

THE RESIDENTIAL LEASE IN THE CIVIL LAW**Vernon V. Palmer***

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INTRODUCTION

Civilians for many years have entertained the notion that the Common Law, at least in the field of landlord and tenant, was anachronistic compared to the more enlightened approach of the civil codes. The Civil Law lease was thought to be not merely different in nature, but different by virtue of a pro-tenant orientation. In 1887 Justice Gray of the United States Supreme Court pointed out some of the notable differences between the two systems:

In considering this case, it is important to keep in mind that the view of the common law of England and of most of the United States, as to the nature of a lease for years, is not that which is taken by the civil law of Rome, Spain, and France, upon which the Civil Code of Louisiana is based.

... As to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood, fire, or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction; and by that law the lessor is under no

implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased.

The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property; and holds the landlord bound, without any express covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident; and if he does not do so, the tenant may have the lease annulled, or the rent abated.¹

In other words, unlike at Common law, where lease traditionally has been regarded as the conveyance of an interest in land (an "estate for years") to which covenants only incidentally attach, the Civil Law lease is, first and foremost, a type of contract and not a property interest. To use Civilian parlance, the Civil Law lease is a contract firmly tied to the principles of conventional obligations. As defined in article 2669 of the Louisiana Civil Code, a lease is "a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price." Most of the fundamentally distinctive features of the Civil Law lease — the lessor's and lessee's mutual obligations, the lessor's liability for accidental destruction and routine repair, the precariousness of the lessee's possession — are differences which can be referenced back to this starting point.²

In the 1960s and 1970s, the so-called "revolution" in landlord-tenant law in other states gathered strength through court decisions, statutes and proliferating codes.³ It was a source of pride to Civilians that some of the revolutionary planks, like the warranty of habitability

¹ *Viterbo v. Friedlander*, 120 U.S. 707, 712-13 (1887).

² PALMER, LEASES, THE LAW IN LOUISIANA, § 1-2 (1982).

³ Professor Glendon has traced this development in a report for the Institute of Comparative Law, University of Florence, entitled *Towards a Right to Housing in the Legal System of the United States*, 10-46 (1982). She notes that since the 1960s, nineteen jurisdictions have enacted comprehensive landlord-tenant codes (nearly all being variants upon the Uniform Residential Landlord and Tenant Act or its predecessor, the Model Landlord Tenant Act); nineteen other jurisdiction have enacted statutory implied warranties or remedies for housing code violations. For detailed statutory references for all states, see Second Restatement of Property — Landlord and Tenant (1976), Chapter 5, Statutory Note.

Perhaps it is not even too extravagant to maintain that the most revolutionary theme of all — the contract approach — was consciously inspired by the Civil Law. Judge Skelly Wright, author of the seminal *Javins*⁵ and *Habib*⁶ decisions, was trained as a Louisiana civilian.⁷ While a federal district judge for the Eastern District of Louisiana, he had decided lease cases under the contract principles of the Louisiana Civil Code.⁸ Later, he was elevated to the District of Columbia Circuit Court of Appeals where, in the pathbreaking *Javins* decision, he held that the tenant's obligation to pay rent is not a covenant independent of the landlord's obligation to warrant the habitability of the leased apartment; hence, breach of that warranty could be used as a defense against eviction for non-payment of rent. Judge Wright thus placed the obligations of landlords and tenants upon a footing of contractual dependency. Reflecting his civilian orientation, he noted, "[t]he civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law."⁹

Unfortunately, Louisiana cannot afford the luxury of complacency or self-eulogy today for, although its Civil Code may in certain respects have superior features worth exporting to our common-law brethren, it is in too many important respects sadly out of touch with present reality and the demands of simple justice. This is particularly true in relation to the residential lease. While many other American states recently have made radical changes in the field of landlord and tenant, and while other civilian jurisdictions (including France) have enacted special statutes that largely supersede their original codes, Louisiana basically still has re-

acted in 1825, appears to be the earliest example of this remedy either at common law or civil law. The source of the provision was apparently inspired by passages in POTHIER, DE LOUAGE, Part II, Sec. III, No. 108. It has since been widely emulated in 20th century civil codes and legislation. At least 14 jurisdictions in the United States, including New York, California and Illinois, provide for this remedy by statute. Restatement of Property 2d, § 11.2 (1977).

⁵ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. den.*, 400 U.S. 925.

⁶ *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert den.*, 393 U.S. 1016 (tenant may not be evicted for reporting housing code violations).

⁷ Judge Wright received his LL.B. from Loyola University Law School in New Orleans.

⁸ See *Illinois Central R.R. Co. v. Gulf, Mobile & Ohio R.R. Co.*, 191 F. Supp. 275 (E.D. La. 1961); *Cutrer v. Humble Oil & Refining Co.*, 202 F. Supp. 568 (E.D. La. 1962) *U.S. v. Leiter Minerals, Inc.*, 204 F. Supp. 560 (E.D. La. 1962), *rev'd*, 329 F.2d 85 (5th Cir. 1964), *vacated as moot*, 381 U.S. 413 (1965).

⁹ 428 F.2d at 1075 n.13. Judge Wright cited the French commentator Planiol and LA. CIVIL CODE art. 2669 for this proposition.

tained, with only minor legislative additions and amendments, the same residential lease law which was enacted in 1825. Isolated attempts at legislative reform — e.g. a retaliatory eviction measure here and a rent control proposal there — have failed for lack of political support.¹⁰ Meanwhile in the courts the judges have not successfully adapted this 19th century law to the needs of modern times. Indeed, quite to the contrary, some of the pro-tenant orientation of our code has been dissipated by judicial doctrines having no basis in the code.¹¹ There is underway, however, a large-scale effort presently under the direction of the Louisiana State Law Institute to revise and recodify the entire Civil Code. As part of this overall effort, one committee has been working on a revised draft of the law of lease that will include, inter alia, new provisions dealing with agricultural, commercial and residential leases. Yet two questions must be addressed — *why* should there be a revision of the lease provisions, and *what* should be revised? Considerable thought should be given to both questions since the perceived reasons for change will determine what (and how *much*) should be changed. This short paper is an attempt to explore and analyze these issues in relation to a single, but important specie of lease — the residential lease.¹²

¹⁰ A retaliatory eviction bill has been considered and rejected by the legislature on three separate occasions (1976, 1979, 1982). Rent control for New Orleans was to be voted upon in 1976 in a city-wide referendum to amend the City Charter. The City Council, however, refused to put the proposal on the ballot, calling it "unconstitutional." See J. Bobo, *A Place to Live: Housing in N.O.*, 50-56 (University of New Orleans Urban Studies Institute 1978).

¹¹ See the discussion and analysis in Part II, below.

¹² The "residential lease" is not a term used or defined in the Civil Code or the jurisprudence, but it may be identified by four distinguishing traits. Firstly, the cause or object of the lease relates to a necessity of life — a human habitat. In this respect it contrasts with the purposes of the commercial lease (the operation of an enterprise), the agricultural lease (the cultivation of crops) or the financed lease (the acquisition of the ownership of a movable). Secondly, as a matter of form and appearance, the agreement is typically oral, unrecorded, and brief. The most prevalent residential lease is an oral month-to-month agreement in which the only stated or discussed terms concern the rent, the utilities, and their manner of payment. If the residential lease is reduced to writing, the parties will often use a single-page realtor's form entitled "Month to Month Agreement to Rent." On such a form the blanks to be filled mostly concern the rent (amount, time and place of payment) the utilities (indicating which party responsible) and the parties' signatures. Generally there is a short paragraph stating that the lessee assumes responsibility for the condition of the premises and for the defects or vices therein. (See the revised 1979 Standard Form of the Real Estate Board of New Orleans.) Thirdly, the content of the agreement is essentially supplied by law. Aside from the questions of rent and utilities, the Civil Code itself embodies the lease between the parties. Thus code revision will affect the residential lease more directly than leases which are typically drafted by the parties. Detailed and lengthy commercial leases, for example, displace and contradict the suppletive rules of the code. Such leases are the

The discussion will be divided into three parts. First, it is necessary to study certain basic statistics about housing in Louisiana, because the factual picture is not the typical one found in the United States or in other countries. Thus, Part I of this paper deals with a factual analysis of the housing picture. Second, because of the extensive jurisprudence in this field it is necessary not only to examine the system of residential lease ordained by our Civil Code, but also to compare that Code to a far different system which the judiciary has constructed apart from the Code. Thus, Part II will discuss the differences between the original "balance" of rights and duties intended by the Code authors and the new balance created and implemented by the courts over the last 150 years. The factual discussion in Part I and the legal discussion in Part II will attempt to make clear why basic reform of residential lease law is long overdue and what direction that reform should take. In Part III of the paper, I will advance three general proposals for modernizing and restructuring the Civil Code in relation to this subject.

PART I.

THE LOUISIANA HOUSING CONTEXT

"One basic proposition is that virtually all renters in the lower and middle income range *vis à vis* landlords hold an unequal bargaining position."

