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"EQUAL JUSTICE UNDER THE LAW": THE EVOLUTION OF A NATIONAL COMMITMENT TO LEGAL SERVICES FOR THE POOR AND A STUDY OF ITS IMPACT ON NEW JERSEY LANDLORD-TENANT LAW

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To many, equal justice under the law means unhindered access to the legal system. This access is of vital importance to the stability of our society. As Reginald Heber Smith observed:

> Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down.[1]

The federal legal services projects, funded out of the Office of Economic Opportunity, were established in response to the fears that, after decades of neglect and abuse from the legal system, the poor of this nation might in fact "pull things down." The experience of the sixties indicates how close we came.

The federal program has, for the most part, been successful in providing individual representation for the poor as well as in bringing about beneficial changes in laws which directly or indirectly affect them. This article will attempt to acquaint the reader with the diffi-

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[1] Smith, *Introduction* to E. BROWNELL, LEGAL AID IN THE UNITED STATES xiii (1951).

culties Legal Services programs faced in the developing years, their successes, and the future of the program as a National Legal Services Corporation becomes viable. Particular areas in which additional reform is needed will be discussed and, in the final part of the article, recent developments in New Jersey landlord-tenant law will be analyzed as an example of what changes Legal Services attorneys can effect.

THE ESTABLISHMENT AND SURVIVAL OF ORGANIZED LEGAL SERVICES FOR THE POOR

Early Developments

The need for some kind of legal assistance program for the poor was first recognized and acted upon during the late nineteenth century.[2] Legal aid societies of varying structures and purposes began appearing in the nation's cities, expanding slowly throughout the next sixty years.[3] But, as late as 1965, the services rendered, although

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[2] Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211, 212 (1966). For an in-depth discussion of the development of legal aid in the United States see E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951 & Supp. 1961) [hereinafter cited as BROWNELL]. For a recent definitive work on Legal Services see E. JOHNSON, JR., JUSTICE AND REFORM (1974) [hereinafter cited as JOHNSON].

[3] BROWNELL, *supra* note 2, at 7–11. The earliest legal aid societies served only specific groups, such as German immigrants (New York's Der Deutsche Rechts-Schutz Verein founded in 1876) and women (Chicago's Protective Agency for Women and Children founded in 1886). JOHNSON, *supra* note 2, at 4–5. *See* J. MAGUIRE, LANCE OF JUSTICE 27–48 (1928).

In 1890, the German Society organization removed all prior restrictions on eligibility for its services except that of poverty. *Id.* at 58. This was the advent of the New York Legal Aid Society and, in 1896, the name was formally changed to indicate its true purpose. *Id.* at 3.

At the end of the 19th century, only the New York society and two Chicago societies were in existence. Smith, *The Relation Between Legal Aid Work and the Administration of Justice*, 45 A.B.A. REP. 217, 224 (1920). The total number of cases handled by these organizations had increased from approximately 5,600 in 1888 to over 16,000 in 1899. BROWNELL, *supra* note 2, Table XVIII, at 167. The first two decades of the twentieth century witnessed a gradual expansion of legal aid and, by 1917, forty-one societies had been established, Smith, *supra* at 224, while the number of cases handled annually exceeded 100,000. BROWNELL, *supra* note 2, at 8.

Throughout the 1920's, the growth of the legal aid movement was "quiet and steady" with seventy-five legal aid organizations in existence at the end of 1928. *Report of the Standing Committee on Legal Aid Work*, 54 A.B.A. REP. 380, 380–81 & App. A, at 382–83 (1929). The early depression years brought a rapid increase in the number of clients. However, the financial support at this time was insufficient to accommodate this swelling workload. The resultant effect was that, with the number of cases to be handled far exceeding the facilities available, "clients became tired of waiting and tired of inadequate service," JOHNSON, *supra* note 2, at 8, and the number of

performed in good faith, were able to reach only ten percent of those who needed them.[4] In response to the recognized need for organized legal services, and the clear inability of the legal aid societies to meet the growing demand,[5] in 1965, the Office of Economic Opportunity set up the first federally funded legal services program.[6]

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cases handled by legal aid organizations actually dropped between 1933 and 1937. BROWNELL, *supra* note 2, Table XVIII, at 168. During the latter part of the depression era, the number of cases handled began to rise, and by 1940 there were 118 legal aid societies or bar association committees actively giving legal aid. *Report of the Standing Committee on Legal Aid Work*, 65 A.B.A. REP. 187, 188 (1940). World War II prevented the expansion of the programs, but the increasingly vocal support of the organized bar in the late forties and early fifties aided in obtaining increased funding for the legal aid movement. *See* Pye, *supra* note 2, at 212; Voorhees, *Legal Aid: Past, Present and Future*, 56 A.B.A.J. 765, 765–66 (1970). There were 210 legal aid organizations in 1959, but, because of the population explosion, the existing legal aid organizations were still unable adequately to handle the workload. *Report of the Standing Committee on Legal Aid Work*, 85 A.B.A. REP. 479, 480-81 (1960).

[4] Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 410 (1965).

[5] Note, *Legal Services—Past and Present*, 39 CORNELL L. REV. 960, 960 & n.3 (1974). The problems which faced the legal aid societies revolved around the need for funding:

> Largely because Legal Aid has been underfinanced and understaffed, it frequently does not take certain types of cases, such as divorces and bankruptcies, or takes them only under emergency circumstances. The Legal Aid societies often have had to shorten office hours and to set eligibility requirements too strictly . . . simply as a device to keep the caseload down.

Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 807 (1967) (footnote omitted).

[6] Although the majority of legal aid societies were privately funded, several publicly funded organizations were established quite early in the movement. *See* BROWNELL, *supra* note 2, at 92. The question of appropriate funding had been in controversy since 1920 when the American Bar Association first seriously considered legal aid. *Compare* Hughes, *Legal Aid Societies, Their Function and Necessity*, 45 A.B.A. REP. 227, 232–35 (1920) *with* Tustin, *The Relation of Legal Aid to the Municipality*, 45 A.B.A. REP. 236, 239–40 (1920). The controversy intensified when the British Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, was enacted. This act created a system whereby the government compensated private attorneys who had handled cases for people who could not afford to pay for legal services, and its implementation had taken place during a period of our history when any federal government action was viewed with disdain. JOHNSON, *supra* note 2, at 17–18.

The result was that a majority of the members of the bar embraced the philosophy of private as opposed to public financing of legal aid since it was believed that the latter would lead to a socialization of the legal profession. *Id.* at 18; Miller, *Lawyers and Judges and Legal Aid*, 38 J. AM. JUD. SOC. 15, 19–20 (1954). This was the dominant view through the 1950's and, as a result, there were fewer municipal legal aid organizations in 1962 than there had been in 1919. JOHNSON, *supra* note 2, at 17–18. However, the increasing workload of legal aid societies in the 1960's and the greater acceptance of the War on Poverty tended to soften the opposition to federal monetary assistance. *See* Voorhees, *The OEO Legal Services Program: Should the Bar Support It?*, 53 A.B.A.J. 23, 23–26 (1967); Note, *Neighborhood Law Offices: The*

Although the American Bar Association immediately voted to support the federally funded Legal Services Program,[7] the organized bar had, prior to that time, made a barely colorable attempt to service the legal needs of the poor.[8] Voices of the bar had, of course, been raised in concern. The National Legal Aid and Defender Association (NLADA) was formed over fifty years ago to assist the handful of attorneys aiding indigents through legal aid societies and criminal defense work.[9] In conjunction with the ABA Standing Committee on Legal Aid, the NLADA attempted to increase the sensitivity of local and state bar associations to the needs of indigents.[10] Without the lonely struggle of NLADA and a very few other organizations and individuals over the past fifty years, organized legal services may never have come to fruition in the OEO program.

OEO—Office of Legal Services

As part of its War on Poverty, the federal government assumed the burden of financing legal services through the Community Action Program (CAP), established by the Economic Opportunity Act of 1964.[11] The relationship between CAP and the Office of Legal Services was rocky from the beginning because of the degree of control the local Community Action Agency had over the funding of a legal services project.[12] In 1966, Congress modified the ties between the

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New Wave in Legal Services for the Poor, 80 HARV. L. REV. 805, 805–06 (1967). *See generally* Parker, *The Impact of Federal Funding on Legal Aid*, 10 CALIF. W.L. REV. 503 (1974).

[7] *Report of the Board of Governors, 1965 Midyear Meeting*, 90 A.B.A. REP. 140–41 (1965).

[8] In 1963 only .2% of the money spent on legal services went toward legal services for the poor. Carlin & Howard, *supra* note 4, at 410. The poor rarely used lawyers and when they did, they were often forced to use lawyers of questionable professional qualities and ethical standards. *Id.* at 384–86.

[9] JOHNSON, *supra* note 2, at 7 & n.30. The original organization, the National Association of Legal Aid Organizations, was formed in 1923 at the recommendation of Reginald Heber Smith in his now classic work, *Justice and the Poor*. *Id.* at 7.

[10] *Id.* at 7–8.

[11] Act of Aug. 20, 1964, Pub. L. No. 88–452, 78 Stat. 508 (codified at 42 U.S.C. §§ 2701–981 (1970)).

The Legal Services program was not specifically created in the 1964 Act but was established in 1965 by virtue of an amendment to the Act which broadened the scope of funding to include CAP programs other than those specifically mentioned in the statute. Act of Oct. 9, 1965, Pub. L. No. 89–253, tit. I, § 12, 79 Stat. 974. *See* Pious, *Congress, The Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418, 423.

[12] Note, *Legal Services—Past and Present*, 59 CORNELL L. REV. 960, 963 (1974). For example, the CAP refused to approve proposals for local programs without the approval of nine reviewers who were not members of the Legal Services staff. JOHNSON, *supra* note 2, at 140.

two offices and provided for direct congressional appropriations to the Office of Legal Services.[13]

The stated objectives of the Legal Services Program included educating the poor as to their substantive rights, sponsoring research in areas of the law affecting the poor, reforming the law, and "acquaint[ing] the whole practicing bar with its essential role in combating poverty."[14] The program provided funding to local private nonprofit organizations which operated in an identifiable location or geographic area and which agreed to meet certain guidelines.[15] The administration, structure, and scope of the local program, however, was to be determined by the local project.[16] Many of the existing legal aid societies received funding and hundreds of new offices were established.[17] The offices were located in storefronts, public buildings, trailers, and converted warehouses. In short, neighborhood Legal Services offices were placed for ready access by the clientele served, and their hours established for the convenience of those clients.[18] Clients who qualified under OEO-established guide-

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[13] Act of Nov. 8, 1966, Pub. L. No. 89-794, § 211-1(b), 80 Stat. 1462, *as amended*, Act of Dec. 23, 1967, Pub. L. No. 90-222, § 225(b), 81 Stat. 702 (codified at 42 U.S.C. § 21(b) (1970)) (repealed 1974) (now 42 U.S.C. § 2996 *et seq.* (Supp. IV, 1975)).

[14] OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 1 (1967) [hereinafter cited as 1967 GUIDELINES].

[15] OEO funded many associations which were already in existence. But to receive such funding, the organization was required to include representatives of the poor on the project's board of directors in order to comply with section 202(a)(3) of the Economic Opportunity Act which mandated " 'maximum feasible participation of the residents of the areas and members of the groups served.' " 1967 GUIDELINES, *supra* note 14, at 4.

[16] *See* Pye, *supra* note 2, at 223.

Various kinds of services were funded as a result, ranging from the traditional individualized services-only approach to research back-up units. *See* Note, *supra* note 12, at 961-62.

[17] By 1967, OEO had made grants to 300 agencies in 210 cities. JOHNSON, *supra* note 2, at 99. In 1971, 40% of the OEO-funded projects were run by legal aid societies which had been established before the OEO program. 1 EVALUATION DIVISION, OEO, EVALUATION OF OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM FINAL REPORT, at II-3 (1971).

[18] For general discussion of the neighborhood concept see Pye, *supra* note 2, at 231-43; Note, *supra* note 6. The experience of two privately funded neighborhood legal services programs established in the early sixties, in New Haven and New York, served as models for the development of later OEO programs. *See* JOHNSON, *supra* note 2, at 21-27. The successes and failures of the New Haven project were evaluated by Jean and Edgar Cahn in their now classic article, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

By placing the law offices in the neighborhoods, instead of in the downtown areas near the courts where legal aid offices were traditionally located, it was hoped that access to legal services would be increased and the hostility toward the legal system would be diminished. *See* J. HANDLER, NEIGHBORHOOD LEGAL SERVICES—NEW

lines[19] were not charged any fees for services rendered and were represented in all but criminal matters.

In the ten years of the program's existence, it has expanded from 247 legal aid offices handling 414,000 cases[20] to 638 offices handling over one and a half million cases annually.[21] The scope of the services available to clients ranged from simple advice to appellate representation and legislative advocacy. No restrictions were placed on the classes of defendants against whom Legal Services attorneys could litigate, and the local programs were often encouraged to actively participate in attempts to reform the law to make the system fairer

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DIMENSIONS IN THE LAW 4 (L. Wells ed. 1966). Although experience has not shown that the neighborhood concept actually increased access to the system, the drawbacks of the inefficiency of scattered offices may be offset by the benefits gained from a minimization of the alienation of the neighborhood residents. K. FISHER & C. IVIE, FRANCHISING JUSTICE: THE OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM AND TRADITIONAL LEGAL AID 17–18 (American Bar Foundation Series 1971).

[19] The only requirement was that the applicant be unable to pay for a lawyer. 1967 GUIDELINES, *supra* note 14, at 7. The original income guidelines thus varied from project to project because of the different economic conditions in the different areas of the country, but the average cut-off point for a family of four was an annual income of $3,600. JOHNSON, *supra* note 2, at 100. For an in-depth analysis of the financial and subject matter eligibility criteria applied by the various legal aid organizations see Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. URB. L. 549 (1967).

The Legal Services Corporation Act places the responsibility for establishing eligibility guidelines for grant recipients on the Corporation and mandates that the following factors be considered in setting eligibility standards:

> (i) the liquid assets and income level of the client,
>
> (ii) the fixed debts, medical expenses, and other factors which affect the client's ability to pay,
>
> (iii) the cost of living in the locality, and
>
> (iv) such other factors as relate to financial inability to afford legal assistance, which shall include evidence of a prior determination, which shall be a disqualifying factor, that such individual's lack of income results from refusal or unwillingness, without good cause, to seek or accept an employment situation . . . .

42 U.S.C. § 2996f(2)(B) (Supp. IV, 1975).

[20] Pye, *supra* note 2, at 212–13.

[21] Arnold, *And Finally, 342 Days Later . . .* , 5 JURIS DOCTOR, Sept. 1975, at 32. In 1971, the reported case load was 1,237,275. NLADA, STATISTICS OF LEGAL ASSISTANCE WORK IN THE UNITED STATES AND CANADA, at v (1971).

