke and noxious gases into the dwelling unit.

8. Every dwelling unit shall contain not less than a lavatory basin, tub or shower and a water closet, all in good working condition and properly connected to an approved water and sewage system or an approved septic tank installation including an approved absorption bed. The basin, tub or shower shall be supplied with adequate hot and cold water.
9. In every dwelling unit in which kitchen facilities are provided, the unit shall contain a kitchen sink in good working condition and properly connected to a water and sewage system. Such units shall also provide adequate garbage disposal facilities.

#### Safety and Injury Prevention

1. All foundation walls shall be structurally sound, given local geological and climatic conditions; reasonably insect and rodent-proof; and maintained in good repair. Foundation walls shall be considered sound if they are capable of bearing imposed loads and are not deteriorated.
2. Every dwelling unit shall have safe, unobstructed means of egress leading to safe and open space at ground level.
3. Where electrical service is provided, the wiring and switches shall be located and installed so as to avoid the danger of electrical shock.
4. Every supplied facility, piece of equipment, or utility which is required under this ordinance shall be maintained to function safely and effectively.

\* Developed in part from Landman, *supra* note 16, at 314-46; American Public Health Association, *supra* note 202, at 72-131; American Public Health Association, *A Proposed Housing Ordinance* (1952).

\*\*"Habitable" room shall mean a room or enclosed floor space used or intended to be used for living, sleeping, cooking, or eating purposes, bathrooms, shower rooms, and water closet compartments, excluding laundries, pantries, foyers, connecting corridors, closets and storage spaces.