— Prof. James Bobo¹³

Demographic Considerations. The 1980 census places the population of the state of Louisiana at 4.2 million, of which 69% percent is white and nearly 31% is black. The population has grown by 15% since 1970. As of 1980, the total number of housing units was about 1.5 million, a 35% increase since 1970. Mobile homes now account for more than 100,000 of these housing units. About 3/4 of the total housing stock is owner-occupied, and the remaining quarter — 486,649 units — consists of rented dwellings regulated by the law of

work of draftsmen who use the code somewhat like a dictionary rather than a rulebook. Commercial parties seek to create their own detailed rulebook. Fourthly, the residential lease, particularly in the economic context of low-

¹³ J. Bobo, *supra* note 10, at 49.

lease. About 50% of these rental units are concentrated in the central cities of seven major metropolitan areas: Alexandria, pop. 151,985; Baton Rouge, pop. 494,151, Lafayette, pop. 150,017; Lake Charles, pop. 167,223; Monroe, pop. 139,241; New Orleans, pop. 1,187,073; and Shreveport, pop. 376,710.¹⁴ In certain Louisiana cities, however, homeownership may not be the dominant housing pattern. Historically New Orleans has always had a higher percentage of renters than homeowners.¹⁵ According to 1982 figures, New Orleans renters outnumber homeowners by a ratio of three to two.¹⁶

Age and Condition. Historically, the age and condition of the Louisiana housing stock has always compared unfavorably to that of the rest of the nation. A 1960 study by the Louisiana Office of State Planning classified 31% of the state's overall housing stock as "dilapidated" (compared to 18% nationwide). The 1960 study also noted that the majority of dwellings in the urban areas of the state were more than 30 years old and had deteriorated progressively between 1940 and 1960: the percentage of dilapidated homes had risen from 12.9% in 1940, to 15.6% in 1950, to 23.9% in 1960.¹⁷ The cities of Louisiana also ranked unfavorably with those in the other states. A Regional Planning Commission study based on the 1960 census concluded that about 28% of urban housing in the United States was constructed in 1939 or earlier, whereas in New Orleans, 55.3% of the houses were built in 1939 or earlier. An even higher percentage of the city's rental units (67.6%) were of this age. A low demolition rate (2.1% in New Orleans, compared to 8.4% nationally) also indicated an excessive utilization of existing housing and an abnormally high degree of substandard housing.¹⁸ It was found that nearly one-third of the city's structures had

¹⁴ U.S. Department of Commerce, Bureau of the Census, *General Housing Characteristics of Louisiana 20-7 — 20-29 (1980)* (hereinafter cited as 1980 General Housing Characteristics). About 60% of all rental units are single detached units, and the rest are either multiple units or mobile homes.

¹⁵ In 1920 nearly four out of five housing units in New Orleans were renter occupied. In that same year in Shreveport, 65% of the housing units were renter occupied. See, Thayer and Neville, *An Analysis of Housing Trends and Factors in Louisiana with Special Emphasis on the New Orleans Metropolitan Area: 1920-1982*, p. 6 (UNO 1982).

¹⁶ Thayer and Neville, *supra* and housing tables in appendix.

¹⁷ Louisiana Office of State Planning, *Initial Housing Element, State of Louisiana 28-29 (1960)*. According to 1986 statistics compiled by the U.S. Department of Housing and Urban Development, more than 49% of all rental housing units in Orleans Parish are inadequate.

¹⁸ Regional Planning Commission, *Regional Housing Study 74 (1969)*.

major structural deficiencies which could not be corrected by ordinary home-improvements.¹⁹ The overcrowding factor — i.e., an excessive number of persons to the room — and the percentage of houses lacking plumbing facilities are both far higher than in the United States generally.²⁰ In an important comparative study in 1973, the Council on Municipal Performance applied five criteria (cost, plumbing, overcrowding, racial integration, and affordability in black/white rentals) as a means of ranking the top urban centers of the United States in housing. Of 30 cities studied, New Orleans was ranked 29th overall: 22nd as to cost, 16th in terms of plumbing, 29th as to overcrowding, 19th as to racial integration, and 23rd in affordability.²¹

The Level of Rents. One indicator of the substandard quality of rental units in Louisiana is the low rent charged tenants even under the best economic conditions. The median monthly rent for Louisiana as compiled from 1980 data was \$156; about 1/5 of the tenants (82,738) paid a mere \$50-99 in rent per month; another one-fifth of all tenants paid less than \$50 per month. Almost 2/3 of all leases (63.5%) fell below \$200 per month.^{21a} In differing localities, of course, there are marked divergences in the rental market. For instance, median rents were far higher in the (once-thriving) cities of the oil patch e.g.,

¹⁹ Yet the study estimated (in 1969) that for \$500 or less, 40% of these could be adequately rehabilitated; for \$1000, 65% could be rehabilitated. *Id.* at 75.

²⁰ In New Orleans, for instance, the 1980 census shows that nearly 3,500 rental units either had no plumbing at all, or only partial plumbing, or the plumbing was shared with another household. 1980 General Housing Characteristics; *supra*, note 13, at 20-42.

²¹ See tables found in J. Bobo, *supra* note 10, at 162-175 (citing Council on Municipal Performance, City Housing - Municipal Performance Report 1:2 (1973)).

^{21a} The 1980 Census provides the following chart on rents in Louisiana:

Contract Rent in the State: 1980

(Number of specified renter-occupied housing units)

Less than \$50	40,520	
\$50 to \$99	82,738	
\$100 to \$149	72,302	Median Rent \$156
\$150 to \$199	61,628	
\$200 to \$249	47,798	
\$250 to \$299	23,023	
\$300 to \$349	11,549	
\$350 to \$399	6,559	
\$400 to \$449	2,705	
\$500 or more		

Lafayette (\$218 per mo.), Houma (\$198 per mo.), and Baton Rouge (\$205 per mo.) than rents in other cities (Monroe (\$131 per mo.), Shreveport (\$159 per mo.) or New Orleans (\$177 per mo.). Within a single city, the median will often mask great fluctuations: the New Orleans median rent (\$177), for instance, is held down by the appalling number of slum properties. According to a 1981 metropolitan survey, the average rents in apartment complexes with 10 or more units were \$269 in Orleans and \$291 in Jefferson. These rents may be taken as more accurate reflections of the levels at which safe and decent housing could be procured. Finally, it must be noted that rents in cities are generally higher than those in rural areas of the state.²² Nonetheless, even with these points in mind we are left with two strong impressions: first, the extremely low rents statewide serve to reinforce the reality of widespread substandard housing throughout Louisiana; secondly, these rents also show that the standard residential lease in Louisiana (i.e. that prevailing in the vast majority of cases) does not involve middle to upper-income tenants. Only 21.5% of all leases involved rentals over \$250 per month, whereas 63.5% of all leases are entered into by low-income lessees at rents under \$200 per month. This measure of rents, which prevails in nearly 2/3 of all leases, indicates that low-income leasing must be regarded as a predominant feature in the Louisiana context.

Vacancy and Occupancy. Vacancy rates are generally lower in the cities (7.5%) than in the rural sections of the state (10.7%).²³ There are, it appears, wide variations in the state's 7.5% urban vacancy rate. An occupancy and rent analysis in 1981 by the University of New Orleans surveyed 275 apartment complexes with 10 or more units in the metropolitan New Orleans region. The study found that the overall regional occupancy rate was 97.5% (vacancy rate 2.5%) and that in certain areas of Orleans, Jefferson and St. Tammany parishes, there was 100% occupancy (vacancy rate 0%).

An occupancy rate of 97.5% (i.e. a vacancy rate of 2.5%) has an important effect upon the market. For example, when vacancy rates fall below 8.0%, this means that on average apartments are rented more than 11 months of the year.²⁴ When vacancy rates fall as low as 2.5% (the 1981 regional level in the New Orleans area), apartments are on average

²² 1980 General Housing Characteristics, *supra* note 13, at 20-7, 20-9.

²³ *Id.* at 20-29.

²⁴ J. Bobo, *supra* note 10, at 173.

rented about 11 2/3 months per year, and there is little pressure or incentive on landlords to compete for new tenants by offering lower rents, better services, or repairs.²⁵

Since 1981 the Louisiana economy has suffered a severe recession in the face of international oil policies. As a consequence the occupancy rate for the metropolitan New Orleans rental market has been progressively falling: 1982 (95.7%), 1983 (94.6%), 1984 (87.8%), 1985 (86.7%). The estimated 1986 rate for the five-parish metropolitan area was 81.1%.²⁶ This has led to lower rents and increasing pressure upon landlords to grant discounts, concessions and promotional incentives to tenants.²⁷ Nevertheless, it may be incorrect to conclude that the low and middle income tenant's bargaining power has been appreciably increased, for at the same time income levels have fallen and jobs have been lost. The number of persons below the poverty line has also undoubtedly increased. A 1987 study notes,

"The hardships and uncertainties imposed by current economic conditions have forced many New Orleans residents, particularly those in the moderate to lower income brackets, to seek larger lower cost rental housing to accommodate shelter needs. This has become increasingly necessary for households which had to double-up and share housing expenses ..."²⁸

The increased tendency toward "doubling up" is reflected by the currently higher occupancy rates in the smaller properties (less than 10 units — 85.6%) as opposed to the larger rental complexes (over 10 units — 81.1%). A housing code enforcement official in New Orleans noted in 1987 that the doubling and even tripling of families into single

²⁵ University of New Orleans College of Business Administration, 3 Metropolitan New Orleans Housing Market Analysis, No. 1, at 23 (1981). The extreme tightening of the New Orleans market in the early 1980s has been attributed to three interrelated factors: 1) low production of new rental housing; 2) net reductions in existing housing stock due to condominium conversions; and 3) relatively strong levels of demand caused by the then (comparatively) healthy metropolitan economy.

²⁶ Ragas and Miestchovich, New Orleans Housing Market Analysis — 1986, 109 (Center for Economic Development, UNO 1987).

²⁷ *Ibid.* at 124.