The contributions of the OEO Legal Services Program have been significant both qualitatively and quantitatively. In a 1971 report, it was estimated that in 1970 the Program doubled the number of cases handled and provided over twice the access which would have been afforded by organized legal aid in cases which involved more than just advice. 1 EVALUATION DIVISION, OEO, EVALUATION OF OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM FINAL REPORT, at IV-52 (1971).

and more responsive to the poor.[22] Law reform activities included class actions, impact litigation, group organization and representation, the creation of specialized legal units, and the development of legal educational programs for the poor.[23]

Legal Services' Successes

Since representation was provided for all civil matters which were not fee-generating, the cases brought covered a wide spectrum. The most easily identifiable and heavily litigated areas were welfare, landlord-tenant, family, and consumer law.

As one of the prime influences in a poor person's life, public welfare programs quickly became the targets of Legal Services law reform activities. Many of these programs had apparently been structured so as to make it as difficult as possible for a recipient to obtain desperately needed benefits. In the late sixties, exclusively as the result of the work of Legal Services attorneys, the Supreme Court reached three decisions which revolutionized the welfare programs

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[22] *See* 1967 GUIDELINES, *supra* note 14, at 7.

[23] There has been considerable controversy over the propriety of law-reform activities, although the purposes of legal aid have long been recognized as

> first to secure legal justice in the individual case for the person unable to retain a lawyer, and second to promote social justice by initiating and supporting measures for the advancement of the cause of legal justice for poor persons.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE WELFARE COUNCIL OF NEW YORK CITY, REPORT OF THE JOINT COMMITTEE FOR THE STUDY OF LEGAL AID 95 (1928). Critics have attacked the policy because "diversion of resources to law reform involves making a choice between two groups of potential beneficiaries" which "choice between clients is not contemplated in the ethics and conventions defining the lawyer's role," and because of the questionable policy "of constituting a publicly funded agency to lobby for the special benefit of a limited sector of the general community." Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 253 (1970). *See also* Boarman, *Issues Concerning Legal Services*, reprinted in 119 CONG. REC. 6034, 6041–46 (1973). However, the policy has been vigorously supported. *See, e.g.*, Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW & SOC'Y REV. 235 (1969); Shriver, *Law Reform and the Poor*, 17 AM. U.L. REV. 1 (1967).

The opposition to the law reform activities of the Legal Services projects is unwarranted:

> Indeed, lawyers serving private clients have traditionally engaged in law reform activities, challenging statutes, bringing test cases, instituting class actions for shareholders and otherwise seeking to change existing legal patterns on their clients' behalf. The poor would seem entitled to no less. In the final analysis, law reform is no more than a lawyer performing his ethical and professional duty for his client.

ABA, THE CORPORATION FOR LEGAL SERVICES: A STUDY 14 (1971) (footnote omitted).

throughout the nation.[24]

In *King v. Smith*,[25] the Court struck down a state regulation which denied welfare benefits to otherwise eligible children if their mother cohabited with an able-bodied male adult, regardless of whether he was legally responsible for their support.[26] A year later, residency requirements for the receipt of welfare benefits were held unconstitutional in *Shapiro v. Thompson*.[27] Finally, in 1970, the Supreme Court, recognizing the importance of welfare assistance once granted, mandated in *Goldberg v. Kelly*[28] that due process required that welfare recipients be afforded notice and a hearing before benefits could be terminated.[29]

The intense and successful litigation of welfare cases at the federal[30] and state[31] levels forced an expansion of services within existing governmental programs. Howard Phillips, former acting director of OEO and an outspoken opponent of the Legal Services Program, stated that over 5.5 million Americans were added to the welfare rolls because of the actions of poverty lawyers.[32]

Legal Services attorneys have also been instrumental in making the judiciary sensitive to the vulnerability of the poor in other areas, such as consumer abuse.[33] For instance, Legal Services of Greater

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[24] This was particularly significant because, until 1965, apparently no legal aid cases had been appealed to the Supreme Court. *See* JOHNSON, *supra* note 2, at 189 & n.22. For a criticism of the approach taken by the Legal Services attorneys see Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211 (1973).

[25] 392 U.S. 309 (1968).

[26] *Id.* at 333–34.

[27] 394 U.S. 618, 641–42 (1969).

[28] 397 U.S. 254 (1970).

[29] *Id.* at 261–64.

[30] *See, e.g.*, Rhode Island Fair Welfare Rights Organization v. Department of Social & Rehabilitative Serv., 329 F. Supp. 860, 870–71 (D.R.I. 1971) (elimination of certain items from needs category in state AFDC program violative of federal statutory mandate); Boddie v. Wyman, 323 F. Supp. 1189, 1190, 1194 (N.D.N.Y.), *aff'd*, 434 F.2d 1207 (2d Cir. 1970) (state enjoined from discriminating geographically in distribution of welfare grants).

[31] *See, e.g.*, Morris v. Williams, 67 Cal. 2d 733, 761, 433 P.2d 697, 716, 63 Cal. Rptr. 689, 708 (1967) (state could not reduce minimum coverage nor entirely eliminate certain services in Medi-Cal program); State *ex rel.* Sell v. Milwaukee County, 65 Wis. 2d 219, 225, 222 N.W.2d 592, 595 (1974) (state policy requiring welfare recipients to sell all motor vehicles held invalid).

[32] *See Hearings on H.R. 3641, H.R. 3175, and H.R. 3147 Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., pt. 1, at 309 (1973).

[33] *See* D. CAPLOVITZ, CONSUMERS IN TROUBLE 6, 184 n.8, 192 n.2, 226 & n.1 (1974). Among the successful actions were Lines v. Frederick, 400 U.S. 18, 20 (1970) (bankrupt wage earners' uncollected vacation pay does not go to trustee in bank-

Miami successfully argued the due process necessity of notice before replevin in *Fuentes v. Shevin*.[34] This increased judicial sensitivity has also been evident in landlord-tenant law where Legal Services cases such as *Brown v. Southall Realty Co.*,[35] *Edwards v. Habib*,[36] and *Marini v. Ireland*[37] have significantly expanded the rights of tenants and low-income residents.[38] Exclusionary zoning practices have also been successfully attacked by Legal Services attorneys, most significantly in the recent cases of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,[39] and *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.[40]

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ruptcy); Abbit v. Bernier, 387 F. Supp. 57, 62 (D. Conn. 1974) (Connecticut's body execution statute held violative of equal protection).

[34] 407 U.S. 67, 96–97 (1972). *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337, 341–42 (1969) (prejudgment garnishment of wages without notice and opportunity for hearing is violative of due process). For an excellent discussion of the development of the *Fuentes* case by the Greater Miami Legal Services Program see Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955 (1972).

[35] 237 A.2d 834 (D.C. Ct. App. 1968). The court of appeals held that in a possessory action for nonpayment of rent, the tenant may raise the defense of illegality of contract where serious building code violations were known to exist at the time of the letting. *Id.* at 837.

[36] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). A landlord's eviction of a tenant in retaliation for complaints she had made to the authorities about violations of the housing code was held illegal. 397 F.2d at 699.

[37] 56 N.J. 130, 265 A.2d 526 (1970). *Marini* held that a defendant may raise the equitable defense of the landlord's failure to provide an apartment in habitable condition in a summary dispossess action. For an extensive discussion of this case see notes 181–90 *infra* and accompanying text.

[38] Other significant housing cases include: Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081–82 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (local housing code is part of landlord's warranty of habitability and cannot be waived by tenant); Turner v. Blackburn, 389 F. Supp. 1250, 1260–61 (W.D.N.C. 1975) (foreclosure and sale statute held unconstitutional as applied because notice of waiver of rights in deed of trust insufficient).

[39] 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 96 S. Ct. 18 (1975). For a more extensive discussion of this case see Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1 (1975). The potential impact of this decision on landlord-tenant relationships is discussed at notes 346–49 *infra* and accompanying text.

[40] 517 F.2d 409, 415 (7th Cir.), *cert. granted*, 96 S. Ct. 560 (1975) (municipality's refusal to grant zoning change to permit construction of low and middle income housing violative of equal protection).

Other actions by Legal Services to expand access to housing for the poor include Escalera v. New York City Housing Authority, 425 F.2d 853, 867 (2d Cir. 1970) (complaint alleging denial of due process in Housing Authority termination of tenancies states a claim); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968) (tenants of public housing authority may maintain class action challenging tenant selection processes as violative of due process); Western Addition Commu-

Political Pressures

The success of Legal Services actions indicates that the courts, often considered the most conservative element of the legal community, agreed that change had to come. Yet, from its inception, the Legal Services Program has been a source of controversy. The bar itself has been schizophrenic about the program. Although the American Bar Association Board of Governors has consistently supported and defended the program as being in the best traditions of the bar,[41] this support has had to be rearticulated because the validity of Legal Services has been challenged consistently by a number of local bar associations.

Many individual attorneys saw the poverty lawyer as an economic threat[42] and the Legal Services Program as a dangerous step toward the socialization of the bar.[43] These fears were eventually alleviated when private attorneys found that the representation of indigents brought about a growth in their own clientele because of increased litigation and negotiation with poverty lawyers. Furthermore, as local attorneys became acclimated to the operation of local Legal Services offices, fears of socialization subsided.

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nity Organization v. Weaver, 294 F. Supp. 433, 440 (N.D. Cal. 1968), *injunction dissolved as moot*, 320 F. Supp. 308 (N.D. Cal. 1969) (local urban renewal agency required to supply feasible plan for relocation of displaced persons).

[41] The ABA had an interest in maintaining the viability of the OEO program because of its participation in the National Advisory Commission (NAC), whose members included officers of the ABA and the NLADA. Until 1971, the NAC played an important role in bridging the gap between the OEO administration and the legal profession. *See* Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 860, 866 (1966); Note, *supra* note 12, at 972.

Although the Senate version of the Legal Services Corporation Bill contained a provision for a 15-member National Advisory Council, no such provision appeared in the House version, and the Senate conceded. H.R. REP. NO. 93-1039, 93d Cong., 2d Sess. 18 (1974).

[42] Other reasons for opposition were:

> (2) competition with existing legal assistance programs, (3) fear that federal funding might result in federal control and lead to unethical conflicts of interest, and (4) fear that affiliation with the CAP would violate the Canons of Ethics.

Note, *supra* note 12, at 971 n.59 (citing J. HANDLER, NEIGHBORHOOD LEGAL SERVICES—NEW DIMENSIONS IN THE LAW 11-12 (L. Wells ed. 1966)).

[43] For example, two officers of the Tennessee Bar Association warned:

> Cooperation or non-cooperation with O.E.O. policy—either one—leads to socialism and destruction of the legal profession. The answer then must lie in alteration of the program not participation in or resignation to it.

Bethel & Walker, *Et Tu Brute!*, TENN. BAR ASSOC. J., Aug. 1965, at 11, 26. *See also* Stumpf, Schoerluke & Dill, *The Legal Profession and Legal Services: Exploration in Local Bar Politics*, 6 LAW & SOC'Y REV. 47, 59 (1971); Note, *supra* note 6, at 843-45.

Nonetheless, assaults on the Legal Services Program persisted. The challenges came in the form of attempts by both state and federal politicians to neutralize the effectiveness of Legal Services projects through an alteration of the kinds of controls placed on them.[44]

In California, for example, the success of California Rural Legal Assistance in significant law reform activities[45] led Senator George Murphy, with the encouragement of Governor Ronald Reagan, to propose an amendment to OEO legislation pending in 1967 which would have prohibited litigation by a Legal Services program against any federal, state, or local agency.[46] The amendment was defeated, but only because of the support of the leadership of the organized bar.[47]

Due to the need for periodic statutory renewal of OEO generally and Legal Services specifically, the battle would be joined again and again. In 1969, Senator Murphy introduced another amendment which, rather than completely prohibiting litigation against government agencies, would have given the governor of a state an absolute veto over the funding of any state Legal Services project.[48] The amendment was passed by the Senate,[49] but was stopped in the House, again because of the efforts of the ABA.[50]

Soon thereafter, OEO attempted to implement a plan whereby the regional directors, a majority of whom were non-lawyer political appointees from the region they served, would assume most of the duties of the Director of Legal Services.[51] The Legal Services

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[44] *See* Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231, 247–59 (1971).

[45] California Rural Legal Assistance (CRLA) was successful in invalidating "Medi-Cal" regulations which attempted to reduce the minimum coverage and eliminate certain services, thus forcing the restoration of $210 million in welfare grants. *See* Morris v. Williams, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967). This loss of state funds was politically damaging to Governor Reagan and, as a result, he attempted to minimize the future activities of the CRLA. Note, *supra* note 12, at 970 n.54.

For an extensive discussion of the continuing problems of CRLA see Falk & Pollak, *Political Interference with Publicly Funded Lawyers, The CRLA Controversy and The Future of Legal Services*, 24 HASTINGS L.J. 599 (1973).

[46] *See* 113 CONG. REC. 27871–72 (1967).

[47] Pious, *supra* note 11, at 427–29. *See* 113 CONG. REC. 27873 (1967).

[48] 115 CONG. REC. 29894–98 (1969). At that time, a governor did have a veto, but such veto could be overridden by OEO. Act of Dec. 23, 1967, Pub. L. No. 90–222, tit. II, § 242, 81 Stat. 706, *as amended*, Act of Dec. 30, 1969, Pub. L. No. 91–177, tit. I, § 107(a), 83 Stat. 830 (codified at 42 U.S.C. § 2834 (1970)).

[49] 115 CONG. REC. 29897–98 (1969).

[50] Pious, *supra* note 11, at 430–31; Note, *supra* note 12, at 980 n.103.

[51] Sullivan, *Law Reform and the Legal Services Crisis*, 59 CALIF. L. REV. 1, 25–26

programs throughout the country, with the support of the organized bar, resisted this move which would have greatly increased the vulnerability of the local projects to political pressure, a result which Legal Services supporters had specifically wished to avoid.[52] After a long and unpleasant dispute, regionalization was dropped. OEO Director Donald Rumsfeld subsequently adopted a "decentralization" plan. This plan was also greeted with massive opposition, and Rumsfeld finally dropped it two months later, but only after firing the two top attorneys in the OEO Legal Services Program for their alleged refusal to support the plan.[53] In response to these controversies, the Legal Services attorneys organized groups to combat the Nixon Administration's growing assault upon the program.

In late 1970, following the abandonment of the regionalization attempt, California once again became the focus of national attention when Governor Reagan, alleging massive irregularities in its operation, vetoed the OEO grant to California Rural Legal Assistance.[54] The new OEO director, Frank Carlucci, appointed a panel to investigate the Governor's charges. The panel exonerated the project of any wrong-doing and found that the charges were almost all fabrications or distortions.[55] OEO therefore overrode the Governor's veto and California Rural Legal Assistance continued to function.[56]

In 1972, the political control question again gained national attention when Vice President Agnew became involved in a contro-

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& nn.85–86 (1971). *See also* Arnold, *Whither Legal Services*, JURIS DOCTOR, Feb. 1971, at 5–8.