²⁸ *Ibid.* at 142-146.

family homes has seriously increased code violations relating to overcrowding.²⁹

Race, Poverty and Discrimination. Statistics on available housing and vacancy rates do not reveal the hidden constraints on supply which economics and racial discrimination create. The greatest inequalities in Louisiana housing are associated with the income levels and racial characteristics of the tenants. According to the 1980 Census Report, Louisiana ranks second in the nation in the percentage of its population that is below the poverty line. Blacks, who comprise 29.4% of the state's population but about 60% of the state's poor,³⁰ tend to live in the substandard, overcrowded, older, and less valuable houses which attract the lowest rents. Statewide figures show that the housing unit of a black householder was seven times more likely to lack complete plumbing, and four times more likely to accommodate more than one person per room than a unit occupied by a white householder.³¹ The market value of black housing units was \$22,300 less than the value of white housing units. The median rentals for blacks was only \$99 per month while the comparable median for whites was \$197 per month.³² About forty percent of all black rental housing in the central cities rented for less than \$100 per month.³³ In Louisiana, as elsewhere, the poor are often subject to economic and/or racial discrimination in renting homes. Engel's Law³⁴ holds that as a family's annual income increases, the percentage of income spent for food decreases, that spent for clothing, rent, heat and light remains the same, and the percentage spent for improving one's condition — education, health, and recreation — increases.³⁵ A Tulane study of housing discrimination in New Orleans verifies that New Orleanians in the lowest economic classes spend a greater share of their income on housing which is physically less de-

²⁹ Minutes, January 13, 1987, Mayor's Housing Coordination Committee.

³⁰ Statistical Abstract of La. 190-92 (University of New Orleans 1974).

³¹ In units with black householders the number of rooms per unit was significantly lower, and the number of persons per room was considerable higher. General Housing Characteristics, *supra* note 13, at 20-14, 20-19.

³² *Id.* For blacks living in the central cities of Louisiana, the median rental was \$114.

³³ *Id.* at 20-19.

³⁴ Named after the theory of the German statistician Ernst Engel (1821-1896) published in *Le Play, Les Ouvriers Européens* (Paris 1855).

³⁵ Tulane Urban Studies Center, *Housing Discrimination in New Orleans*, 5 (1970).

sirable.³⁶ Rent levels, while they may seem low, are nevertheless excessive both in relation to the substandard housing that is rented and in terms of the percentage of income expended by the low-income tenant.³⁷

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Housing Codes. The largest cities in Louisiana have enacted "minimum housing codes." As a historical matter, the impetus behind these codes was not local initiative and concern, but a federal program that established housing codes as a prerequisite for obtaining grants to the cities.⁴³ The earliest codes were introduced in 1954, but enforce-

³⁶ *Id.*

³⁷ The disproportionate rent-income ratio for black renters in the metropolitan New Orleans area is clearly indicated by 1982 data taken from a more recent study. These figures, as shown in Thayer and Neville, *An Analysis of Housing Trends and Factors in Louisiana with Special Emphasis on the New Orleans Metropolitan Area: 1920-1982* (UNO 1982), show, for example, that about 1/5 of all black renters expend more than 60% of their income on rent.

³⁸ In units with black householders the number of rooms per unit was significantly lower, but the number of persons per room was considerably higher. 1980 General Housing Characteristics, *supra* note 14, at 20-14, 20-19.

³⁹ *Id.* For blacks living in the central cities of Louisiana, the median rental was \$114.

⁴⁰ *Id.*

⁴¹ Deseran, Mullan, Stokeley, LSU Center for Agricultural Services and Rural Development, 1979.

⁴² *Supra* note 35, Table 22.

⁴³ Comment, *The Enforcement of the New Orleans Housing Code - An Analysis of Present Problems and Suggestions for Improvement*, 42 Tul. L. Rev. 604, 605 (1968).

ment of their provisions has been hindered by lack of money, authority, manpower and judicial zeal.

A few details about the New Orleans example are instructive in this regard. A report in 1969 noted that since the inception of the Code Enforcement program in 1954, nearly 37,000 units had been inspected, with a deficiency ratio of greater than 95%, and a violation abatement rate of 80%.⁴⁴ The inspections were concentrated on only fifteen small areas of the city, and expanding beyond these intensive zones was severely restricted by shortages of manpower. The program was in existence 16 years, yet only 1/6 of the city's total number of units were inspected. Although the recommended ratio for the City was one inspector for each 10,000 inhabitants, or about 70 inspectors, the agency in 1969 had only 26 inspectors, and in earlier years, sometimes as few as 5. One commentator had observed that the rate of inspections did not even match the rate of housing deterioration. Assuming 70,000 dilapidated/deteriorating dwellings as a reasonable estimate for New Orleans, he concluded that "it will take more than twenty-five years merely to inspect the ... substandard dwelling units that *presently* exist in the city."⁴⁵ Unfortunately, given present staffing levels, this projection seems greatly optimistic; in 1986, there were but 3 inspectors.

Another reason for the system's ineffectiveness is the inordinate delay in bringing delinquent landlords to court. A 1968 League of Women Voters' report noted that ordinarily a property owner does not land in court until about a year after inspection of his property.⁴⁶ The present writer's own examination of the agency's 1981 court docket revealed that the average delay, from filing of complaint in court to court-ordered compliance, was 1 to 1 1/2 years. The average overall delay from time of initial inspection to date of court-ordered compliance or

⁴⁴ Regional Planning Commission, *supra* note 18, at 78.

⁴⁵ Comment, *supra* note 43, at 608. *See also* League of Women Voters of New Orleans, Housing Code 7 (1968) (hereinafter Housing Code Paper).

⁴⁶ Housing Code Paper, *supra* note 35, at 6 (citing Times-Picayune, Feb. 4, 1968, at 2.) The delays do not end, however, when the cases reach court. The report noted the following breakdown of the cases for 1967:

Of the 79 cases brought to court during 1967, a total of 34 were dismissed, in most instances because owners of properties involved complied by the time the cases came to trial; 25 cases were continued, invariably giving the owners additional time in which to comply; no trial dates were set in 15 cases; attachments were issued for arrest of two owners who failed to show up for trial; and fines of \$25.00 each were levied on two owners.

Id. at 7 (quoting Times-Picayune, Feb. 4, 1968, at 1).

dismissal was 2 to 2 1/2 years. Housing officials would deflect criticism away from these conditions by arguing that neither the length of delay nor the infrequency of sanctions is a good measure of the system's effectiveness since the real goal is not punishment but compliance with the code. Nevertheless, statistics make clear that compliance or "specific performance" has not been achieved on any significant level, principally because tenants, the most affected complainants, have no counterpart civil remedy to obtain forced compliance,⁴⁷ and the deterrent effect of sanctions is lost in the sporadic, delayed, and reluctant application of criminal sanctions under the present system.

The agency's docket also revealed other, deeper flaws and injustices in the use of criminal sanctions. Since criminal jurisdiction to enforce municipal code violations does not extend beyond the parish line, landlords who happen to live in different parishes cannot be served with process or subjected to penalties. To reach these landlords, the agencies' response has been to evict the tenant (the party, ironically enough, who may have sought protection by lodging a complaint) with the hope of creating economic pressure on the landlord by cutting off his source of revenue. Of the 253 cases shown on the 1981 docket in New Orleans, for instance, 43 were eviction proceedings against the tenant.⁴⁸ Another deficiency is that criminal *in personam* proceedings are dismissed when ownership of the property is transferred or when the owner dies. Thus, a delinquent owner can dodge code enforcement by selling or simulating a "sale" of his sub-code property.⁴⁹ The result of a dismissal in such cases is that the enforcement proceeding must be lodged anew, with no certainty that a death or a sale will not recur.

It must be recognized that even if code requirements are met, as they should be, this does nothing for substandard housing in rural areas where housing codes do not extend. Furthermore, wherever there is enforcement, it would be logical to assume that rents must rise, probably higher in many cases than can be afforded. Indeed, the general failure of enforcement may partly result from the fact that enforcement officials themselves believe that Code enforcement is counterproductive. The

⁴⁷ *Id.* at 7 (League of Women Voters 1968).

⁴⁸ This procedure, of course, may achieve nothing but injury to the tenant, since after the eviction the landlord may rapidly substitute another tenant in the premises with little economic cost to himself.

⁴⁹ The 1981 docket, comprising 253 cases, showed 14 dismissals due to death of the owner or sale of the property.

more conscientious might fear that landlords who are required to raise their property to code standards will simply pass the added costs on to their tenants, or they may abandon their property entirely, in which case the tenant will be deprived even of sub-code housing.⁵⁰

Professor Bobo of the University of New Orleans has observed that "if we only, and simply, remove substandard housing and slumlords (and indeed we should), then we have standard housing that cannot be afforded. Thus, the root cause of the problem is inherent in our social and economic system, not necessarily evil landlords."⁵¹ Although Professor Ackerman has attempted to show that a pass-on of costs to the tenant is not the inevitable result of Code enforcement,⁵² other studies suggest that it is inevitable. One empirical study of the costs of habitability laws has found that indigents paid statistically higher rents in states which had such laws than in states which did not.⁵³ Professor Bobo has noted that combining code enforcement with rent control is not an effective answer to the problem of higher rents: "if rent control, advocated as a corrective policy, is viewed as keeping rents below market rates (rates affordable by the poor), then the housing situation must deteriorate over time."⁵⁴ The answer he suggests — of little consolation to the present generation of tenants — is comprehensive economic development and greater social and economic integration.⁵⁵

The problem, of course, can be attacked by more direct means. These means include stricter code enforcement, coupled with housing subsidies, receivership laws, direct repairs by governmental agencies, and recognition of the tenant's role in code enforcement (e.g., rent defense based on code violations).

⁵⁰ Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 Yale L.J. 1093, 1095 (1971).

⁵¹ J. Bobo, *supra* note 10, at 59.

⁵² Professor Bruce Ackerman's study concludes that Code enforcement may operate as a program to redistribute income from the landlord class to the generally poorer tenant class. Under his model of a city slum, code enforcement costs are not passed to tenants and such costs do not generate rent increases. Ackerman, *supra* note 50, at 1191.

⁵³ Hirsch, Hirsch and Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 Calif. L. Rev. 1098 (1975). See also Komesar, *Return to Slumville: A Critique of the Ackerman Analysis*, 82 Yale L.J. 1175 (1973); Posner, *Economic Analysis of Law of Housing Code Enforcement and the Poor*, 259-263 (1973).

⁵⁴ J. Bobo, *supra* note 10, at 59.

⁵⁵ *Id.* at 61.

Housing Summary. Five conditions characterize the Louisiana housing picture:

- the scarcity of low-income housing
- the prevalence of substandard structures
- the failure of housing code enforcement
- the unequal bargaining position of the low-income lessee
- the predominance of low-income leasing.

To elaborate, the housing problem throughout Louisiana is severe. Progressive aging of the housing stock is one reason for the high number of substandard structures in both urban and rural areas. The relative poverty of Louisiana's citizenry is another, as a very sizable percentage of Louisiana's population lives below the poverty line and cannot afford to buy or rent adequate housing. The relationship of low incomes to substandard housing has become particularly visible in larger cities, where the well-known "flight" of middle-income families to newer suburbs has left behind the older inner city housing to lower-income groups. Furthermore, mainly for economic and discriminatory reasons, the supply of housing available to blacks and other minorities is limited, making it both possible and profitable for some landlords to rent substandard facilities. Low property taxes (guaranteed to remain low by the Louisiana constitution)⁵⁶ tend to encourage the maintenance of substandard dwellings on the land. Given the state of the housing stock, the degree of housing shortage in Louisiana, the poverty and illiteracy of the tenants who occupy these scarce and often substandard structures, and the lack of effective governmental resolve and resources to enforce minimum housing standards, the tenant in the typical and predominant case has no bargaining or enforcement power compared to that of his landlord.^{56a} The present laws, however, for at least three reasons, play little role in rectifying or correcting the operation of market forces.

⁵⁶ LA. CONST. OF 1974, Art. 7, § 18.

^{56a} It is true that some lessees, owing to their wealth, education and standing may have appreciable bargaining power, perhaps in some cases greater than that of the lessor. We have seen, however, that in the Louisiana context they do not comprise, even on the most generous estimate, more than 20-25% of the lessees. See *supra* note 21a and accompanying text.

First, the provisions of the Civil Code contain no special regime governing residential leases.⁵⁷ Special legislation on residential leases is now normally the case in the United States⁵⁸ and in many foreign countries,⁵⁹ and indicates recognition elsewhere of the fact that the lease of a habitation is an extremely important, if not a fundamental, right of the individual.⁶⁰ In contrast, the Louisiana Civil Code contains no explicit structure recognizing that the lease of a family dwelling frequently calls for particular policies and responsibilities that differ from those involved in the leasing of a commercial warehouse, a law office, or a television set.

A second shortcoming of the present law of lease in Louisiana is that no rules in the Civil Code are designated as imperatively binding upon the parties to the residential lease. As a result, basic tenant rights are waived, and lessor obligations may be and are routinely shifted, due only to the disparate bargaining positions of the parties. Our 19th century code presupposed as its paradigm two parties of relatively equal bargaining strength; accordingly suppletory rules were considered proper and sufficient. Long ago, however, this paradigm of equality ceased to have substantial relevance to the typical leasing situation in Louisiana. In contemporary circumstances, the Civil Code's suppletory regime serves more to exacerbate than to redress or properly resolve this central problem.

Third, many glosses — changes even — have been introduced by the judiciary. The original balance struck between landlord and tenant under the Civil Code has been judicially altered in many important respects. Certain protections intended by the Code for tenants are not in fact recognized by the jurisprudence. This last theme will be the principal subject of the next part of this article.

⁵⁷ The Civil Code followed the 18th century view that leases of things ought to be classified as either urban or rural. Article 2676 follows this binary classification.

⁵⁸ *Supra* note 3.

⁵⁹ The relevant French legislation is summarized in MALAURIE ET AYNES, *LES CONTRATS SPECIAUX* 253-254 (1986).

⁶⁰ The French legislation declares: "The right to habitation is a fundamental right." Art. 6, Loi Quillot (1982) (Author's transl.).

PART II.

JUDICIAL INTERPRETATION: THE ALTERATION OF
THE ORIGINAL CODE BALANCE

The balance originally struck between the rights and duties of lessors and lessees under the Civil Code was, in comparison to other legal systems at the time, quite favorable to the tenant. The lessor had the more burdensome obligations — to deliver the premises in good condition, to maintain and repair the premises during the lease, and to keep the tenant in peaceable possession.⁶¹ The lessor was a strict guarantor against all vices and defects in the thing, as well as injuries arising therefrom.⁶² For his part, the lessee was obliged to use and care for the premises as a *bon père de famille*, to pay the rent, and to return the thing in proper order at the end of the lease.⁶³

Since the Code's adoption, the legislature has never changed this original balance to any appreciable extent. Apart from a statute dealing with the handling of the lessee's security deposit,⁶⁴ the most important measure was a 1932 statute that gave owner-lessors a certain degree of protection from strict liability tort claims by third persons injured on the premises.⁶⁵

Still, the original balance of the Code was not thought to be an imperative of public order or good morals that the parties were unable to modify by contract. The spirit of the age and the laissez-faire ideology of the code presupposed the autonomy of the will and freedom of contract. In their lease contracts, parties could "legislate" for themselves;

⁶¹ LA. CIV. CODE art. 2692.

⁶² LA. CIV. CODE art. 2695.

⁶³ LA. CIV. CODE arts. 2710, 2719, 2729.

⁶⁴ LA. R.S. 9:3251.

⁶⁵ LA. R.S. 9:3221. See PALMER, *supra* note 2, at § 3-21, 3-22. A 1977 statute, authorized under the "right to property" guarantee of Article I, Section 4 of the Louisiana Constitution of 1974, seems designed to freeze the original balance of the Code in place until further modification by the legislature. The statute broadly provides that *all* rights granted to lessors by Title IX of the Civil Code shall not be altered, abridged or diminished except by state law. LA. R.S. 9:3258. The purpose and effect of this statutory provision is not entirely clear. It may have been designed to protect the rights of lessors in state appropriation proceedings, but the provision is broad enough to pose a potential barrier to any landlord/tenant reform at a local level. For example, might it preclude the enactment of municipal rent control, since the right to a full rental is arguably a right given to lessors by the Civil Code?

their agreements would have the effect of laws upon them.⁶⁶ Therefore, it was expressly recognized that code-allocated duties could be shifted from lessor to lessee.⁶⁷

It is understandable that the ideology of unrestrained freedom of contract enjoyed free reign before the industrial revolution when Louisiana was predominantly rural⁶⁸ and agricultural,⁶⁹ when urban centers were the exception to the rule, when wealth was tied mainly to immovables, and when the scope of governmental regulation of contract making was comparatively small.⁷⁰ Our code speaks from the day and with the values of Adam Smith and Grotius. But urbanization and industrialization have created new conditions that suggest the need to place limits on the freedom to reallocate duties under the residential lease. Industrial specialization and division of skills among workers has brought about the lessee's incompetence to make his own repairs and inspections.⁷¹ The omniscient frontiersman who was a "jack of all trades" has given way to the single-skilled assembly line worker. The average urban dweller, it is said, "cannot work on his own electrical system beyond replacing fuses and light bulbs."⁷² Furthermore urbanization entails multiple dwellings and more sophisticated structures that are less easily inspected and repaired by the lessee. Urbanization also means increased externalities which take their worst form in the context of the effect of deteriorating structures on neighborhoods.⁷³ More particularly, we have seen⁷⁴ that urban residential leasing in Louisiana is attended by poverty, housing scarcity, substandard conditions, lack of municipal enforcement, and unequal bargaining power. All of these factors have

⁶⁶ LA. CIV. CODE art. 1901 (1870), which now is embodied in revised LA. CIV. CODE art. 1983.

⁶⁷ *E.g.*, LA. CIV. CODE art. 2715: "The lessee is bound to cause all necessary repairs to be made which it is incumbent on lessees to make, unless the contrary has been stipulated." *See also* LA. CIV. CODE art. 2718.

⁶⁸ In 1920 the population was 65.1% rural, whereas in 1980 the population was 68.6% urban. *Supra*, Thayer and Neville, appendix tables.

⁶⁹ Morrison, *The Need For a Revision of the Louisiana Civil Code*, 11 Tul. L. Rev. 213, 219 (1937).

⁷⁰ *Ibid.* pp. 219-220.

⁷¹ Model Residential Landlord-Tenant Code, General Introduction, 6 (A.B.F. 1969).

⁷² *Ibid.*

⁷³ Externalities refer to the cost or benefit imposed upon or derived by third persons through private or public decisionmaking. *Ibid.* p. 7.

⁷⁴ *See supra* "Housing Summary" text at notes 56-60.

greatly undermined the *laissez-faire* presuppositions of our law, yet the legislature has not revised the law.