[52] Note, *supra* note 12, at 980–81.

[53] *Id.* at 981 & n.109.

[54] Falk & Pollak, *supra* note 45, at 610. The charges, published in a study which became known as the Uhler Report, included disruption of the prison system, public schools, and farm workers, violation of certain conditions of the OEO grant, and generally unethical conduct such as solicitation. *See id.* at 610–17.

[55] *Id.* at 634–35.

[56] *Id.* at 639. However, OEO Director Carlucci promised to make a new grant for another experimental legal services project in California to "salve" the Governor's wounded political ego. *Id.*

> Unfortunately, the experience of CRLA demonstrates
> [t]he anomaly of placing this authority in the hands of an official who is one of the most likely subjects of suits by [Legal Services] attorneys . . . .

Id. at 642. This problem is alleviated by the Legal Services Corporation Act, which places the authority to make grants with the president of the Corporation. 42 U.S.C. § 2996f(e) (Supp. IV, 1975). But the governor of each state must appoint a state advisory council to monitor the activities of the projects to insure compliance with provisions of the Act, *id.* § 2996c(f), and the governor and state bar association must be notified prior to the approval of a grant application at which time they may offer comments and recommendations, although there is no veto power, *id.* § 2996f(f).

versy with Camden Regional Legal Services (CRLS) in New Jersey. The Camden office had instituted a suit on behalf of a community coalition to insure that there would be significant provisions for low-income housing and better housing for displaced blacks and Puerto Ricans in Camden's proposed urban renewal project.[57] The ensuing litigation halted the urban renewal project.[58] Claiming that CRLS was trying to destroy the community, Camden city officials called upon Vice President Agnew to apply pressure on the Legal Services program to withdraw the suit. Mr. Agnew eventually responded and, against the advice of OEO officials,[59] summoned all parties to the dispute to the old Executive Office Building in February 1972 for what he termed "mediation." At this meeting he expressed the opinion that elected officials can better speak for Legal Services clients because the officials " 'earned that right at the polls.' "[60] The director of CRLS, David H. Dugan III, indicated to the Vice President that he considered the attempt at mediation an unwarranted interference into a matter in litigation and refused to withdraw the suit. Fred Speaker, the national director of Legal Services, supported Dugan's decision, and the matter was eventually settled.[61]

The Vice President continued his attacks on Legal Services. In a controversial article published in the *American Bar Association Journal*, he criticized the program for "expend[ing] much of its resources on efforts to change the law on behalf of one social class—the poor."[62] He argued that law reform should be effectuated at the

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[57] Camden Coalition v. Nardi, Civ. No. 1128–70 (D.N.J., filed Aug. 19, 1970).

[58] The plaintiffs, civil rights and community groups and several representatives of a class of poor people, filed a lis pendens which made it impossible for the Camden Housing Authority to pass a grant title to the builders. *See* Note, *supra* note 44, at 254 n.77.

[59] *Id.* at 254–55 n.77. Fred Speaker, Director of the Office of Legal Services, had investigated the suit and found everything in order. *Id.* at 255 n.77.

[60] *Id.* (quoting from Transcript of Meeting in Vice President Agnew's Office, Feb. 1, 1972). The Vice President indicated later that he felt that agencies which require public funding should not attack a governmental agency for decisions which involve the judgments of public officials. *See* N.Y. Times, Feb. 2, 1972, at 1, col. 4; N.Y. Times, Feb. 6, 1972, § 4, at 3, col. 4.

[61] *See* N.Y. Times, Feb. 2, 1972, at 1, col. 4.

[62] Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A.J. 930, 930 (1972). Responding to the Vice President's charge that the program was creating "ideological vigilantes," whose interests were only in changing the system, not helping the individual client, *id.* at 931, one commentator pointed out that the vast majority of Legal Services cases were either settled or litigated in a traditional manner. Klaus, *Legal Services Program Reply to Vice President Agnew*, 58 A.B.A.J. 1178, 1179 (1972). *See also* Falk & Pollak, *What's Wrong with Attacks on the Legal Services Program*, 58 A.B.A.J. 1287 (1972).

national or regional level, not by the local attorney. In addition, he argued that the off-duty political activities of the individual poverty lawyer should be strictly regulated and that controls be placed on group representation and attempts at the solicitation of clients. Finally, he felt that these lawyers should be "supervised by the bar . . . and held to a very high standard of conduct."[63] In part, these restrictions were incorporated into the Legal Services Corporation Act which was signed into law in 1974.[64]

Although the Vice President's attacks were demoralizing, none were nearly as lethal as the actions of Howard Phillips, named acting director of OEO in January 1973 and given the goal of dismantling the Office of Economic Opportunity.[65] Within days after his appointment, Phillips fired the acting national Legal Services director and a number of regional office staff, abolished the long-standing National Advisory Commission to Legal Services, authorized month-to-month funding of programs, and denounced the policy of law reform.[66] Phillips opposed the expenditure of federal funds " 'to pay people unaccountable to elected officials to decide what is good and what is bad public policy on behalf of the poor.' "[67]

Fortunately for the continued health of Legal Services, a number of senators successfully sued to oust Phillips from his position as acting director, contending that he was serving illegally because his name had not been submitted to the Senate for confirmation.[68] Previous congressional appropriations funded the program until the Legal Services Corporation became operative.[69]

From the 1967 Murphy amendments, through the attacks on Legal Services by Agnew and Phillips, the critics continually pushed for the increased accountability of the Legal Services programs to local elected officials. However, what all have failed to recognize or

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[63] Agnew, *supra* note 62, at 932.

[64] *See* 42 U.S.C. §§ 2996e–f (Supp. IV, 1975).

[65] *See* Note, *supra* note 12, at 966.

[66] *See* Arnold, *The Knockdown, Drag-out Battle Over Legal Services*, JURIS DOCTOR, Apr. 1973, at 4, 4–6; Note, *supra* note 12, at 966. Phillips' moves caused general panic in the local projects, and the temporary closing of some major projects.

[67] Arnold, *supra* note 66, at 6. A founder of Young Americans for Freedom, Phillips was ideologically and politically bound to the Nixon Administration. *Id.* at 8–9.

[68] Williams v. Phillips, 360 F. Supp. 1363 (D.D.C.), *motion for stay denied*, 482 F.2d 669 (D.C. Cir. 1973). A union of OEO employees was also successful in obtaining an injunction against any dissolution of the agency prior to the legal date on which it was set to expire. Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 83 (D.D.C. 1973).

[69] *See* Note, *supra* note 12, at 967.

accept is that an attorney's ethical responsibility to his or her client is—and must be—severable from the question of how legal services are to be funded.[70] It was a recognition of this need for professional and fiscal severability which led to the creation of a totally separate program.

The Legal Services Corporation

In May 1971, President Nixon, following the recommendation of the Ash Council on Executive Reorganization, proposed that the entire Legal Services Program be severed from the executive branch.[71] The Administration introduced legislation providing for a nonprofit corporation to take over the Legal Services Program. A bill was passed by both houses of Congress,[72] but was vetoed by President Nixon on December 9, 1971, because he was opposed to certain re-

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[70] The new ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-23, instructs:

> Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

(Footnote omitted.)

There has been extensive discussion of the possible effects that a federally funded program might have on the ethical responsibilities owed by lawyers to their clients. *See, e.g.*, Note, *supra* note 12, at 973–77; Note, *supra* note 6, at 836–39; Note, *Ethical Problems Raised by the Neighborhood Law Office*, 41 NOTRE DAME LAW. 916 (1966). However, the new Code seems to have alleviated many of the more serious problems. *See* Note, *supra* note 12, at 973–77.

[71] This action was prompted more by political than social considerations. By removing Legal Services from the executive branch, politically unsafe litigation could be pursued without reflecting on the Nixon Administration. *See* Note, *supra* note 12, at 982 & n.115.

The possibility of independence from the executive was appealing to the organized bar, as well. One commentator has summarized the reasons for the organized bar's support of an independent corporation:

> (1) The Governor's veto, provided for in the Economic Opportunity Act, was being used against local projects;
>
> (2) The requirement of a 20 percent local share led some cities or community leaders to cut off the share in an attempt to close down successful legal service offices;
>
> (3) Each time the Economic Opportunity Act came up for a two year renewal the Legal Services Program was endangered by amendments;
>
> (4) In 1970 the Senate Finance Committee wrote into the amendments to the Social Security Act a provision prohibiting litigation against government agencies. The amendment was dropped in conference, but nevertheless symbolized another statutory threat to the LSP;
>
> (5) An independent corporation would ensure the legitimacy of separate budget requests, and perhaps higher amounts would then be allocated by Congress.

Pious, *supra* note 11, at 439 (footnote omitted).

[72] S. 1305, 92d Cong., 1st Sess. (1971); H.R. 6361, 92d Cong., 1st Sess. (1971).

strictions placed on him as to the selection of directors of the Corporation.[73] The vetoed measure would have permitted the President to appoint his own choices to only five out of nineteen directorship posts; the remaining fourteen positions would have been filled from lists provided by various professionals and groups.[74] The bill was redrafted in 1972 at the urging of the President, but it died in conference committee when no compromise could be reached.[75]

Finally, on May 11, 1973, with the mandated date for the dissolution of OEO rapidly approaching, the President again called for passage of an Administration-sponsored bill establishing the Legal Services Corporation as an independent, nonprofit organization.[76] With Howard Phillips' exit from OEO in September 1973, the main concern of Legal Services supporters became the contest in Congress over the final shape of the bill. Supporters in both houses were frankly fatigued with the issue of Legal Services and pressed both sides for a resolution of differences between the Administration and the Legal Services community. The White House, increasingly directing its attention to the unfolding Watergate crisis, vacillated between an acceptance of a reasonable bill advocated by moderate White House aides such as Leonard Garment and catering to the stringent pro-veto voices of a more conservative element whose support might be needed in an impeachment fight.

As the bill neared passage in July 1974, the battle claimed one more victim. Alvin J. Arnett, Howard Phillips' successor, was asked to submit his resignation to the President on July 16th. He agreed to resign rather than precipitate another controversy only after assurances from the White House that the President would sign the Legal Services Corporation bill into law.[77]

On July 25, 1974, without ceremony, President Nixon signed the

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[73] President Nixon viewed these restrictions as "an affront to the principle of accountability to the American people as a whole," and he insisted that "a free hand" be given to the President in the appointment of the directors inasmuch as the Chief Executive is "the one official accountable to, and answerable to, the whole American people." *The President's Message to the Senate Returning S. 2007 Without His Approval*, 7 PRES. DOC. 1634, 1635 (1971).

[74] S. 1305, 92d Cong., 1st Sess. § 904(a) (1971); H.R. 6361, 92d Cong., 1st Sess. § 904(a) (1971).

[75] *See* H.R. REP. NO. 92-1367, 92d Cong., 2d Sess. 26 (1972). It is probable that neither version of the 1972 bill would have been signed by the President, as neither incorporated changes regarded by Mr. Nixon as necessary in the area of Presidential appointment of directors. *See* Note, *supra* note 12, at 983-84.

[76] *See Statement by the President Upon Transmitting to the Congress Proposed Legislation to Establish the Corporation*, 9 PRES. DOC. 664 (1973).

[77] Washington Post, July 16, 1974, at A1, col. 1.

Legal Services Corporation Act of 1974, in San Clemente, California, one of the last official acts of his presidency.[78] The law itself was satisfactory to few on either side of the long debate, but for good or ill it institutionalizes a national commitment to free civil legal services for the poor.

The Legal Services Corporation Act of 1974[79] was a response by Congress to its perception that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressure."[80] While President Nixon had first called for the depoliticization of Legal Services on May 5, 1971,[81] he vetoed the resulting legislation for what is clearly a political reason: the failure of the bill to permit the chief executive to name a sufficient number of directors in accordance with his own prerogatives.[82] The 1974 enactment seeks to meet the need for political insulation by establishing the Legal Services Corporation as "a private nonmembership nonprofit corporation"[83] with a board of directors[84] empowered to make financial grants, engage in research activities, and discipline grant recipients who fail to comply with provisions of the Act.[85] Congress attempted to keep effective control of the Corporation from any one political party. The board of directors is comprised of eleven members of whom no more than six may be of the same political party. The President is empowered to name the directors with the advice

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[78] N.Y. Times, July 26, 1975, at 34, col. 7.

[79] Act of July 25, 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. § 2996 *et seq.* (Supp. IV, 1975)).

[80] 42 U.S.C. § 2996(5) (Supp. IV, 1975). Congress also recognized the "need to provide equal access to [our] system of justice," noting that making legal services available to the poor has in many instances "reaffirmed [their] faith in our government of laws." *Id.* §§ 2996(1), (4).

[81] *See The President's Message to the Congress Proposing Establishment of the Independent Corporation*, 7 PRES. DOC. 726, 727 (1971). President Nixon, after enumerating his suggestions for the procedures to be used in appointing directors of the corporation, stated that these recommendations were "all painstakingly designed to insulate the board from outside pressures." *Id.* at 728.

[82] *See The President's Message to the Senate Returning S. 2007 Without His Approval*, 7 PRES. DOC. 1634 (1971). In this veto message, President Nixon reiterated that the interest of the administration in proposing the Legal Services Corporation legislation was to "create a . . . Corporation, truly independent of political influences." *Id.* at 1635. It is difficult to square this statement with the reason announced for the veto.

[83] 42 U.S.C. § 2996b(a) (Supp. IV, 1975). For a discussion of other federally funded nonprofit corporations, notably the Corporation for Public Broadcasting which served as a model for the Legal Services Corporation see ABA, THE CORPORATION FOR LEGAL SERVICES: A STUDY 33-41 (1971).

[84] 42 U.S.C. § 2996c (Supp. IV, 1975).

[85] *Id.* §§ 2996e(a), (b).

and consent of the Senate but is limited as to his own choices. No director may be a full-time employee of the United States.[86] Nor may the selection, appointment, promotion, or any other action relating to Corporation personnel, or the appointment or supervision of fund recipients, be based upon any political consideration.[87]

This process of depoliticization extends to the activities of the Corporation as a whole, and to the individual Legal Services attorneys. Corporation funds, whether used by a grantee or the Corporation itself, may not be expended to support any political party or candidate.[88] Nor may such funds be used in either support or opposition to "any ballot measures, initiatives, or referendums."[89] Apart from financial expenditure to achieve these purposes, the Corporation itself may not "undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies."[90] The political restrictions imposed on the individual Legal Services attorneys are even more marked. The attorney who is "engaged in legal assistance activities supported in whole or in part by the Corporation" is not permitted "while so engaged" to take part in "any political activity,"[91] transporting voters to or from the polls,[92] or engage in "any voter registration activity."[93]

While acknowledging the need for legal services and the importance of limiting partisan influences, Congress has diminished the significance of the Act by placing a number of restrictions on the Corporation. Funds may not be expended in the support or conduct of training programs designed for the advocacy of a specific public policy or for strikes, boycotts, or demonstrations.[94] Exempted from this restriction are programs for training attorneys and paralegals to assist eligible clients, and the mere dissemination of information concerning political activities.[95] The Act forbids the Corporation from

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[86] *Id.* § 2996c(a).