The gap existing between law and socio-economic reality, however, is not entirely the product of old legislation in the face of 150 years of social change. The problem of the code's "correspondence" to modern-day reality also has been aggravated by judicial doctrines and interpretation of the code. I do not want to suggest that this was the invariable tendency, for in certain instances the judges developed doctrines that worked in favor of the tenant.⁷⁵ However, for the most part, the judiciary has counterbalanced or eviscerated code articles originally weighted in the tenant's favor.⁷⁶ In some instances, this has been done by importing from sources outside the Code wholly novel and anomalous doctrines. A notorious example is the mass of rules collectively known as the "law of abandonment."⁷⁷

Another counterbalancing technique was to develop restrictive interpretation that drained the code provisions of their content. An exam-

⁷⁵ Certain pro-tenant doctrines come to mind. One is the doctrine of interpretation which states that any ambiguity in a contract of lease will be construed against the lessor and in favor of the lessee, regardless of which party prepared the lease. *Tullier v. Tanson*, 367 So.2d 773 (La. 1979); *Bunch v. Hecks*, 440 So.2d 820 (1st Cir. 1983). This represents a slanted variation upon the familiar principle that "In case of doubt ..., a provision in a contract must be interpreted against the party who furnished its text." LA. CIV. CODE Art. 2056. The purpose of this doctrine has been explained as being "to protect the weaker party, usually the lessee, from any overbearing or imposition from the stronger party, traditionally the lessor, which prepared the contract." *Coxe v. F.W. Woolworth Co.*, 652 F. Supp. 64 (M.D. La. 1986).

⁷⁶ Katherine Thouez in a paper prepared for the *Association Henri Capitant* comments that the Louisiana judiciary has not only interpreted the most liberal provisions of the code (drawn from the 18th century commentators rather than the Code Napoleon) contrary to their spirit, but all the other provisions which could have been understood more liberally by the jurisprudence were oriented in favor of the landlord class. "Le Droit au Logement: Le Logement et Le Propriétaire" 1 (1982).

⁷⁷ In *Christy v. Casenave*, 2 Mart. (n.s.) 451, 453 (1824), the court founded this doctrine on a passage in the Digest (D. 19.2.24.2), and asserted that "landlords, who in all countries have had a great share in making laws, have secured to themselves the extraordinary privilege of enforcing the contract for the whole term, if the tenant leave the premises before the expiration of the lease." Yet though clothed in the robes of Roman Law, the abandonment doctrine is essentially Common Law in content. It holds that after a tenant has unjustifiably "abandoned" the premises:

(1) the rent for the entire term is automatically accelerated without the need for a clause to that effect;

(2) the lessor of the abandoned property has no obligation to relet the premises in order to mitigate his damage (an exception to an almost universal rule of contract law); and

(3) if the lessor chooses to relet the premises to a second tenant then, viewed as agent or "negotiorum gestor" toward the original tenant, he may hold both the old and the new tenant liable for the rent. See generally, PALMER, *supra* note 2, at § 5-20.

ple was the construction placed upon article 2733, a provision intended to protect the tenant from eviction when the owner sells the premises. The article provides, "If the lessor sells the thing leased, the purchaser can not turn out the tenant before his lease has expired, unless the contrary has been stipulated in the contract."

The article on its face embodies the principle that "sale does not supersede lease." The provision was intended to form an express exception to the usual rule that contracts involving immovables must be recorded to affect third parties.⁷⁸ Judicial decisions, however, have disregarded this intent, refusing to protect the tenant from eviction by the purchaser unless he has recorded the lease.⁷⁹ Since unregistered, oral leases are typically used in residential leases to the poor and the elderly, such tenants are particularly vulnerable to the dangers of eviction after a sale.⁸⁰ In fact, under Louisiana's strict recordation doctrine, a third party purchaser is not bound by an unrecorded lease even if he has actual knowledge of the lease and of the lessee's possession.⁸¹ The effect of this interpretation obviously increases the lessor's ability to sell rental property free of its encumbrances, but the intent of article 2733 was to prevent that from occurring.

By a similar process, other rights and protections of the lessee were also diluted. Thus, the lessee's right to sublease and assign was strictly construed against him by giving an ungrammatical reading to the pertinent code article.⁸² The lessor's strict liability guarantee against vices and defects in the premises was held to extend to the lessee, but not to his wife or children.⁸³ More seriously, the judges narrowed the scope of the two main duties of the lessor — i.e., the obligation to de-

⁷⁸ See Stadnik, *The Doctrinal Origins of the Judicial Nature of Lease in the Civil Law*, 54 Tul. L. Rev. 1094 (1980).

⁷⁹ *Talley v. Alexander*, 10 La. Ann. 627 (1855); *Carmouche v. Jung*, 102 So. 518 (1925); *Port Arthur Towing Co. v. Owens-Illinois, Inc.*, 352 F. Supp. 392 (W.D. La. 1972), *aff'd*, 492 F.2d 688 (5th Cir. 1974).

⁸⁰ Residential tenants under oral leases are in legal danger of eviction after a sale of the premises since an oral lease cannot be recorded.

⁸¹ *Murray v. Leblanc*, 6 Orl. App. 8 (1909).

⁸² LA. CIV. CODE Art. 2725. See PALMER, *supra* note 2, § 7-5. See *Gamble v. New Orleans Housing Mart, Inc.*, 154 So.2d 625 (La. App. 4th Cir.), *cert. den.*, 156 So.2d 229 (1963); but see Comment, *The Right to Sublease*, 53 Tul. L. Rev. 556, 570-572 (1979) (criticizing *Gamble*); *Serio v. Stewart Investments, Inc.*, 427 So.2d 692 (La. App. 4th Cir. 1983).

⁸³ See *Jordan v. Palm Apts.*, 353 So.2d 1120 (La. App. 4th Cir. 1978); *Duplain v. Wiltz*, 194 So. 60 (La. App. Orl. Cir. 1940); see also, PALMER, *supra* note 2, at § 3-1.

liver the premises in good repair and to maintain the premises in good repair during the lease. In the interpretation of these duties, courts did not simply reduce the original protections offered by the Code to lessees, but reduced them in the face of socio-economic conditions which made those protections more essential than ever, indeed, calling for their creative extension. The transformation of these duties will be dealt with in the sections that follow.

A. THE NARROWING OF THE DELIVERY OBLIGATION. Under article 2693, the lessor is obligated at the outset "to deliver the thing in good condition, and free from any repairs." As the duty extends to patent and latent defects, both typically found in slum housing, article 2693 can confidently be described as a routinely ignored provision of the Code. The bulk of substandard housing in Louisiana is rented under oral leases in which there is no contractual stipulation displacing this duty. When a landlord delivers a faulty dwelling to a lessee, the tenant theoretically should be entitled to a variety of remedies, including: dissolution of the lease; damages for breach of the lease; the right to make the repairs himself and deduct the cost from the rent; and, it is submitted, the right to obtain specific performance of the repairs. However, the most authoritative case in point has taken a narrow view of the tenant's options, stating that the court is powerless to order a lessor to make repairs, and further, that any action for damages based on *patent* substandard conditions may be blocked by such defenses as assumption of the risk or contributory negligence.

In *Evans v. Does*,⁸⁴ the court sustained an exception of no cause of action in regard to a number of remedies sought by the tenant. The lessee rented a three-room "shotgun" house in Shreveport for \$30 per month without a fixed term. It was alleged that from the inception of the lease the house was totally useless as a dwelling and in flagrant violation of both the Housing Code of Shreveport and the Louisiana Civil Code. The lessee sought, inter alia: (1) an order directing the landlord to make certain repairs; (2) compensatory and punitive damages; and (3) a declaratory judgment that she was entitled to withhold rent while the property remained in a state of disrepair.

Rejecting the right to court-ordered repairs, the court stated:

⁸⁴ 283 So.2d 804 (La. App. 2d Cir. 1973).

We know of no authority for the court to order defendants to restore this property in any manner.... The Housing Code of the City of Shreveport is not a part of the record in this case nor is it alleged that the housing code authorizes a court to grant the relief sought. Louisiana Civil Code Article 2694 referred to in plaintiff's petition does not empower the court to order substandard houses repaired to meet minimal housing codes.⁸⁵

With respect to damages, the court rejected the possibility of recovering compensatory damages if they arose from *patent* housing deficiencies, such as missing or broken plumbing or holes in the walls of a building. It added that the lessee's assumption of the risk or his contributory negligence could be used by lessors as defenses to the action.⁸⁶ The court assumed, without acknowledging the assumption, that lessees of slum housing have sufficient bargaining power to waive the delivery obligation created by the Code, and that they can waive their rights to enforce this obligation by leasing premises with patent defects.⁸⁷ The court did not consider the view that the lessor has an imperative obligation to deliver the premises in good repair and in compliance with the housing Code.

Given this finding that neither compensatory damages nor specific performance are viable options, the lessee is left either to seek dissolution of the lease or to make the repairs and deduct the cost from the rent. Neither of these remedies offers, in practice, the solution to the low-income lessee's housing problem. Given the high cost of repairs in relation to the short term of the residential lease, the repair and deduct remedy is not functional. On the other hand, given the scarcity of affordable

⁸⁵ *Id.* at 807.

⁸⁶ The court stated:

"The question immediately arises whether plaintiff has admitted by the allegations of her own petition that she had assumed the risk of whatever damages she might have suffered by alleging the house was totally useless at the inception of the tenancy, and is at present...."

Id.