[87] *Id.* § 2996d(b)(2).

[88] *Id.* § 2996e(d)(3).

[89] *Id.* § 2996e(d)(4).

[90] *Id.* § 2996e(c)(2).

[91] *Id.* § 2996f(a)(6)(A)

[92] *Id.* § 2996f(a)(6)(B).

[93] *Id.* § 2996f(a)(6)(C).

In addition to these political and quasi-political restrictions, the Act provides that if it is found that an action has been "commenced or pursued for the sole purpose of harassment of the defendant" or that the Legal Services plaintiff has "maliciously abused legal process," the Corporation is required to pay all reasonable costs and legal fees of the defendant. *Id.* § 2996e(f).

[94] *Id.* § 2996f(b)(5).

[95] *Id.*

making grants or entering into contracts with any private law firm which spends fifty percent or more of its time or resources dealing with "issues in the broad interests of a majority of the public,"[96] thus eliminating the useful back-up centers. Corporation funds may not be spent for school desegregation,[97] nontherapeutic abortion,[98] or selective service, desertion, or amnesty litigation.[99] Additionally, the institution of class actions and participation as amici curiae by Legal Services attorneys are restricted.[100] Furthermore, the local projects must solicit from and give preference to members of the local bar when hiring new attorneys.[101]

Despite these restrictions and the questionable limitations on the personal political activities of individual attorneys, the very establishment of the Corporation is the most positive aspect of the Act. It is hoped that the Corporation will be able to protect the poverty law program from the political attacks which have consistently threatened its stability.

Further political problems, however, hindered the final implementation of the Corporation. Although the Act was passed in July of 1974, it was not until October of 1975 that the Corporation became operational.[102] The list of eleven proposed directors for the board which was floated by the Ford Administration in December 1974 was greeted with opposition from the Legal Services community and the organized bar. The majority of the designees had neither knowledge of nor experience in Legal Services. Two had been strong critics of the concept of federally funded programs in the past. And the primary qualifications of the person first nominated as Chairman of the Board were his conservative Republican credentials as Barry Goldwater's former campaign manager.[103] The lobbying activities of the bar associations throughout an entire year led finally to the withdrawal of the objectionable nominees, and the appointment of a new, more acceptable board.[104]

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[96] *Id.* § 2996f(b)(3).

[97] *Id.* § 2996f(b)(7).

[98] *Id.* § 2996f(b)(8).

[99] *Id.* § 2996f(b)(9).

[100] *Id.* § 2996e(d)(5).

[101] *Id.* § 2996f(a)(8).

[102] Arnold, *supra* note 21, at 32.

[103] President Ford's designees included one former congresswoman, Edith Green, who had successfully worked to eliminate back-up centers from the 1973 bill, and William L. Knecht, a Republican, who had been Governor Reagan's prosecutor of California Rural Legal Assistance. *Id.* at 34–35.

[104] *See id.* at 34–38. Roger C. Cramton, Dean of Cornell University Law School, ultimately became the first Chairman of the Board. Among the other directors are an-

In the interim between the signing of the bill and the completion of the confirmation process, the Office of Economic Opportunity passed out of existence. The recently created Community Services Administration operated as a caretaker for the Legal Services programs, until they passed fully into the national Corporation in October of 1975.[105] In the meantime the board met frequently and actively. At its first meeting it unanimously submitted a request to increase annual funding to $96.6 million.[106] The board's initial activities appear to reflect a professional, competent, and non-ideological approach to maintaining and improving the quality of legal services for the nation's poor. The long era of political battling has hopefully come to an end.

ACCESS TO THE COURTS: REFORM FOR THE FUTURE

While the establishment of the Corporation is, on balance, a positive step, and the efforts of Legal Services attorneys have significantly changed the law in many areas affecting the poor, several areas remain in which reforms must be effected.

Although a majority of the nation's citizens have access to free counsel in civil matters as a result of the federally funded Legal Services programs, no constitutional right to counsel in all civil matters has yet been recognized.[107] The right to counsel in criminal matters was established by the Supreme Court in *Gideon v. Wainwright*.[108] Legal Services attorneys have made significant contributions in extending the right to counsel to persons facing possible imprisonment for misdemeanor violations in *Argersinger v. Hamlin*[109] and to juve-

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other law school administrator, a professor, a former state attorney general, a former judge, and the president of NLADA. *Id.* at 36.

[105] *Id.* at 33. For discussion of the problems and opportunities which face the new corporation see Klaus, *Civil Legal Services for the Poor*, in AMERICAN ASSEMBLY, LAW AND THE AMERICAN FUTURE 131 (M. Schwartz ed. 1976); Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339 (1975).

[106] Arnold, *supra* note 21, at 32.

[107] For a general discussion of the right to counsel see Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). While the various issues involved in "access to the courts" are analyzed in terms of the federal constitution in this article, the same questions may be explored under state constitutions. This is an area of potential importance in light of the increasing conservatism of the United States Supreme Court and an emerging willingness of state courts to make expansive interpretations of state constitutional rights. *See generally* Note, *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973).

[108] 372 U.S. 335, 344 (1963). For discussion of the development of a right to counsel in criminal matters see Seidelson, *The Right to Counsel: From Passive to Active Voice*, 38 GEO. WASH. L. REV. 849 (1970).

[109] 407 U.S. 25, 37 (1972). The Court held

that absent a knowing and intelligent waiver, no person may be imprisoned

nile offenders in *In re Gault*.[110] But that right must be extended to guarantee to indigent citizens the assistance of counsel in all matters in which the interests of life, liberty, or property are at stake.[111] Many civil proceedings have consequences for the poor which are as serious as criminal proceedings.[112] Certainly, a poor tenant facing an illegal eviction who has no money to pay for a security deposit on another apartment, or a welfare mother of six whose welfare grants have been mysteriously cut off, must be represented by counsel in some capacity to defend these vital interests properly and to assure a meaningful opportunity to redress their grievances.[113] Is it not of fundamental interest to the individuals involved and society in general to prevent homelessness and malnutrition and the break-up of families? The courts and legislatures must recognize the importance of providing counsel to help protect these important interests.[114]

Although there is no right to counsel in divorce proceedings, the Supreme Court established the right to a waiver of court filing fees in a divorce action in *Boddie v. Connecticut*,[115] a case brought by Legal Services attorneys. The Court based its holding on the fundamental nature of the marriage relationship and the fact that the state had complete control over the creation and dissolution of marriages. Given these two considerations, a financial barrier to access to the courts was deemed a violation of due process.[116] However, in two subsequent cases, the Court failed to pursue the approach enun-

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for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

Id. (footnote omitted).

[110] 387 U.S. 1, 41 (1967).

[111] Many commentators have argued for representation in specific kinds of cases. *See, e.g.*, Chotiner, *Parole Revocation Hearings: The Need for Right to Counsel*, 4 U. SAN FERNANDO VALLEY L. REV. 23 (1975); Comment, *A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determination Through the Use of a Legal Advocate*, 6 SETON HALL L. REV. 303 (1975); Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction*, 5 SETON HALL L. REV. 64 (1973).

[112] Lee v. Habib, 424 F.2d 891, 901 & n.44 (D.C. Cir. 1970).

[113] Other seriously traumatic events might include the garnishment of wages, divorce, and the loss of custody of a child.

[114] One commentator noted in 1967 that eleven states had enacted legislation providing for the appointment of counsel for indigents in civil cases, but that the statutes were rarely used. Many states limited the appointment of counsel to specific cases. For example, New Jersey provided such counsel only in matrimonial matters. *See* Silverstein, *Payment of Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21, 49–50 (1967).

[115] 401 U.S. 371, 382–83 (1971). *See generally* LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487.

[116] 401 U.S. at 374.

ciated in *Boddie*. In *United States v. Kras*,[117] despite the cogent argument of the respondents that a discharge in bankruptcy involved constitutionally protected rights, the Court refused to invalidate a provision requiring the payment of filing fees before obtaining a discharge in bankruptcy.[118] And, in *Ortwein v. Schwab*,[119] the Court ranged even further afield from the sensitivity to the effects of poverty evinced in *Boddie*. The petitioners in *Ortwein* had been denied the right to appeal a welfare agency determination which had reduced their grants when they were unable to pay the $25.00 appellate court filing fee.[120] The Court did not view this as an unconstitutional barrier, emphasizing that the relationship sought to be protected in *Boddie* was more significant than the loss of welfare benefits.[121]

Despite the Court's refusal to recognize the fundamental nature of the rights involved in bankruptcy and in the loss of welfare benefits,[122] many states have statutory provisions for the waiver of court fees for indigent litigants, including all clients of Legal Services programs.[123] But there are many jurisdictions in which such fees are not waived. It is of vital importance that the Supreme Court finally recognize the right to the waiver of such fees in all civil cases.[124]

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[117] 409 U.S. 434 (1973).

[118] *Id.* at 443–46. The Court felt that no fundamental interest was involved and that the federal courts did not hold the exclusive remedy for a debtor because he could always adjust his debts by negotiated agreement with his creditors. *Id.* at 445.

[119] 410 U.S. 656 (1973).

[120] *Id.* at 656–57.

[121] *Id.* at 659.

[122] For discussion and analysis of *Boddie*, *Kras*, and *Ortwein* see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 DUKE L.J. 1153; Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129, 135–46 (1974); Comment, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 571 (1973).

[123] *See, e.g.*, ILL. ANN. STAT. ch. 33, § 5 (Smith-Hurd Supp. 1975–76); N.J. STAT. ANN. § 22A:1–7 (1969); WIS. STAT. ANN. § 271.29 (Supp. 1975–76).

[124] The possible avenues of approach to establishing a constitutional right to unhindered access to the courts include due process, equal protection and first amendment arguments. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 2), 1974 DUKE L.J. 527. Professor Michelman concludes his analysis with a two-pronged argument in support of a constitutional right to free access:

> [F]irst, there is a doctrine opposed to governmentally imposed fees which have the effect of excluding indigent persons from the enjoyment of constitutionally favored interests; second, persons do have a constitutionally favored interest in a standing opportunity to avail themselves of whatever juridical processes are normally available to members of the community.

Id. at 567 (footnote omitted). *See also* Hisey, *Right to Counsel in Civil Matters*, 31

Even indigent litigants whose filing fees are waived by the state and who are represented by a Legal Services attorney, however, face further access problems because they cannot afford to pay for such "luxuries" as expert testimony at trial or transcripts at the appellate level.[125] Because the Legal Services programs do not have sufficient funds to underwrite these costs,[126] the result is that the poor are often forced to press their claims without sufficient testimony or to accept an adverse decision without a possibility of appeal.

New Jersey is an example of a state which has been trying to come to grips with the problem, with the significant prodding and help from the Legal Services projects. It has been in the vanguard of states providing indigent litigants accessibility to the legal system.[127] One of the most significant measures taken by New Jersey in this regard is the waiver of court filing fees at both the trial and appellate levels, upon the court's acceptance of the indigent's "verified application" of his lack of funds.[128] This application is waived if the party is represented by a legal aid or legal services program.[129] A notice of the availability of legal services is now included on all summonses from lower courts,[130] and third-year law students and

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NLADA BRIEFCASE 302, 303–06 (1972); Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129, 146–54 (1974); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

[125] Another expense which generally must be borne by the litigant is that of divorce publication fees. *See* Wife L. v. Husband L., 305 A.2d 620, 622 (Del. 1973). However, the practice of publication is "archaic" and will probably soon be eliminated. *See id.* Going beyond the question of filing fees, the Court in *Boddie* stated:

> [W]e think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. . . . We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper.

401 U.S. at 382 (citation omitted).

For an exhaustive study of the in forma pauperis provisions of the various states and the litigation costs in the major cities see AMERICAN BAR FOUNDATION, PUBLIC PROVISION FOR COSTS AND EXPENSES OF CIVIL LITIGATION, App. A, at 53–68 (1966); *id.* App. C, at 80–100.

[126] Each program is budgeted a certain amount for appellate expenses, but often the project may spend its whole annual budget on one or two appeals and a few expert witnesses. Also, because of the fixed nature of the grants, projects have been forced to invade these funds in order to keep or attract good attorneys and staff with reasonable salaries, or to cover some other area which has suffered from inflation.

[127] *See generally* Bianchi, *Effects of Progressive Court Administration in Legal Services and the Poor in New Jersey*, 55 JUDICATURE 227 (1972).

[128] N.J.R. 1:13–2(a). *See* N.J. STAT. ANN. § 22A:1–7 (1969).

[129] N.J.R. 1:13–2(a).

[130] *See* Bianchi, *supra* note 127, at 229.

recent law-school graduates, if part of an approved program, are permitted to represent indigents in the lower courts.[131]

The expense of expert witnesses constitutes a significant barrier for litigants in New Jersey. The payment of fees for such witnesses is, for the most part, the responsibility of the litigant, except in negligence or wrongful death actions where the court may order and pay the fees of an impartial witness if necessary.[132] This provision does not benefit Legal Services clients, however, because it generally applies to fee-generating cases which the projects are specifically precluded from handling.[133] Despite the lack of explicit statutory or constitutional authority to do so, there appears to be a discernible effort on the part of the New Jersey courts to make expert testimony available to the poor in exceptional cases. In *In re Gannon*,[134] for example, the Somerset County Court held that in an involuntary commitment proceeding, due process entitled the patient to both counsel appointed by the court[135] and to the services of "an independent psychiatrist . . . to be designated by the court and paid by the county."[136]

The payment of expert witness fees can be prohibitive even for the state, but in cases involving fundamental rights, in which the testimony of experts is the most important evidence considered, the

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[131] N.J.R. 1:21–3(c). Another provision which is of particular importance to Legal Services is N.J.R. 1:21–3(d), which permits out-of-state attorneys to practice law in New Jersey for up to two and a half years if employed by a Legal Services program.

[132] N.J.R. 4:20. The rule provides for the establishment by the Administrative Director of the Courts of an impartial panel of experts with the assistance of the Medical Society of New Jersey. N.J.R. 4:20–2. Compensation for the services of these experts is to come "out of funds appropriated for the operation of the State courts." N.J.R. 4:20–11.

[133] 42 U.S.C. § 2996f(b)(1) (Supp. IV, 1975).

[134] 123 N.J. Super. 104, 301 A.2d 493 (Somerset County Ct. 1973). The patient had voluntarily entered a Veterans Administration Hospital. Thereafter he expressed a desire to be released, but permission was denied by the hospital staff. *Id.* at 105, 301 A.2d at 493. Statutory commitment proceedings were begun. The court held that, although counsel had been provided for Gannon, this alone would not protect his rights to due process of law. Because of the varying possible diagnoses of mental illness, the court determined that the patient has the right to an examination by an impartial psychiatrist who could effectively represent him at the commitment hearing and possibly rebut the testimony of the psychiatrist employed by the state. *See id.* at 105–06, 301 A.2d at 493–94.

[135] *Id.* at 105, 301 A.2d at 494.

[136] *Id.* at 107, 301 A.2d at 494. The court found that the commitment statute which allowed the court to have transcripts made of the proceedings at the court's expense "impliedly authorizes the appointment of an independent psychiatrist." *Id.* at 106, 301 A.2d at 494. The court, however, did not go so far as to allow Gannon "to 'shop around' for a psychiatrist who agrees with him." *Id.* This limitation is unfortunate, for the rich are probably in a position to find an expert to support exactly their position.

failure of the state to pay for a witness effectively precludes an indigent from presenting any case at all.[137] Therefore, it is important that legislation be passed which would provide for the direct payment of reasonable fees to a witness of the litigant's choice, or the furnishing of impartial witnesses by the state.[138] The litigant should only be required to show indigency and a reasonable need for such expert testimony.

Another area in which serious financial barriers exist is the fees charged by court reporters for depositions or trial transcripts.[139] The constitutional right of a criminal defendant to obtain a transcript for purposes of appeal was established by the United States Supreme Court in *Griffin v. Illinois*.[140] The Court recognized that, because of the state's requirement that a transcript of the lower court proceeding be furnished to the reviewing court on appeal, an appellant who could not afford to pay for the transcript was effectively precluded from pressing an appeal. Such a barrier was viewed as violative of equal protection and due process of law.[141]

In criminal actions, the fundamental interest at stake compels recognition of a constitutional right to a transcript as well as counsel. The courts have had some difficulty in applying the *Griffin* rationale to civil cases in which no fundamental interest is involved. In *Lee v. Habib*,[142] a landlord-tenant case, the District of Columbia court of appeals cogently outlined the constitutional right to a transcript in

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[137] One commentator, noting the decided advantage to be gained by the use of a blood test in defending a paternity suit, has pointed out that in some jurisdictions the laboratory fees are prohibitive. Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 278–79 (1968). He also noted the need for expert testimony in an action brought by a tenant for a breach of the implied warranty of habitability to appraise the rental value, the market value, and the estimated value of the damages to the tenant. *Id.* at 279.

[138] Although it may be unrealistic to ask "experts" of the various professions and trades to appear without compensation, they should be urged through their representative organizations to ask lower fees of indigents. A panel of experts might be assembled by these organizations to provide testimony and advice for indigent litigants. Additionally, students of the various professional schools throughout the state, though perhaps not qualified to testify at trial, might assist in the evaluation and preparation of indigents' law suits.

[139] Depositions are excluded as a matter of course because they are too expensive. The Legal Services programs lack the funding to allow the poor to avail themselves of the right to employ depositions in their discovery processes. As a result, their claims cannot be pursued as completely as necessary. *See* Willging, *supra* note 137, at 278.

[140] 351 U.S. 12 (1956).

[141] *Id.* at 18. *See also* Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (an indigent criminal defendant has a right to a free transcript of a preliminary hearing).

[142] 424 F.2d 891 (D.C. Cir. 1970).

civil cases. Starting with *Griffin*, the court traced the development of equal protection principles into the civil area[143] and concluded:

> The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. . . .
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> . . . .
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> The right of all to have free access to the courts is basic to our democratic system. It . . . cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the right.[144]

Although the decision in *Lee* is based on statutory authority to order a free transcript,[145] it is one of the few cases to approach this question so progressively. Nevertheless, the production of a trial transcript is almost universally required for appellate review.[146] Thus, an indigent who cannot pay the high costs of transcribing the lower court proceedings is effectively precluded from bringing an appeal.

The New Jersey supreme court, currently considering the issue of a right to a transcript in *In re Guardianship of Felicia Dotson*,[147] has an opportunity to implement the principles discussed in *Lee*. The case involves an appeal from a guardianship proceeding in which the defendant mother was represented by Legal Services.[148] The trial judge granted the defendant's request for a free transcript at state expense because of the fundamental nature of the rights involved.[149]

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[143] *Id.* at 898–901.

[144] *Id.* at 901 (footnote omitted).

[145] *Id.* at 903–04.

[146] *See, e.g.*, N.J.R. 2:5–3(a), which instructs that a request for a transcript be made at the same time as the filing of the notice of appeal. At the time this request is made, the appellant must also pay a deposit amounting to "either the estimated cost of the transcript or the sum of $200.00 for each day or fraction thereof of trial or hearing." N.J.R. 2:5–3(d).

[147] No. A-1403-74 (N.J. Super. Ct., App. Div., Apr. 25, 1975), *cert. granted*, 68 N.J. 171, 343 A.2d 459 (1975).

[148] The appellant had lost custody of her four children in Juvenile and Domestic Relations Court to the New Jersey Division of Youth and Family Services. No. A-1403-74, at 1 (N.J. Super. Ct., App. Div., Apr. 25, 1975).

[149] *In re* Guardianship of F. D., No. 523, at 5 (N.J., Somerset County Juv. & Dom. Rel. Ct., Jan. 18, 1974). The court determined:

> The permanent termination of parental rights is one of the most drastic actions the State can take against its citizens. To permit it to be done in the fact [*sic*] of alleged error by the simple expedient of refusing an indigent appellant a

The appellate division affirmed and the supreme court subsequently granted certification.[150] An indigent's constitutional right to a transcript has already been recognized in New Jersey when the fundamental interest of liberty in an involuntary civil commitment proceeding was present. Relying upon the access principles enunciated in *Griffin* and *Boddie*, the trial court in *In re Minehan*[151] held that both due process and equal protection required the furnishing of a transcript at "public expense."[152] The interest in a continuing familial relationship is at least as fundamental a concern as the question of a civil commitment.

In cases not involving a fundamental interest such as that presented in *Dotson*, the legislature must provide funds for the provision of transcripts to indigents in all civil appeals. The right to one appeal, otherwise constitutionally guaranteed in New Jersey,[153] is seriously curtailed by the prohibitive cost of obtaining a transcript. Although filing fees are waived by court rule for persons represented by a Legal Services program, transcripts in New Jersey appear to be the property of the court reporter[154] and, as such, may not be covered by the fee-waiver provision. Thus, without any specific grant of authority, an order by the court to provide a transcript would seem to amount to a "legislative appropriation"[155] that might not

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transcript would be unconscionable.

Id. at 4.

The appellate division in *Dotson* did not address itself to the constitutional issues, but held that because the state had initiated the action,

> [i]t is not an unreasonable exercise of judicial discretion to require that the State bear the cost of perfecting its claim through the appellate stages of the proceedings where the trial court . . . determines that a full transcript is necessary for the appeal.

No. A-1403-74, at 2 (N.J. Super. Ct., App. Div., Apr. 25, 1975).

[150] No. A-1403-74 (N.J. Super. Ct., App. Div., Apr. 25, 1975), *cert. granted*, 68 N.J. 459, 343 A.2d 459 (1975).

[151] 130 N.J. Super. 298, 301–03, 326 A.2d 118, 120–21 (Union County Ct. 1974).

[152] *Id.* at 303–04, 326 A.2d at 121.

[153] N.J. CONST. art. 6, § 5, ¶ 2. *See also* Midler v. Heinowitz, 10 N.J. 123, 129, 89 A.2d 458, 461 (1952).

[154] N.J. STAT. ANN. § 2A:11–16(f) (Supp. 1975–76) provides:

> Every reporter shall be entitled to retain for himself the fees collected for transcripts as herein provided. All transcript supplies and equipment shall be furnished by the reporter at his own expense.

[155] Bianchi, *supra* note 127, at 231. The applicable statute refers to the waiver of "payment of any fees to any court or clerk thereof" for indigents. N.J. STAT. ANN. § 22A:1–7 (1969). The applicable rule provides for the waiver of "the payment of any fees provided for by law which are payable to any court or clerk of court or any public officer of this State." N.J.R. 1:13–2(a). No mention is made of waiver of transcript fees.

But the statute does discuss fees paid to the *court clerk*, and the fees of the court reporter are so paid. Arguably, because the costs of a transcript are paid to the court clerk,

yield to the demands of due process and equal protection. Only if the legislature appropriates funds to the Administrative Office of the Courts to be disbursed to the individual court reporter upon order of the trial judge or to be given directly to the court reporter by an appropriate state agency, will there be a sufficient source of funds available to subsidize this necessary expense. Until the legislature appropriates the funds necessary to provide free transcripts in all cases, the courts might welcome and encourage the use of the present rule which permits the submission of an abbreviated transcript.[156] Many hearings, particularly in landlord-tenant actions, are quite short, so that the possibility for disagreement of counsel as to relevant portions of the transcript is significantly lessened. Parties should be admonished to consent to the use of the abbreviated transcript unless they can maintain an argument that the full transcript must be presented.

Although only a few of many viable alternatives have been suggested, it is incumbent upon the courts and the legislature to further explore this area of access to the courts. Only an elimination of these financial barriers will truly open our judicial system to all citizens of this nation.

THE NEW JERSEY EXPERIENCE: IMPACT ON LANDLORD-TENANT REFORM

New Jersey has learned through painful experience the consequences of the alienation of the poor from established government. On April 29, 1967, the Attorney General of the State of New Jersey warned of the "increased isolation of millions of Americans and the concomitant frustrations which tend to generate ominous threats to

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they are included in the waiver provision, although the original order is placed with the reporter.

N.J. STAT. ANN. § 22A:2–3 (1969) permits the supreme court by general or specific rule to "order . . . the payment of the cost of the transcript . . . as the court may deem just," but no such rule has been promulgated. While no such rule exists, it is clearly the intent of the legislature that if the court deemed it necessary, it would be entirely appropriate to promulgate a rule providing for free trial transcripts.

[156] N.J.R. 2:5–3(c) provides:

> The transcript may be abbreviated only in civil actions and under R. 3:23–3, either:
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> (1) by consent, provided all parties to the appeal agree in writing that only a stated portion thereof will be needed by the appellate court, and in such cases, only those portions of the transcript specified in the writing shall be ordered in the request for transcript, or
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> (2) by order of the trial judge or agency which determined the matter on appellant's motion specifying the points on which he will rely on the appeal. . . .

the stability of the rule of law."[157] Seventy-seven days later, the city of Newark erupted into massive violence which resulted in the death of twenty-three persons and property damage exceeding ten million dollars. Throughout that summer, one of the few tenuous links between the governmental establishment and the poor and black communities was the fledgling local Legal Services program. Newark Legal Services Project estimated that it had handled over 1300 cases in connection with the disturbances.[158]

The speed and willingness with which Legal Services and volunteer attorneys responded to this emergency was indicative of the history of general responsiveness on the part of the bar in New Jersey to the concept of legal assistance to the poor. The movement to expand legal aid in New Jersey was spurred in the 1950's by the enthusiasm of Chief Justice Arthur T. Vanderbilt of the state supreme court.[159] As a result, New Jersey became one of the first states to attempt to make legal assistance available to nearly all of its indigent citizens.[160] With this already relatively well established network, the OEO programs were implemented quite rapidly with the enthusiastic support of the state.[161] There are presently 32 Legal Services offices

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[157] Address by Attorney General Arthur J. Sills Before a Law Student Conference on Legal Service to the Poor, Sponsored by the Seton Hall University School of Law and the American Law Student Association, April 29, 1967 (reprinted in LEGAL REPRESENTATION OF THE POOR xxxvii (E. Jarmel ed. 1968)).

[158] NEWARK LEGAL SERVICES PROJECT, NEWARK'S POOR AND THE LAW 11–12 (1968). The project was considered in the late sixties to be one of the best in the country. *See* OEO, Evaluation Reports: Newark Legal Services Project and Newark-Essex Law Reform 1–3, Aug. 6, 1971.

[159] *See* Bell, *Legal Aid in New Jersey: The Answer to a Socialized Legal Profession*, 36 A.B.A.J. 355–56 (1950). Vanderbilt's enthusiasm was in part due to his fear of American implementation of the British plan for government-paid legal services. In an address to the members of the New Jersey bar and participants in legal aid, he urged:

> "Let us set an example to the Bar of the entire country by showing in every county of the state that we can take care of this whole problem of legal aid here and now. Let us show the other professions that no matter what others may do, the Bar intends to remain free and independent."

Id. at 356.

[160] *See id.* at 355; ADMINISTRATIVE OFFICE OF THE COURTS, REPORT ON LEGAL AID IN NEW JERSEY 1 (1955). It also had the highest proportion of legal aid offices to population in the nation. *Id.* at 7, 10.

[161] Although the state had been quite progressive relative to the rest of the nation, the legal aid societies in existence in New Jersey in 1964 were wholly inadequate to deal with the vast problems faced by New Jersey's citizens. Many areas had no services and those that did had limited services with severe limitations placed upon litigation. In 1964, the societies serviced 12,485 cases, only 4.6 percent of which were litigated. NEW JERSEY STATE BAR ASSOCIATION, COMMITTEE ON LAW AND POVERTY, LAW AND POVERTY: LEGAL SERVICE SYSTEMS FOR NEW JERSEY 8–9 (1966).

in the state, representing approximately fifty thousand clients annually.[162] Although each project is autonomous, the State Office of Legal Services[163] and Legal Services of New Jersey, Inc.,[164] have successfully provided opportunities for coordination and collective action in confronting the many problems of New Jersey's poor.

Prominent among the problems plaguing indigent persons is the unsatisfied need for adequate housing: "Frustration, eviction and moving are a constant part of a poor person's life."[165] In most areas of the law, the attorneys for poor people were successful in extending existing law to their clients through the expansion of procedural safeguards. The cases involving due process rights, application of welfare regulations, and right to counsel in proceedings in which incarceration might result all expanded the law but did not restructure substantive rights and remedies. One area in which a major

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> By 1966, it was clear that the traditional legal aid societies
> failed because they have been inadequately financed, administered, staffed, and coordinated with other Agencies better qualified to deal with the poor in their own environment. Thus, Legal Aid Societies have been too remote from the poor and have never touched more than the tip of the ice-berg which freezes the poor to their condition of helplessness.

Id. at 9.

When OEO funds became available, many already existing legal aid societies as well as bar associations and newly formed projects sought funding. In order to receive such grants, the local project had to raise up to 10% of the grant. The state gave cash to help many projects, and the waiver of court fees, which served as an in-kind grant, meant that many projects were over-subscribed in matching funds.