⁸⁷ Compare the views expressed in many common-law jurisdictions: *Foisy v. Wyman*, 515 P.2d 160, 164 (1973) ("We believe this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty of habitability."); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831, 843 (1973). ("This warranty (in so far as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease or rental agreement.").

low-income housing, the prevalence of substandard conditions and the costs and trouble associated with moving, dissolution will frequently amount to the theoretical right to move from one substandard lodging to another. The remedy is often illusory.

Strangely, the courts seem to regard dissolution in a preferred light and regularly deploy doctrines in favor of the tenant in ways that overcome the objections discussed in the case of *Evans v. Does*. Thus the lessee's suit for dissolution has succeeded though the defective condition in the premises may have been patent or obvious to the lessee⁸⁸ and though the lessee had signed a written waiver of the lessor's warranty.⁸⁹ Two doctrines have worked in favor of the lessee's dissolution claim: first, that a disclaimer of warranty must be clear and unequivocal and will be strictly interpreted in favor of the lessee; second, that a disclaimer of warranty should operate only prospectively and will not be read to cover defective conditions already existing at the time of the lease. For example, if the lease contains an assumption clause (wherein responsibility for maintenance is shifted from the lessor to the lessee), this clause is generally construed to produce only prospective effect, waiving only those defects arising after delivery is made.⁹⁰

In the case of *Wolf v. Walker*,⁹¹ this reasoning became the basis for granting relief to a lessee who had been evicted after making extensive repairs. The lessee rented a residence without a fixed term and agreed to pay \$80 per month, with the stipulation that he would make all necessary repairs.⁹² At the inception of the lease, the condition of the

⁸⁸ *Moity v. Guillory*, 430 So.2d 1243 (La. App. 1st Cir. 1983).

⁸⁹ *Wolf v. Walker*, 342 So.2d 1122 (La. App. 4th Cir. 1976); *Moity v. Guillory*, 430 So.2d 1243 (La. App. 1st Cir. 1983); *Pylate v. Inabnet*, 458 So.2d 1378 (La. App. 2nd Cir. 1984).

⁹⁰ Thus, in *Houma Oil Co. v. McKey*, 395 So.2d 828 (La. App. 1st Cir. 1981) a lessee sued for dissolution of a lease because, *inter alia*, the building had a leaking roof when it was delivered and the lessor would not repair it. The lease provided: "The Lessee will make all necessary repairs, including repairs to the roof and flooring" The court granted dissolution of the lease after finding that the stipulation was prospective and did not free the lessor from his obligation to deliver the premises in good condition. However, since the broad language of the stipulation did not differentiate between prospective and retrospective responsibility, the court's distinction is in reality one imposed upon the parties' agreement as a means of avoiding the stipulation and of giving imperative force to the lessor's duty to make repairs.

⁹¹ 342 So.2d 1122 (La. App. 4th Cir. 1976).

⁹² The agreement was heavily weighted in the lessor's favor. Although the lessee had assumed an extensive repair obligation, he had no greater security of tenure than a month to month lease. Thus he could not prevent the landlord from terminating the lease.

property was deplorable though it must have been apparent to the parties:

“A front screen door was broken, the bathroom floor was falling, the commode was supported by only one beam, the wall behind the bathtub had separated, the kitchen floor had only five pieces of linoleum tile, some of the wallpaper was completely loosened from the ceiling and various walls, paint was peeling ... and the entire interior of the house needed repainting.”⁹³

Five months from the inception of the lease, the lessee received an eviction notice for nonpayment of rent although he had already spent \$709 on repairs. The lessee moved out and then sued to be reimbursed for his outlays. The court granted him the sum of \$395 as reimbursement for the repairs (rent due being deducted) even though the lease had obligated the lessee to undertake the repairs at his own expense. The court reasoned that the assumption clause in the lease only embraced repairs becoming necessary during the lease, and not those necessary at its inception. Accordingly, reimbursement was proper under the repair and deduct provisions of the Code. Since the defects were patent and the stipulation sufficiently inclusive, the court in reality interpreted the agreement contrary to the intent of the parties.⁹⁴ Though the court did not expressly state that the lessor's duty to deliver a vice-free residence cannot be contractually shifted, this is the apparent effect of a result fundamentally at odds with their contract.

In summary, we may perceive that some recognition has been given in the jurisprudence to the need to make the lessor's warranty imperative. Unfortunately this recognition has been usually reserved for cases involving dissolution — the least efficient remedy of the lessee. Furthermore, the recognition is selective and heavily disguised, and no clear policy has been articulated. The jurisprudence seems caught in the contradiction between the spirit of contractual freedom and the pressing need to control the abuse of bargaining position in the residential lease. The overall effect is to obscure the basic question that must be answered

⁹³ 342 So.2d at 1122-23.

⁹⁴ It is hardly doubtful that the intent of the parties, in return for a low rent, was to shift the responsibility for the patent defects present when the premises were delivered.

— should the obligation of the lessor to deliver the premises in good repair be an imperative requirement of the law?

B. THE NARROWING OF THE MAINTENANCE OBLIGATION. Besides imposing on the landlord the obligation to deliver the premises in good condition, Civil Code articles 2693 and 2695 also place the lessor under a continuous duty to maintain the thing in good repair during the term of the lease. Hence, these articles provide two somewhat interrelated protections for the lessee. The maintenance and repair obligation of article 2693, however, can be shifted or avoided by the provisions of the lease. Casting the provision as imperative or non-derogable would perhaps run counter to the individualistic outlook of its 19th century draftsmen, but would be more consistent with several important functional considerations, including the amelioration of substandard housing, the deeper pocket of the lessor, and the problem of unequal bargaining power.

At Civil Law, the basis for burdening the lessor with a lion's share of the repair obligations⁹⁵ runs back to the essential difference between the sale and the lease of a thing. In a sale, the buyer becomes owner and must assume the risk of loss under the rule *res perit domino*. In a lease, on the other hand, there is no similar change of ownership or shift of risk; the risk of loss, which is another way of saying the responsibility to repair, remains upon the owner-lessor. Accordingly, the civil law traditionally has begun with the rule that a lessor bears the risk for every major repair not resulting from the lessee's own fault.⁹⁶

It has become clear in practice, however, that this original allocation has made little difference in preventing dilapidation or in ameliorating housing conditions. The lessor's repair obligation is normally avoided without transferring it to anyone. The legal basis on which substandard housing is leased in Louisiana has little to do with contractual stipulations regularly imposed by landlords upon tenants; such stipulations are not widely used in leasing to low-income tenants.⁹⁷ Rather, the truth is that a restrictive interpretation of the scope of the re-

⁹⁵ The lessee has only minor repair responsibility for the "locatives" — small repairs which, as a rule, are attributed to his fault. PALMER, *supra* note 2, at § 3-6.

⁹⁶ *Viterbo v. Friedlander*, 120 U.S. 707 (1887); POTHIER, DE LOUAGE, No. 219 at 87.

⁹⁷ As we have seen, *supra* note 12, the typical lease of this sort is an oral, unregistered, month-to-month lease in which the rights and duties of the parties are generally governed by the leasing regime stated in the Code.

pair obligation, coupled with the lack of tenant remedies and resources to assert legal claims, have made it largely unnecessary for landlords to use their market dominance to obtain contractual waivers of their obligations.⁹⁸ The restrictive view adopted by the courts can be best seen from three vantage points — the obligation to pay rent, the availability of specific performance to require repair, and the repair and deduct remedy.

(1.) THE LESSOR'S DEFAULT IS NO DEFENSE TO HIS ACTION FOR THE RENT. Civil Code article 2712 provides:

“The lessee may be expelled from the property if he fails to pay the rent when it becomes due.”

But can the tenant be evicted for withholding the rent due to the lessor's failure to deliver the premises in good repair or for a failure to maintain the premises in good repair? Surprisingly, the answer is “Yes.” Courts have held that article 2712 entitles the lessor to evict the tenant even when the lessor is in breach of these duties under the lease. Thus, regardless whether the premises are in bad repair due to the lessor's default,⁹⁹ or whether the lessor has failed to provide heat to the tenants,¹⁰⁰ or has arbitrarily refused to agree to a sublease,¹⁰¹ the lessee in possession is generally subject to eviction if he fails to pay the full rent.

Civilians familiar with the internal scheme of the Code, according to which particular provisions in contracts, including leases, are interpreted in *pari materia* with general obligations principles (particularly the mutuality principle and the dependency of promises in onerous contracts), may find this reading of article 2712 an exemplary case of tunnel vision. Merely because Civil Code article 2712 does not state any defenses to an eviction for nonpayment does not mean that the obligation to pay rent is absolute.

Clearly, the lessee has a number of defenses that are not stated in article 2712. For example, one unmentioned exception is the right of the tenant to repair the premises and deduct the cost from the rent. A tenant

⁹⁸ In a sense the judiciary, rather than rectifying or counterbalancing the market power of the landlord, has simply recognized it, thus sparing the need for it to be exercised.

⁹⁹ *Winn v. Spearing*, 26 La. Ann. 384 (1874).

¹⁰⁰ *Baronne Building, Inc. v. Mahoney*, 132 So. 795 (La. App. Orl. 1931).