While emphasis was originally placed on having an individual OEO project in each county, experience with representation in every county showed the inefficiencies inherent in such decentralization. Many county offices were subsequently merged into regional offices servicing as many as five counties as is the case for Camden Regional Legal Services.

[162] Letter from Legal Services of New Jersey, Inc. to *Seton Hall Law Review*, Feb. 20, 1976, on file at *Seton Hall Law Review*.

[163] The State Office of Legal Services is part of the Department of Community Affairs and is the conduit for the disbursal of state funds to the local projects. It has served in the past as a general liaison office and back-up center. *See* Bianchi, *supra* note 127, at 227 & n.1. The state office publishes a monthly State Clearinghouse Review which is designed to apprise all New Jersey Legal Services lawyers of developments in New Jersey law in the hopes of avoiding unnecessarily duplicative law reform work.

[164] This organization, which grew out of the New Jersey Legal Services Project Directors Association, is the spokesgroup for the State programs and open to all attorneys and staff members of the legal services projects. The group has a warm, informal relationship with the state office and has served as the negotiating party for all of the local projects with various state funding agencies. It has also developed task forces to deal with problem areas such as welfare, sexism, and mental health.

[165] Bruno, *New Jersey Landlord-Tenant Law: Proposals for Reform*, 1 RUTGERS-CAMDEN L.J. 299, 299 (1969).

modification was accomplished is landlord-tenant where the legal system's handling of landlord-tenant relationships has had substantive and procedural ramifications that profoundly affect low-income tenants.[166] While work was done nationally by Legal Services attorneys committed to remedying the inequities of landlord-tenant law,[167] housing problems were a major concern to New Jersey Legal Services offices.

In many ways New Jersey has been a microcosm of low-income housing problems.[168] It is one of the most populous states in the nation, with a substantial percentage of its citizens living in rental premises. Due to economic conditions, restrictive zoning, and other factors, there is less than a one percent vacancy rate in the state. New construction of low-income housing is almost non-existent. Substandard dwellings with faulty heating devices, leaking toilets, lead-based paint on the walls, and other dilapidated and unhealthy conditions rent for exorbitant prices. In most locales, month-to-month tenancies are the rule. In many federally subsidized projects, a standard HUD-sanctioned single-month lease is signed, solely protecting the landlord—usually a local housing authority—and is subject to no negotiation by the tenant.

Although the legal system in New Jersey has become increasingly progressive and responsive to tenant needs, it unquestionably had—and still retains in some areas—a bias that makes the landlord the favored suitor. This article will now examine the impact of New Jersey Legal Services lawyers in improving dwelling conditions, keeping tenants in their apartments, and increasing access to housing.

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[166] Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9, 13–16 (1966). *See also* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

[167] For an overview of some of the efforts of Legal Services attorneys in this area see Bross, *Law Reform Man Meets the Slumlord: Interactions of New Remedies and Old Buildings in Housing Code Enforcement*, 3 URB. LAW. 609 (1971). The author summarizes the impact of Legal Services as follows:

> The primary effort in law reform in the landlord and tenant area has been defensive. The litigation involving law reformers may generally be classified under three headings: (a) assurance to tenants of a right to a hearing so that defenses may be raised to landlord eviction and rent claims; (b) generation of new defenses to eviction and rent claims; and (c) protection of those tenants who exercise their defenses, whether those defenses are administrative or judicial, commonlaw or common sense.

Id. at 611 (footnote omitted).

[168] *See generally* Comment, *Housing Maintenance and Rehabilitation: Legislative and Judicial Responses*, 6 SETON HALL L. REV. 86, 86–91 (1974).

The Quality of Housing

Obtaining and maintaining habitable conditions in urban residential leaseholds was recognized as a major problem by Legal Services.[169] Traditionally, courts have viewed a lease as a conveyance of a real property interest.[170] The doctrine of *caveat emptor* or "buyer beware" limited the landlord's obligation to transferring possession to the tenant and leaving that tenant in quiet enjoyment of the leasehold.[171] The burden was on the tenant to inspect for defects. Additionally, in the absence of an express agreement, the landlord had no obligation to maintain the premises in any habitable quality.[172] Tenants were required to pay the rent since, in the eyes of the common law, they had what they had bargained for—possession of an interest in land—regardless of the condition of the leased premises.[173] This "buyer beware" principle had an especially severe impact on low-income tenants who were geographically and economically relegated to the slum-housing market.[174]

With a beginning recognition of contemporary social needs and housing realities, courts started to move away from common law property concepts and embrace a more flexible contract analysis.[175] Legal Services attorneys have been instrumental in fashioning remedies for New Jersey tenants in substandard housing.

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[169] *See* Gibbons, *Landlord-Tenant Problems*, in LEGAL REPRESENTATION OF THE POOR 275–77 (E. Jarmel ed. 1968). The development of possible tenant remedies is discussed at length. *See id.* at 282–95.

[170] Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958). *See generally* 3 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1209, at 87 (repl. 1959); Grimes, *Caveat Lessee*, 2 VALPARAISO U.L. REV. 189, 192 (1968); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227 (1969).

[171] Quinn & Phillips, *supra* note 170, at 227. The landlord's obligations under the so-called covenant of quiet enjoyment were not of an affirmative nature but rather negative in character; merely to leave the tenant in possession. *See id.* at 299 n.5.

[172] *Compare* Franklin v. Brown, 21 Jones & Spen. 474, 479 (N.Y.C. Super. Ct. 1886), *aff'd*, 118 N.Y. 110, 23 N.E. 126 (1889) *with* Coleman v. Steinberg, 54 N.J. 58, 62–63, 253 A.2d 167, 170 (1969).

[173] *See* Stewart v. Childs Co., 86 N.J.L. 648, 650–51, 92 A. 392, 393 (Ct. Err. & App. 1914); *cf.* Duncan Dev. Co. v. Duncan Hardware, Inc., 34 N.J. Super. 293, 298, 112 A.2d 274, 277 (App. Div.), *cert. denied*, 19 N.J. 328, 116 A.2d 829 (1955). *See also* 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952); Quinn & Phillips, *supra* note 170, at 233–35; Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123, 123–24 (1971).

[174] *See* Bruno, *supra* note 165, at 303.

[175] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075–79 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Brown v. Southall Realty Co., 237 A.2d 834, 836–37 (D.C. Ct. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 433, 462 P.2d 470, 474 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 461, 251 A.2d 268, 276–77 (1969); Pines v. Perssion, 14 Wis. 2d 590, 596–97, 111 N.W.2d 409, 412–13 (1961).

In 1968, a challenge to the common law doctrine was rebuffed in *Peters v. Kelly*.[176] The tenant's apartment was roach-infested and had inadequate heating and hot water, which resulted in illness to various persons in the family. The doors had no locks; the hall had no lights.[177] The building was permeated by "[a] rotten stench emanating from the cellar."[178]

The appellate division of New Jersey's superior court abdicated its responsibility by summarily dismissing the tenant's showing of nonhabitability:

> We recognize the social problem involved. Tenants in substandard housing should have some reasonably direct and workable means of compelling a landlord to correct conditions in and about premises that threaten health and safety. However, this is not a judicial function. Solution to the problem requires administrative regulation and inspection by trained personnel at the local level.[179]

Two and a half years later, however, New Jersey's highest court found that bringing pressure to bear on landlords of substandard dwellings was in fact "a judicial function."[180]

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[176] 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968).

[177] *Id.* at 443–44, 237 A.2d at 636.

[178] *Id.* at 444, 237 A.2d at 636.

[179] *Id.* Without citation of authority, the court stated:

> [W]e think that under existing law, the alleged nonhabitable condition of the leased premises is not a defense to the landlord's suit for possession based on nonpayment of rent.

Id.

[180] In Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969), the New Jersey supreme court undermined the doctrines that had traditionally relieved a landlord of responsibility for the unsuitability of the leased premises. A commercial tenant vacated a ground floor office because of continual flooding from a concealed defect in the abutting driveway. *Id.* at 448–50, 251 A.2d at 270–71. The landlord sued to recover the rent for the balance of the term. *Id.* at 447–48, 251 A.2d at 270. The supreme court sustained the tenant's defense that the continual flooding constituted a constructive eviction. *Id.* at 462, 251 A.2d at 278. It stated that the tenant's right to vacate could be founded upon "breach of a covenant of quiet enjoyment, or material failure of consideration, or material breach of an implied warranty against latent defects." *Id.* at 461, 251 A.2d at 276–77. Moreover, the court made the important observation that

> present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord, either within the demised premises or outside the demised premises, require imposition on him of an implied warranty against such defects. . . . Such warranty might be described as *a limited warranty of habitability*.

Id. at 454, 251 A.2d at 273 (citations omitted) (emphasis added).

Although *Reste Realty* involved a commercial tenancy, the applicability of its

In *Marini v. Ireland*,[181] a tenant in a two-family house with a rent of $95 a month engaged a plumber to repair a leaking toilet when attempts to get the landlord to repair it failed.[182] She then deducted the plumber's bill from her rent and sent the landlord the balance.[183] The supreme court noted the trend toward contract analysis in landlord-tenant problems[184] and found that "[t]he very object of the letting was to furnish the defendant with quarters suitable for living purposes."[185] Modern social conditions required the implication of a warranty of habitability against latent defects in every residential leasehold agreement.[186] The landlord's obligation under this implied warranty was no more than maintenance and rehabilitation of "facilities vital to the use of the premises for residential purposes" so that they were usable at the commencement of the lease and "remain[ed] in usable condition during the entire term of the lease."[187]

The court observed that breach of the warranty of habitability would constitute a constructive eviction entitling the tenant under the common law to abandon the premises without liability for rent.[188] The remedy in *Marini*, however, was more in tune with the realities of the statewide housing shortage. The tenant was given "the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs."[189] After making the repairs, the tenant was authorized to deduct the cost from future rent.[190]

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habitability principles to a residential leasehold was anticipated in Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 403–04, 261 A.2d 413, 417 (L. Div. 1970).

[181] 56 N.J. 130, 265 A.2d 526 (1970).

[182] *Id.* at 134, 265 A.2d at 528.

[183] *Id.* at 134–35, 265 A.2d at 528. The repairs cost $85.72, so that the landlord received only a small sum that month. *Id.*

[184] *Id.* at 141–43, 265 A.2d at 532–33.

[185] *Id.* at 144, 265 A.2d at 533.

[186] *Id.* at 144, 265 A.2d at 534.

[187] *Id.* The court declared that it was "eminently fair and just" to impose such a warranty. *Id.* It recognized that where the tenant was responsible for damage, the tenant would be liable. *Id.* The court also balanced the economic realities of the landlord's income, various standards of decent living, and the possibility of rent-gouging:

> The nature of vital facilities and the extent and type of maintenance and repair required is limited and governed by the type of property rented and the amount of rent reserved.

Id. at 144–45, 265 A.2d at 534.

[188] *Id.* at 144–45, 265 A.2d at 534.

[189] *Id.* at 146, 265 A.2d at 535.

[190] *Id.* The court explained that

> [t]he tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him

While it is a large step forward, the *Marini* remedy has apparent limits. If the cost of the repairs exceeds more than a month's rent, the tenant probably cannot afford it and it is unlikely that the expenditure can be made in installments. Moreover, in large multiple-dwelling complexes needing major repairs or renovations, the right to repair and deduct has little meaning.

These apparent limits—repair and deduct or move out—did not, however, constrict lower courts and Legal Services attorneys who daily faced the housing crisis in the state. In *Academy Spires, Inc. v. Brown*,[191] a tenant in an urban multi-apartment complex withheld rent alleging breach of the warranty of habitability.[192] The court candidly recognized that there was virtually no place for the tenant to move in Essex County[193] and that requiring repairs as a prerequisite would make the remedy meaningless to most urban tenants.[194] Consequently, the court fashioned a remedy diminish-

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> the opportunity to make the necessary replacement or repair. If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to repair or replace. This does not mean that the tenant is relieved from the payment of rent so long as the landlord fails to repair. The tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive eviction.

Id. at 146–47, 265 A.2d at 535. The court would reconsider the obiter dictum of the last two sentences in Berzito v. Gambino, 63 N.J. 460, 468–69, 308 A.2d 17, 21 (1973). *See* note 204 *infra*.

[191] 111 N.J. Super. 477, 268 A.2d 556 (Essex County Dist. Ct. 1970).

[192] *Id.* at 479–80, 268 A.2d at 557. The tenant claimed the warranty of habitability had been breached because the owner

> failed to supply heat and water service to a ninth-story apartment; the incinerator did not function, impairing garbage disposal; the hot water supply failed; water leaked into the bathroom; there were defects in venetian blinds; the plaster in the walls was cracked, and the apartment was unpainted.

Id. at 482, 268 A.2d at 559. The court found that in a multi-story apartment building the "bare living requirements" of a human being were affected by lack of heat, hot water, garbage disposal, and elevator service. *Id.* It recognized the inconvenience of the other complaints, but characterized such facilities as " 'amenities.' " The disrepair, "at least of the magnitude presented here," did not render the premises uninhabitable. *Id.* at 482–83, 268 A.2d at 559.

[193] *Id.* at 480, 268 A.2d at 558.

[194] *Id.* at 484, 268 A.2d at 560. The court noted the apparent limits of the *Marini* doctrine, but asked:

> Was the tenant required to make the repair to this 400-unit complex as a prerequisite to availability of the relief given by *Marini*? If the answer to that question is in the affirmative, *Marini* has no meaning to tenants in multi-family dwellings who need the relief most. Obviously, few such tenants have the means to lay out the capital, and if they do, why should they repair someone else's real estate on the chance of a reduction in rent? It is hard to believe that the Supreme Court intended such a result.

Id.

ing the amount of unpaid rent that was due and owing in proportion to the reduced habitability of the premises.[195]

In both *Marini* and *Academy Spires* the conditions breaching the warranty of habitability arose after the commencement of the lease.[196] In *Samuelson v. Quinones*,[197] a case involving a pre-existing defect, the trial judge granted a partial abatement for certain conditions[198] but denied the tenant any abatement for lack of adequate heating facilities because she had observed this condition when she rented the apartment.[199] The appellate division reversed.[200] Although a municipal housing code prohibited rental unless an apartment's heating facilities met the ordinance's standard, the court rejected the claim that this rendered the lease contract illegal and entitled the tenant to a total abatement.[201] The court balanced the

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[195] *Id.* at 485–88, 268 A.2d at 561–62.

[196] *See* 56 N.J. at 134, 265 A.2d at 528; 111 N.J. Super. at 479, 268 A.2d at 557.

[197] 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972).

[198] *Id.* at 340, 291 A.2d at 581. An abatement was allowed for defects in kitchen range and sink, leaks, a broken window, cracked walls, cracked and chipped plaster, and a bathroom door that was hanging loose. *Id.*

[199] *Id.* The basement apartment never had any heating facilities other than the gas range in the kitchen. *Id.* at 339, 291 A.2d at 581.

In Berzito v. Gambino, 114 N.J. Super. 124, 274 A.2d 865 (Union County Dist. Ct. 1971), *rev'd*, 119 N.J. Super. 332, 291 A.2d 577 (App. Div. 1972), *rev'd*, 63 N.J. 460, 308 A.2d 17 (1973), the trial judge, in dictum, commented upon a tenant occupying an apartment with patent habitability defects:

> May a tenant who is a victim of the critical shortage of urban housing enter into a rental agreement, accept possession of the premises, and thereafter require the landlord to render the demised premises suitable for habitation although their condition is known at the time of the letting? It would seem that the answer must be in the negative. One who agrees in effect to accept the premises "as is" should not be allowed to obtain an agreement from the landlord as to the rent to be paid, take possession, and then require repairs and improvements by the landlord. . . .
>
> An opposite conclusion would not be of economic benefit to the tenant in any event. A landlord obliged to make improvements to the premises would be entitled to increase the rent substantially, so that the tenant in most cases would be obliged in turn to seek other living quarters.

114 N.J. Super. at 128–29, 274 A.2d at 868. This observation assumes that the rent charged by a landlord is not inflated out of relation to the reasonable value of the premises. Such an assumption, however, is frequently not warranted. *See* Schoshinski, *supra* note 166, at 520.

[200] 119 N.J. Super. at 343, 291 A.2d at 583.

[201] *Id.* at 340, 343, 291 A.2d at 581–82, 583. The tenant's argument consisted of three parts: (1) the municipal housing code set the standard of habitability and a breach of the housing code constituted a breach of warranty of habitability; (2) a lease agreement where there were housing code violations at the inception of the lease term constituted an illegal and unenforceable contract; and (3) allowing a landlord the benefit of his agreement where there are code violations "would be against the State's public policy of protection of urban low-income tenants." *Id.* at 340, 291 A.2d at 581.

economic hardship to the landlord against the tenant's need for housing and concluded that complete denial of rent to the landlord would ultimately deny any housing to the tenant.[202] Consequently it directed the trial judge to determine "the reasonable value of the demised premises, with its lack of heating facilities," and then deduct any additional abatement for other defective conditions.[203]

In 1973, the remedy of rent abatement was approved by the New Jersey supreme court in *Berzito v. Gambino*.[204] Additionally, the court provided a new remedy—an affirmative action for damages resulting from breach of the warranty of habitability.[205] Upon establishing the uninhabitable condition of the premises the tenant would recover the difference between the rent paid and "the reasonable rental value of the property in its imperfect condition during his period of occupancy."[206]

In Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court held that the implied warranty of habitability is measured by housing code regulations. In Brown v. Southall Realty Co., 237 A.2d 834, 836–37 (D.C. Ct. App. 1968), the court held that violation of the housing code at the beginning of the term rendered the lease an illegal contract. *See generally* Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Note, *D.C. Housing Regulations, Article 290, Section 2902: Construed Pursuant to Brown v. Southall Realty Co. and Javins v. First National Realty Corp.—A New Day for the Urban Tenant?*, 16 HOW. L.J. 366 (1971).

[202] 119 N.J. Super. at 343, 291 A.2d at 583.

[203] *Id.*

[204] 63 N.J. 460, 469, 308 A.2d 17, 21 (1973). The court recognized that in *Marini* it had stated " '[t]he tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive eviction.' " *Id.* at 468, 308 A.2d at 21 (quoting from Marini v. Ireland, 56 N.J. 130, 147, 265 A.2d 526, 535 (1970)). However, Justice Sullivan refused to allow "a casual *dictum* [to] shackle the Court to prevent a later exercise of its creative powers in fashioning new remedies as need and occasion demand." 63 N.J. at 469, 308 A.2d at 21. In the process the court abolished the doctrine of independent covenants that had prevented tenants from compelling landlords to maintain housing in decent condition. The court held the covenant to pay rent and the covenant or warranty of habitability were "mutually dependent." *Id.*

[205] 63 N.J. at 469, 308 A.2d at 22.

[206] *Id.* The court stressed that, before the tenant's right to bring the action matured, the landlord must be given "positive and seasonable notice" of the defective condition, be requested to take action, and have a reasonable time in which to accomplish the repairs. *Id.* Although the court did not mention it, presumably "[i]f the tenant is unable to give such notice after a reasonable attempt," the cause of action will accrue. *See* Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970).

Justice Sullivan suggested some of the factors to be used in determining whether the warranty of habitability had been breached:

> 1. Has there been a violation of any applicable housing code or building or sanitary regulations?

The expansion of the warranty of habitability and the affirmative remedy of *Berzito* show the vitality and potential of the concept as a means of improving the quality of housing. Habitability is not to be given a narrow or restricted meaning. Heat and hot water are not the only requisites of a habitable dwelling. It also includes such elements as preventing the use of lead paint on walls and providing adequate locks on doors.[207] The creative use of the various habitability remedies to directly affect the landlord's economic return in the form of rent can provide an incentive to maintain premises in a safe and decent condition.[208] Thus the attorneys representing poor

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2. Is the nature of the deficiency or defect such as to affect a vital facility?
3. What is its potential or actual effect upon safety and sanitation?
4. For what length of time has it persisted?
5. What is the age of the structure?
6. What is the amount of the rent?
7. Can the tenant be said to have waived the defect or be estopped to complain?
8. Was the tenant in any way responsible for the defective condition?

63 N.J. at 470, 308 A.2d at 22.

The court noted that the legislature essentially agreed with the remedy it had fashioned. A 1971 statute authorized the appointment of a receiver to collect and administer rents in order to meet standards of health and safety. *Id.* at 471–73, 308 A.2d at 23–24 (construing N.J. STAT. ANN. § 2A:42–85 *et seq.* (Supp. 1975–76)). There are as yet no reported cases under the statute. It has, however, an obvious limit. Repairs are made only out of available rents.

[207] The warranty of habitability was held to cover a defect preventing use of outdoor areas of a suburban apartment complex where the tenants had relied upon its availability. Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 583–84, 338 A.2d 21, 24–25 (L. Div. 1975). Further expansion of the warranty of habitability is suggested in Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975), where the court held the landlord liable for loss of the tenants' personal property as a result of a burglary facilitated by inadequate door locks. Justice Pashman, the Chief Justice, and Justice Sullivan raised the possibility of using the warranty of habitability as the basis for liability. *Id.* at 387–88 & n.16, 346 A.2d at 86–87.

[208] Another economic pressure device used by Legal Services attorneys to cause repairs to be made is the rent strike. The coordinated withholding of rent by a large group of tenants because of uninhabitable conditions seems to be supported by the principles enumerated in *Marini* and its progeny.

One of the largest rent strikes was that involving tenants of the Newark Housing Authority, especially in the Stella Wright Homes project. An attempt was made to bring the matter before federal courts. *See* Housing Authority of the City of Newark v. Henry, 334 F. Supp. 490, 491–92 (D.N.J. 1971). Although Judge Lacey held that the federal courts were without removal jurisdiction, the Newark rent strike action eventually did reach the federal courts, where it was settled. The events involved in the Newark rent strike are described in David & Callan, *Newark's Public Housing Rent Strike: The High-Rise Ghetto Goes To Court*, 7 CLEARINGHOUSE REV. 581 (1974). *See generally* Note, *Tenant Rent Strikes*, 3 COLUM. J.L. & SOC. PROB. 1 (1967); Note, *Rent Strike Legislation—New York's Solution to Landlord-Tenant Conflicts*, 40 ST. JOHN'S L. REV. 253 (1966).

One of the hazards of poverty law practice for attorneys was displayed in this

tenants have, in part, utilized the law to attempt to equalize the economic bargaining positions between landlords and tenants.

Besides the indirect remedies of exerting economic pressure on landlords through the warranty of habitability, Legal Services has been involved in getting municipalities to cure fundamental breaches of a standard of safe and decent housing in exigent circumstances. In *Jones v. Buford*,[209] a multiple-dwelling tenant was without heat or hot water.[210] After contacting the landlord's agent without avail, she sought to compel the local board of health to use its statutory authority "to act as agent for the landlord to engage repairmen and order parts necessary to restore the boiler at the premises to operating condition."[211] The tenant argued that the board of health was empowered to bill the landlord directly for the expense and place a statutory lien on the building in favor of the persons doing the work.[212]

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case. Involvement in the Newark rent strike, with the accompanying political tensions, led to the contempt of court conviction of three Legal Services lawyers, which was ultimately reversed by the New Jersey supreme court. *See In re* Callan, 122 N.J. Super. 479, 300 A.2d 868 (Ch.), *aff'd*, 126 N.J. Super. 103, 312 A.2d 881 (App. Div. 1973), *rev'd*, 66 N.J. 401, 331 A.2d 612 (1975). Recently, another chapter was added to the Newark rent strike litigation. The Housing Authority sought to recover rent arrearages by having deductions from the payments made to tenants receiving welfare benefits paid directly to the Authority by the welfare agencies. Housing Authority of Newark v. Commissioner of Institutions and Agencies, 136 N.J. Super. 136, 138–39, 345 A.2d 322, 324 (App. Div. 1975). Legal Services lawyers intervened on behalf of the tenants. The Housing Authority's request was denied. *Id.* at 148, 345 A.2d at 329.

[209] 132 N.J. Super. 209, 333 A.2d 279 (App. Div.), *cert. granted*, 68 N.J. 151, 343 A.2d 438 (1975).

[210] 132 N.J. Super. at 211, 333 A.2d at 281.

[211] *Id.* The tenant claimed relief pursuant to N.J. STAT. ANN. § 26:3–31(p) (Supp. 1975–76).

[212] 132 N.J. Super. at 211, 333 A.2d at 281. The statute provides in pertinent part:

> The local board of health shall have power to pass, alter or amend ordinances and make rules and regulations in regard to the public health within its jurisdiction, for the following purposes:
>
> . . . .
>
> p. To act as the agent for a landlord in the engaging of repairmen and the ordering of any parts necessary to restore to operating condition the furnace, boiler or other equipment essential to the proper heating of any residential unit rented by said landlord, provided, however, that at least 24 hours have elapsed since the tenant has lodged a complaint with the local board of health, prior to which a bona fide attempt has been made by the tenant to notify the landlord of the failure of the heating equipment, and the landlord has failed to take appropriate action, and the outside air temperature is less than 55° F.
>
> Any person who supplies material or services in accordance with this section shall bill the landlord directly and by filing a notice approved by the local board of health, with the county clerk, shall have a lien on the premises where the materials were used or services supplied.

N.J. STAT. ANN. § 26:3–31(p) (Supp. 1975–76).

Although the trial judge dismissed the complaint for lack of jurisdiction,[213] the appellate division reversed and directed that the tenant was entitled to the requested relief.[214] The court held that the board of health's grant of power under the statute was "of a mandatory character. The public interest in the health, safety and welfare of tenants of residential units requires such construction."[215]

The significance of the *Jones v. Buford* remedy lies in comparing it with other alternative forms of relief in the face of an emergency. The remedy of constructive eviction confronts again the statewide housing shortage. Neither a receivership action[216] nor a *Marini* repair and deduct procedure is meaningful where rental income is limited and repairs are of a major nature. A rent abatement does not provide heat. Nor do criminal sanctions under housing codes. Furthermore, injunctive relief by way of code enforcement or a suit for specific performance of the lease agreement is futile where the landlord is impecunious.[217]

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[213] 132 N.J. Super. at 211, 333 A.2d at 280.

[214] *Id.* at 216, 333 A.2d at 283.

[215] *Id.* at 215, 333 A.2d at 283. The court further stated:

> It is apparent from the nature and scope of the legislation that the Legislature intended that the members of the residential renting public, for whose protection the statute was enacted, should have the right to have the power thus conferred, exercised for their benefit.

Id.

The court also rejected the arguments that as a Faulkner Act municipality, the Newark board of health was not subject to the statute, that the board of health's power was limited to making recommendations concerning ordinances, and that since no ordinances had been enacted no action could be taken. *Id.* at 212, 333 A.2d at 281.

[216] N.J. STAT. ANN. § 2A:42–85 *et seq.* (Supp. 1975–76). *See* note 206 *supra*.

[217] The *Jones v. Buford* remedy raises the practical problem of the financial ability of the board of health to provide the required relief. Even with the grant of a statutory lien as security, the board of health in a city such as Newark might well be unable to obtain parts or repairs where the suppliers and workers would have to look to the landlord. They might demand cash in advance. To some extent, the meaninglessness of a lien on dilapidated buildings is demonstrated by the experience of rent receivership programs which include a statutory lien procedure. *See, e.g.*, Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URB. LAW. 577, 584 (1971); Moerdler, Debrot, Quirk, Castrataro & Weidenfeld, *A Program for Housing Maintenance and Emergency Repair*, 42 ST. JOHN'S L. REV. 165, 183–84 (1967); Note, *Receivership of Problem Buildings in New York City and its Potential for Decent Housing of the Poor*, 9 COLUM. J.L. & SOC. PROB. 309, 325–26 & nn.104–05 (1973).

These fiscal concerns are legitimate. However, they are not insurmountable. First of all, the remedy has not been reality-tested. Suppliers and repairmen may possibly be found who are willing to take the risk in the interest of improving the area where they themselves live or work. Secondly, the local responsibility to protect the state interest in health and safety can be coupled with the local power to compel the landlord to provide funds for such repairs in advance.

In Apartment House Council v. Mayor & Council, 123 N.J. Super. 87, 301 A.2d 484 (L. Div. 1973), *aff'd mem.*, 128 N.J. Super. 192, 319 A.2d 507 (App. Div. 1974),

Eviction—Grounds, Defenses, and Procedures

In addition to the development of remedies regarding habitability, Legal Services attorneys have addressed themselves to the obstacles facing a tenant in an eviction action. Much of the law of eviction is a function of the "form of the action" and the forum—

Judge (now Justice) Pashman considered the constitutionality of an ordinance requiring owners of multiple-dwellings to post security with a commission authorized to spend the money for repairs where the landlord failed to do so after twenty-four hours' notice. 123 N.J. Super. at 89, 301 A.2d at 485. Legal Services participated as an amicus.

The ordinance authorized repairs of " 'emergency conditions' " which included:

(1) Lack of adequate ventilation or light;

(2) Lack of adequate and properly functioning sanitary facilities;

(3) Lack of adequate and healthful water supply;

(4) Structural, mechanical or electrical defects which increase the hazards of fire, accident or other calamity;

(5) Lack of adequate heat during specified months and specified times of the day.