¹⁰¹ *Gamble v. N.O. Housing Mart*, 173 So.2d 219 (La. App. 4th Cir. 1965).

properly exercising his right to deduct a portion of the rent could not be evicted for failure to pay the full rent, and no reading of article 2712 in isolation could persuasively make it seem so. Another unmentioned but clear exception to article 2712 arises when the lessor fails to keep the lessee in peaceable possession thus causing his eviction by a party claiming a legal right to the premises. The courts hold that the lessee is relieved from the date of eviction from further obligation to pay the rent.¹⁰²

Furthermore, a reading of the rent article without regard to the overall intent of the Code undermines the theory that a lease is a commutative contract containing mutually dependent obligations. Article 2022 declares, "Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously." In view of this article the jurisprudence's treatment of the lessee's promise to pay rent as if it were an independent covenant is indeed strange. Recognition that a state of disrepair (not caused by the tenant's fault) is a defense to an eviction for nonpayment of the rent would provide a powerful enforcement tool in the hands of low-income tenants. At present, he lacks a remedy that permits him to remain in possession and affirmatively require the lessor to repair the property.¹⁰³

(2.) THE LESSOR'S OBLIGATION IS UNENFORCEABLE BY SPECIFIC PERFORMANCE. Courts have also ruled that a lessee cannot obtain specific enforcement of the lessor's duty to keep the premises in good repair.¹⁰⁴ By depriving the lessee of this remedy, courts have eliminated the most direct means of enforcing the repair obligation. The civilian authorities generally indicate that the remedy of specific performance, in regard to an obligation *to do*, cannot be demanded as of right. Yet it is also said that the courts may in their discretion grant such an order in cases where the remedy is practical and

¹⁰² See *Rulf v. Von Schoeler*, 52 So.2d 82 (La. App. Orl. 1951).

¹⁰³ PALMER, *supra* note 2, at § 4-8. Furthermore by reading article 2712 as an absolute duty of the lessee the courts have created a conspicuous exception to the almost universal rule that an obligee cannot enforce a contract or put the obligor in default where the obligee himself is in default. *Pemington v. Drews*, 49 So.2d 5 (La. 1950); *Lundy v. S. Pfeifer & Co.*, 110 So. 556 (La. 1926).

¹⁰⁴ See *Evans v. Does*, 283 So.2d 804 (La. App. 2nd Cir. 1973); cf. *Laroussini v. Werlein*, 18 So. 704 (La. 1895).

the defendant's liberty is not encroached upon.¹⁰⁵ These conditions are easily met in the context of the repair obligation, and this is *a fortiori* the case since the 1984 Obligations Revision undertook to strengthen and extend the remedy.¹⁰⁶ It should also be noted that French Courts have compelled landlords to make repairs through the use of *astreintes*,¹⁰⁷ even though the Louisiana court in *Evans v. Does*¹⁰⁸ summarily rejected the use of specific performance without weighing any of the discretionary factors or considering the important public policy considerations at stake.¹⁰⁹

As we have seen earlier, compliance with Housing Code standards rests upon the threat of criminal fines or incarceration of the landlord. The aim of the penal sanction is to obtain specific performance in much the manner as an *astreinte*.¹¹⁰ In view of the fact that criminal sanctions have been almost totally ineffective as deterrents it is difficult to understand why the courts have failed to place this analogous remedy in the hands of the lessee, the party with the greatest interest in code enforcement.

Recognizing this, one commentator has recommended that the civil penalty of a cumulative fine be instituted in the place of criminal sanctions.¹¹¹ Clearly this recommendation reinforces the submission made here: that the civil remedy of specific performance parallels the aim of the Housing Code, and is the strongest remedy available to the lessee. Courts have dismissed this remedy without sufficient explanation.¹¹²

¹⁰⁵ PALMER, *supra* note 2, at §§ 5-10, 5-11. Jackson, *Specific Performance in Louisiana Past and Future*, in ESSAYS ON THE CIVIL LAW OF OBLIGATION 200 (J. Dainow ed. 1969); MAZEAUD ET MAZEAUD, III LECONS DE DROIT CIVIL § 1139 (4th ed. 1974).

¹⁰⁶ See La. Civ. Code arts. 1986-1988.

¹⁰⁷ According to Planiol, an *astreinte* may be defined as a pecuniary judgment imposing a penalty at a rate of so much per given unit of time. It is designed to obtain specific performance by the obligor through the use of a penalty susceptible of continuing indefinitely. *Astreintes* begin as threatened penalties. They take effect only if the obligor fails to execute his obligation within a given deadline. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL § 208 (Louisiana State Law Inst. Trans. 1959).

¹⁰⁸ 283 So.2d 804 (La. App. 2d Cir. 1973).

¹⁰⁹ 283 So.2d at 807.

¹¹⁰ Comment, *supra* note 43, at 613.

¹¹¹ *Id.* at 617.

¹¹² Ironically, one suspects that the repair and deduct remedy is in part to blame. The provision was so *avant-garde* for its times that it was looked upon as the

(3.) THE LESSOR'S OBLIGATION IS NOT EFFECTIVELY ENFORCEABLE BY REPAIR AND DEDUCT. Under the "repair and deduct" provision of the Civil Code (article 2694), the lessee possesses a kind of "self-help" remedy against a landlord who refuses to make necessary repairs. Louisiana's was the first modern code to provide this remedy, an idea the draftsmen apparently borrowed from Pothier.¹¹³ Rather than extending the remedy to its full measure, however, courts have weakened it to the point of ineffectiveness.

Under the terms of article 2694, when the landlord refuses to make necessary repairs, the lessee may make the repairs himself and deduct their cost from the rent, provided he meets three conditions: (1) he must first place the lessor in default by calling upon him to make the repairs; (2) he must prove that the repairs were indispensable; and (3) the price paid was just and reasonable.¹¹⁴ Regrettably, courts have insisted that the sequence is strictly one of repair and then deduct, and not one of deducting the rent until such time as enough capital has been withheld to pay for the repairs. This sequence, of course, is unfavorable to the low-income tenant, and it is perhaps the chief reason why the remedy has had, and can have, so little impact upon slum housing.

Courts have also limited the amount of repair to the amount of rent due, thereby imposing a ceiling upon the total cost of repairs that can be charged to the lessor's account. It is indeed usual, in the case of a month-to-month lease of poor quality housing, for the cost of repairs to exceed the periodic rent. Yet courts have ruled that the lessee must absorb the cost of any repair in excess of the rent due or to become due under the lease.¹¹⁵ A repair and deduct provision limited by a rental ceiling is not a serious self-help remedy.

In stressing this limitation, courts have given the impression that they are only following the strict text of the law. Yet the text does not necessarily suggest a ceiling; rather, it suggests the deduction of the price of the repairs from the "rents due *and to become due.*"¹¹⁶ A

tenant's exclusive remedy when in reality it was intended to be a concurrent remedy along with specific performance.

¹¹³ DE LOUAGE, Part II, Sec. III, No. 108.

¹¹⁴ PALMER, *supra* note 2, at § 3-8.

¹¹⁵ Rumfola v. Civileto, 123 So. 153 (La. App. Orl. 1929); Heirs of Merilh v. Pan American Films, 200 So.2d 398 (La. App. 4th Cir. 1967). *But see* Wolf v. Walker, 342 So.2d 1122 (La. App. 4th Cir. 1976).

¹¹⁶ The French text of article 2694 reads "les loyers échus et à échoir."

workable, if not an exegetic, interpretation of the law would hold that any amount spent in excess of the rent term operates as a prepayment of future rent and automatically extends the term in proportion to the payment.^{116a} The prepayment notion would simply prevent the lessor in default on his own repair obligation from enriching himself by evicting his lessee and retaining improvements for which he has not paid. This is hardly a radical suggestion, for it would only read into the typical month-to-month verbal leasing situation a temporary freeze of the lessor's power to terminate the contract after repairs have been made. The lessee who repaired would gain an extension beyond the month to which he was entitled to occupy the premises, which is only fair, when one considers that his repairs to the premises will inure to the long-term benefit of the lessor, both in terms of capital improvement and liability avoidance.

CONCLUSION TO PART II.

Thus far this Article has attempted to present a factual picture of the housing situation in Louisiana and a general case for reforming the Civil Code provisions as they relate to the residential lease. The code articles have stood unchanged for over 150 years, and the time has come for considerable revision.

This is not to imply that we should depart from our civilian tradition, for we can modernize our laws within a tradition that has always produced a more advanced and workable conception of the residential lease than that fostered by the common law of England and Louisiana's sister states. In the next Part of this article I will consider a final question — what should revision of the law seek to accomplish?

^{116a} The prepayment notion was first advanced by Judge Samuel: "Thus, by analogy, it appears to us the lease agreement here should be interpreted as not terminating until the plaintiff reasonably had been compensated for the repairs he made." *Wolf v. Walker*, 342 So.2d 1122, 1123 (La. App. 4th Cir. 1976).

PART III.

**STRUCTURING A NEW CODE BALANCE THROUGH
CODE REVISION — THREE ESSENTIALS**

We have seen how over the years the Code's aspirations and assumptions — for example, that the bargaining power of both parties is equal and that a free and fair allocation of housing is achieved through the market — have lost much of their validity. A fair balance in the late 20th century will be one that substantially redresses the actual defects of the present market by recognizing that residential lessees in Louisiana frequently lack the education, the means, and the legal expertise — which is to say the bargaining power — of the lessors with whom they deal. In this Article it is not of course my aim to present a draft of new articles or to discuss the details of code revision. I wish only to suggest the broad directions which reform should take. In my view it will be essential to deal with three basic needs.

(1.) The Need to Create Imperative Provisions¹¹⁷

A newly drafted code should make clear that certain basic obligations of the lessor and certain rights, remedies and defenses of the lessee are imperative features of the law that cannot be transferred or waived by contract. In relation to a range of important matters, but certainly not all, the values of freedom to contract must be subordinated to imperative provisions of the law. In view of the shortage of low-income housing and the high percentage of Louisiana tenants with incomes falling below the poverty line, the typical residential lessee has no substantial bargaining or enforcement power. Restricted to renting what they can afford, such lessees are necessarily faced with the choice between renting substandard housing or none at all. Whether the substandard condition is patent or latent should be immaterial in the eyes of the law since legal responsibility for the condition cannot be the subject of fair and equal bargaining. Hence it should be irrelevant that the lessee has by contract, waived some or all of his remedies or has assumed full responsibility for the condition of the premises. Contractual waivers on essential

¹¹⁷ On the distinction drawn here between suppletive and imperative provisions of the law, and the many equivalent expressions used by legal writers, see Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 Tul. L. Rev. 544, 548 (1935).

terms, whether tacit, oral or written, should not be regarded as the source of law between the parties.¹¹⁸

Any detailed list of these essential terms will require careful thought and doubtless, much debate, but the list should probably include the following subjects:

- (a.) all remedies and defenses of the lessee established by law;
- (b.) the lessor's obligation to deliver and maintain the premises in compliance with the minimal standards of the Housing Code;
- (c.) the lessor's obligation to guarantee the safety of the premises;
- (d.) a minimum term for the residential lease (6 months?), during which the lessee has security from eviction without cause.

(2.) The Need to Strengthen and Create Affirmative Remedies and Defenses.

The most noticeable deficiency in the Civil Code's remedial scheme lies in the weakness of the lessee's remedies to enforce the lease contract. We have seen that judicial decisions have restricted the number, scope and efficiency of the lessee's remedies, while viewing the lessor's action to evict or collect on the rent as an independent covenant.¹¹⁹ It is true that where the lessor fails to repair or to provide essential services the lessee may have the right to dissolve the contract by judicial action or by justifiable abandonment of the premises. Yet dissolution is a negative remedy that will rarely suit the needs of the urban lessee. The law should not withhold a remedy from the lessee who desires to remain in possession and to enforce the obligations of the lessor to provide a safe and habitable dwelling. Under the current law, however, the positive remedial options are seriously deficient. We have seen, that notwithstanding the preference for forced execution in the civilian tradition, the lessee cannot obtain specific performance of the

¹¹⁸ The use of imperative provisions, it is believed, is far more precise and certain than the common-law approach of controlling the freedom of the parties to decrease or increase the lessor's obligations through the relatively indeterminate notions of unconscionability and public policy. § 5.6 Restatement of Property 2nd (Landlord and Tenant) (1977).

¹¹⁹ See text *supra* at notes 99-103.

lessor's repair obligation.¹²⁰ If he stays in possession, electing not to attempt repairs and then to apply their cost to the rent, he must pay the full rent despite the impairment to his enjoyment of the premises.¹²¹ There are no other recognized procedures by which the lessee in possession may withhold the rent, pay a reduced or abated rent, or pay the rent into court. Repair and deduct is often an inadequate or impractical option because the residential lessee usually has a short-term lease that may be terminated without cause before the repairs can be completed and/or before the expenditures for repairs can be deducted from current and future rents.¹²² Furthermore, if complaint is made to the lessor or housing code violations are reported to the appropriate authorities, the lessee has no defense against a retaliatory eviction except where the lessor's action constitutes an "abuse of right."¹²³

Because of this remedial hiatus, there is a need to strengthen and to expand the positive remedies and defenses of the lessee. To that end, the following proposals should be considered.

- (1.) Specific performance should be liberally available in enforcing the residential lease. It is already viewed as a preferred remedy of the civil law¹²⁴ but explicit reemphasis in the title on lease will be necessary in order to overcome the reluctance expressed in the lease jurisprudence.

¹²⁰ *Supra*, text at notes 104-112.

¹²¹ *Supra* text at notes 99-103.

¹²² *Supra* text at notes 113-116.

¹²³ The Louisiana courts have indicated that the doctrine of abuse of rights may be available to counteract a retaliatory eviction in certain instances, but thus far no defenses based upon that doctrine have been successfully established. *Real Estate Services, Inc. v. Barnes*, 451 So.2d 1229 (La. App. 4th Cir. 1984). *See also Mascaro v. Wokocha*, 489 So.2d 274 (La. App. 4th Cir. 1986); *Mascaro v. Hudson*, 496 So.2d 429 (La. App. 4th Cir. 1986). This is not surprising in light of the lessee's difficult burden of establishing an "abuse" under the elusive and vague criteria stated in *Real Estate Services*:

- (1) "exercise of rights exclusively for the purpose of harming another or with the predominant motive to cause harm;
- (2) "the non-existence of a serious and legitimate interest that is worthy of judicial protection;
- (3) "use of the right in violation of moral rules, good faith or elementary fairness; or
- (4) "exercise of the right for a purpose other than that for which it was granted."

See generally Cueto-Rua, *Abuse of Rights*, 35 La. L. Rev. 965 (1975).

¹²⁴ This preference has been significantly clarified by the 1984 Obligations revision. LA. CIVIL CODE arts. 1986-1989.

- (2.) The existing "repair and deduct" remedy should be expanded so that it receives a more liberal application. Within established dollar limits, the expenditures of the lessee on reasonable repairs should be viewed as payment of the current rent or prepayment of the rent to become due.¹²⁵
- (3.) Where Housing Code violations and other defaults are alleged and proven, the commutative nature of the lease contract should be recognized. Accordingly the lessee should be entitled to a defense against the lessor's action for rent or eviction.¹²⁶
- (4.) Rent abatement and rent withholding should be recognized as remedies of the lessee. Both remedies are essential to the indigent tenant who may have no means at his disposal to exercise the repair and deduct remedy. Rent abatement may be used as either an affirmative defense to a proceeding to evict for nonpayment of the rent¹²⁷ or a basis to recover the excess on rentals already paid.¹²⁸ Rent withholding typically permits the lessee, after proper notice to the lessor, to place the accruing rent in escrow until the default is eliminated or the lease terminates whichever first occurs. The lessor may collect the funds held in escrow after eliminating his default.¹²⁹

¹²⁵ This remedy is provided for in the Restatement of Property 2nd, § 11.2 (1977) and the Uniform Residential Landlord Tenant Act, § 4.104(a)(1) (1972). As of 1976 statutes in at least 14 states, including California, New York and Illinois, authorized some version of this remedy.

¹²⁶ To ensure reporting and enforcement, the lessor could be made liable for the reasonable attorney fees incurred by the lessee in defending the action and proving the violation.

¹²⁷ The lessee may defend the eviction proceeding by establishing his right to abate and by paying to the lessor the abated amount. Restatement of Property 2nd, § 11.1 (1977).

¹²⁸ The amount to be abated may be measured by the decrease in the fair market value of the premises occurring after default. This fractional decrease is then multiplied times the original rent, thus yielding a proportionately reduced sum. Restatement of Property 2nd, § 11.1 (1977). Rent abatement is recognized by statute in at least 14 jurisdictions, including Florida, Massachusetts, Ohio and Virginia.

¹²⁹ Restatement of Property 2nd, § 11.3 (1977). This remedy is recognized by statutes, as of 1976, in 23 states, including New York, Florida, Ohio, Virginia and Pennsylvania. It has also been adopted by the Uniform Residential Landlord Tenant Act, § 4.105 (1972).

- (5.) A defense against lessor's retaliatory action — such as by proceedings to evict, increase in the rent, decrease of services etc. — should be recognized. This protection is now a feature of the laws in nearly all the states.¹³⁰

(3.) The Need for a Special Regime

A special regime for residential leases should be created in the Civil Code. Underlying this suggestion is recognition that the residential lease is specially important in social terms and has particular problems calling for discrete solutions. An independent code structure will permit the flexibility to adopt solutions that might otherwise be considered inappropriate for commercial, agricultural and other leases. In many cases the residential lease cannot be properly regulated by general rules simultaneously applicable to other leases.¹³¹

CONCLUSION

Reform of the laws on residential lease must take into account the very real problems which our population faces. The quality and condition of the housing stock is far below the national average. Delapidation is severe, and municipal code enforcement has been largely a failure. A high percentage of Louisiana tenants live below the poverty line and thus have no substantial bargaining or enforcement power.

To be sure, the law of lease is no cure-all for such deep-seated problems, but it must take them into account. To assume that the law has no role to play in redressing socio-economic problems is to belittle the value of legal reform of any kind, at any time. Reform worthy of its name must sometimes do more than modernize the phraseology of an old code or simply make the law more understandable to judges and

¹³⁰ This includes New York, Pennsylvania, California, Maryland, Ohio and Connecticut. See also the provisions of the Restatement of Property 2nd, § 14.8 (1977) and the Uniform Residential Landlord Tenant Act, § 5.101 (1972).

¹³¹ There are numerous illustrations of this point, but I shall briefly mention two that seem obvious to me. Consider the well-known principle that third parties are regarded as strangers to a contract. This principle functions in an acceptable way in the field of commercial leases. It is anomalous, however, in the context of a residential lease, to say that the spouse and family of the lessee are strangers to the lease and therefore are not entitled to the protection of the lessor's warranty. Consider as well the rule that leases must be recorded in order to bind third parties (for example a third-party purchaser of the leased premises). The requirement of recordation produces no particular hardships for the commercial lessee advised by counsel, but it may work a great injustice upon the unadvised residential lessee who, in a vast number of cases, does not or cannot record his agreement.

lawyers; it must modernize our assumptions, revise our principles and devise new means to solve our legal problems. This is the type of reform now called for in the area of the residential lease.