Id. at 90, 301 A.2d at 485. The ordinance had a schedule of graduated amounts of security: $100 for each apartment in buildings with four to twenty-four units; $2,500 for the first twenty-five apartments and $50 for each additional one where there were twenty-six to forty units, and where there were over forty apartments, $2,500 for the first twenty-five, $50 for the next fifteen, and $30 for each additional unit. There was a ceiling of $5,000 on the amount of security that could be required. *Id.* at 103, 301 A.2d at 492.

The constitutionality of the ordinance was challenged on grounds that it lacked statutory authorization, denied a hearing into the existence of a purported condition, denied an appeal from the commission's decision, and placed an unreasonable burden on landlords. *Id.* at 90, 301 A.2d at 485. The court rejected all these contentions.

Judge Pashman found statutory authority for the ordinance in the general police power of municipalities, enabling them to act " *'as may be necessary to carry into effect the powers and duties conferred and imposed . . . by any law.'* " *Id.* at 90–91, 301 A.2d at 485–86 (quoting from N.J. STAT. ANN. § 40:48–2 (1967)) (emphasis by the court). He further found that the ordinance was an implementation of the statutory authorization of municipalities to establish "minimum standards" for health and safety. 123 N.J. Super. at 91, 301 A.2d at 486 (citing N.J. STAT. ANN. § 2A:42–74 *et seq.* (Supp. 1975–76)). Even in the absence of such specific authorization, Judge Pashman postulated that the inherent police power permitted the regulation. 123 N.J. Super. at 93–94, 301 A.2d at 487–88.

He summarily dismissed the unreasonableness of the burden on landlords in requiring the deposit:

> The landlord who complains he is unable to post the security proves the point he is trying to challenge; he will be equally as unable to correct an emergency defective condition should the occasion present itself. The ordinance requests the landlord, after a fashion, to insure himself to raise the money now, before an emergency arises, so that the money is there when needed.

Id. at 103, 301 A.2d at 493. While the deposit might not cover the complete cost of a *Jones v. Buford* remedy, there may be sufficient cash to induce commencement of repairs and acceptance of a lien for the balance.

For a discussion of another area where third parties affect habitability see Comment, *Public Utility Discontinuance and the Residential Lease: Providing a Remedy for the Residential Tenant's Right to Service*, 6 SETON HALL L. REV. 690 (1975).

normally a summary dispossess proceeding[218] in the landlord-tenant division of the county district court.[219] The dispossess action has a short waiting period between service of process and final hearing,[220] no counterclaims are allowed[221] and there is no pretrial discovery.[222] Appeals are limited to issues of jurisdiction with no review of the merits of a case.[223]

Until June 25, 1974,[224] a tenant could be evicted in a summary dispossess action if the tenant: held over and continued in possession after expiration of a fixed term or a proper notice to quit;[225] held over after default in rent;[226] destroyed the peace and quiet of the landlord and other tenants;[227] willfully damaged the property;[228] continually violated rules of the tenancy;[229] or breached any covenants

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[218] *See* N.J. STAT. ANN. § 2A:18–53 *et seq.* (Supp. 1975–76). A landlord may also regain possession pursuant to N.J. STAT. ANN. § 2A:35–1 *et seq.* (1952), a statutory substitute for the common law action of ejectment. A special cause of action is created where there is one year's rent arrearages. *See* N.J. STAT. ANN. § 2A:42–7 *et seq.* (1952). Many of the technical requirements of the intricate common law ejectment proceeding are eliminated by this special cause of action. I. LEWINE, LANDLORD AND TENANT LAW, 23 N.J. PRACTICE § 3573 (1962). This action is brought by means of an ejectment proceeding pursuant to N.J. STAT. ANN. § 2A:35–1 *et seq.* (1952). Ejectment proceedings, however, may only be brought in the superior court or county court and not the district court. *Id.* § 2A:35–1. Since they entitle the tenant to all the procedural rights of pleadings, discovery, jury trial, and full appeal—as in any other superior court action—they are rarely, if ever, used against urban low-income tenants. Furthermore, self-help evictions of residential tenants have been illegal since 1971. *See* N.J. STAT. ANN. § 2A:39–1 to –2 (Supp. 1975–76). Thus, summary dispossess proceedings will invariably be used. For a discussion of the problems prior to 1971 see Gibbons, *supra* note 169, at 320–24; Note, *Self-Help Eviction: Proposals for the Reform of Eviction Procedures in New Jersey*, 1 RUTGERS-CAMDEN L.J. 315 (1969).

[219] N.J. STAT. ANN. § 2A:6–34(b) (Supp. 1975–76), bestows jurisdiction upon the county district court "in actions between landlords and tenants." The district court is one of the "inferior courts of limited jurisdiction" authorized by the state constitution. *See* N.J. CONST. art. 6, § 1, ¶ 1. Such "courts and their jurisdiction may from time to time be established, altered or abolished by law." *Id.*

[220] N.J.R. 6:2–1 provides a landlord-tenant action shall be heard "not less than 5 days nor more than 15 days from the date of service of the summons."

[221] N.J.R. 6:3–4.

[222] N.J.R. 6:4–3(a).

[223] N.J. STAT. ANN. § 2A:18–59 (1952) which provides:

> Proceedings had by virtue of this article shall not be appealable except on the ground of lack of jurisdiction. The landlord, however, shall remain liable in a civil action for unlawful proceedings under this article.

[224] On this date, amendments to the summary dispossess act became effective. *See* Law of June 25, 1974, ch. 49, [1974] N.J. Laws 119 (codified at N.J. STAT. ANN. §§ 2A:18–53, 2A:18–61 to –61.5 (Supp. 1975–76)).

[225] N.J. STAT. ANN. § 2A:18–53(a) (1952), *as amended*, N.J. STAT. ANN. § 2A:18–53 (Supp. 1975–76).

[226] *Id.* § 2A:18–53(b).

[227] *Id.* § 2A:18–53(c)(1).

[228] *Id.* § 2A:18–53(c)(2).

[229] *Id.* § 2A:18–53(c)(3).

for which the landlord had reserved a right of re-entry.[230] The 1974 amendment modified the grounds for eviction in certain circumstances.[231]

The most commonly occurring grounds for eviction in cases involving low-income tenants were the default in rent and the hold-over after termination of the tenancy. These presented separate but related problems for anti-poverty attorneys.

As a matter of course, much of the work done by Legal Services in the area of habitability arose in the context of a nonpayment dispossess proceeding. Under the dispossess act, where rent was unpaid the tenant had essentially only one means of avoiding eviction—to pay the rent, thereby depriving the court of jurisdiction.[232] In *Peters v. Kelly*, the uninhabitable condition of the leasehold had been raised as an equitable defense to the action for possession based upon nonpayment.[233] The trial judge rejected the offer of proof.[234] On appeal, the tenant faced the problem, unique to dispossess proceedings, of establishing her right to the appeal. The dispossess act provides that such an eviction judgment "shall not be appealable except on the ground of lack of jurisdiction."[235] The tenant argued that refusal to consider her equitable defense went to the district court's jurisdiction.[236] The appellate division disagreed and dismissed the appeal.[237]

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[230] *Id.* § 2A:18–53(c)(4).

[231] *See* notes 281–82 *infra* and accompanying text.

[232] N.J. STAT. ANN. § 2A:18–55 (1952) provides in pertinent part:

> If, in [a nonpayment action], the tenant . . . shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default, together with the accrued costs of the proceedings, all proceedings shall be stopped.

The tenant's payment of rent and costs pursuant to this section was held to have jurisdictional consequences in Saveriano v. Saracco, 97 N.J. Super. 43, 47, 234 A.2d 244, 246 (App. Div. 1967). Relying upon this interpretation and another section of the dispossess act which prohibits issuance of the warrant of removal until three days after judgment for possession has been entered, a trial judge stated that "the tenant as a practical matter has three days in which to pay the amount he is in default in order to remain in possession." Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 400, 261 A.2d 413, 415 (L. Div. 1970). This three-day period was accepted in practice. Recently, however, another trial judge characterized the statement in *Academy Spires* as an unwarranted and unsupportable dictum. Workman's Automatic Music Serv., Inc. v. New Colony Diner, Inc., 136 N.J. Super. 131, 133–34, 344 A.2d 794, 795–96 (Camden County Dist. Ct. 1975).

[233] 98 N.J. Super. at 443, 237 A.2d at 636.

[234] *Id.*

[235] N.J. STAT. ANN. § 2A:18–59 (1952).

[236] 98 N.J. Super. at 444, 237 A.2d at 636.

[237] *Id.* at 444–45, 237 A.2d at 636–37. The court stated:

> Once the landlord and tenant relationship is proved and a default in the pay-

In *Marini*, the supreme court expressly overruled *Peters v. Kelly*.[238] It reviewed the history of the summary dispossess proceeding and emphasized that all elements of a statutory ground of removal must be present to vest the district court with jurisdiction.[239] Noting that an action based on nonpayment arose from " 'a default in the payment of rent,' "[240] the court stated:

> The jurisdictional issue of "default" encompasses the question of whether the amount of rent alleged to be in default, is due, unpaid and *owing*, not only whether it is due and unpaid. The mere fact of the tenant's failure to pay rent in full as provided in the lease is not in and of itself a sufficient fact to meet the statutory jurisdictional requisite. Thus a tenant's evidence in substantiation of a defense that there is no default or that the default is not in the amount alleged by the landlord, is admissible on the jurisdictional issue. Consideration must be given not only to a legal defense but as well to an equitable excuse for non-payment, such as confession and avoidance, which would relieve the tenant of the duty of paying and hence make the unpaid rent in whole or part due but not owing and thus not in "default."[241]

The court held that equitable defenses to payment of rent were available in the county district court and that the trial judge's failure to consider such defenses was a jurisdictional issue that could be appealed.[242] Then considering the merits of the tenant's equitable defense, the court articulated the landlord's duty to maintain the premises in habitable condition and formulated the repair and deduct

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ment of rent shown, equitable defenses asserted to offset or avoid the duty to pay rent go to the merits of the action rather than the jurisdiction of the court.

Id. at 444, 237 A.2d at 636. This view of the district court's jurisdiction combined with the appellate division's statement in *Peters* that uninhabitability is no defense to nonpayment frustrated attempts at reform. It reinforced the reluctance of district court judges to exercise their existing, albeit limited, equitable power. *See* Bruno, *supra* note 165, at 301.

[238] 56 N.J. at 140, 265 A.2d at 531.

[239] *Id.* at 137–39, 265 A.2d at 529–31.

[240] *Id.* at 136, 265 A.2d at 529 (quoting from N.J. STAT. ANN. § 2A:18–53(a) (1952), *as amended*, N.J. STAT. ANN. § 2A:18–53(a) (Supp. 1975–76)).

[241] 56 N.J. at 139, 265 A.2d at 530–31 (emphasis in original).

[242] *Id.* at 139, 265 A.2d at 531. The court noted that prior case law required the district court to deal with equitable issues involved in an action within its jurisdiction. *See* Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 124, 228 A.2d 674, 678 (1967); Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 469, 173 A.2d 270, 275–76 (1961). Prior to the *De Marco* decision, there was doubt as to whether the county district court had any equitable jurisdiction. Lynch, *Lack of Jurisdiction of the Subject Matter in the New Jersey Courts: Application of N.J.R. 1:13–4, The Transfer of Causes Rule*, 6 SETON HALL L. REV. 1, 12 & n.47 (1974).

remedy.[243] Following *Marini*, courts at both the trial and appellate levels entertained equitable defenses based on nonhabitability and

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[243] 56 N.J. at 140–46, 265 A.2d at 531–35. This aspect of the decision is examined at notes 181–90 *supra* and accompanying text.

The supreme court noted that allowing a habitability defense both as to the merits of an eviction proceeding and as to the jurisdiction of the court to hear it would probably result in an increase in trials and appeals. 56 N.J. at 147, 265 A.2d at 535. The court stated:

> By way of warning, however, it should be noted that the foregoing does not constitute an invitation to obstruct the recovery of possession by a landlord legitimately entitled thereto. It is therefore suggested that if the trial of the matter is delayed the defendant may be required to deposit the full amount of unpaid rent in order to protect the landlord if he prevails. Also, an application for a stay of an order of removal on appeal should be critically analyzed and not automatically granted.

Id.

Some trial judges require the entire amount of claimed unpaid rent to be deposited in court before they will hear a habitability defense. Allowance is made for repairs by the tenant if the receipts are presented and the repairs were major. If the tenant is unable to comply with this prerequisite, the court refuses to hear the habitability defense and enters a judgment for possession. Authority for this procedure is based upon the above statement in *Marini*.

This requirement is not justified by *Marini*. The supreme court was concerned about delaying tactics that would prevent the landlord from regaining possession. In the ordinary case, there is no delay: the tenant and Legal Services counsel appear and are prepared to present their defense on the return date. The tenant may be unable to deposit the disputed rent for a variety of reasons, such as an emergency expenditure for health care. *Cf.* Bruno, *supra* note 165, at 300 n.14. Regardless of the deposit in court, the amount of an abatement may be determined immediately so that there is no delay. If the habitability defense is found insufficient, judgment for possession may be entered the same day. The tenant must then either pay the rent or be evicted. If the defense is sustained, judgment for possession is still entered the same day and the tenant must pay the abated amount of rent or be evicted. *See* N.J. STAT. ANN. § 2A:18–55 (1952). Denial of the habitability defense in these circumstances is not only harsh and inequitable, but also results in a judgment beyond the jursidiction of the court under the principles enunciated in *Marini*.

Delay in the recovery of premises where a habitability defense is raised is often created by the trial judge. Apparently because there is no pretrial discovery in the summary dispossess proceeding, a trial judge may adjourn the trial to allow the landlord to prepare a response to the habitability defense. Recovery of possession is thus "obstructed" and the tenant is required to deposit the rent into court. However, this approach, in fact, penalizes the tenant because the landlord is not ready.

Requiring the tenant to make the deposit also gives the landlord a remedy to which he is not entitled in a summary dispossess action—damages for unpaid rent. In Sprock v. James, 115 N.J. Super. 111, 278 A.2d 421 (App. Div. 1971), Legal Services attorneys appealed the actions of a district court judge who had entered judgment for possession without hearing the tenants' habitability defense and had turned over to the landlord rent that had been paid into court. *Id.* at 112, 278 A.2d at 422. The rents had been deposited with the court while the tenants applied for removal of the action to the superior court. *Id.* at 113, 278 A.2d at 422; *see* N.J. STAT. ANN. § 2A:18–60 (1952). This was a delay resulting from the tenants' actions and legitimately requiring the deposit. The tenants' motion for removal was denied. 115 N.J. Super. at 113, 278 A.2d at 422. The district court judge apparently directed the turnover of

fashioned the equitable remedy of percentage rent abatements.[244]

When the supreme court approved the abatement remedy in *Berzito*, a major doctrinal reform was achieved—the abolition of the doctrine of independent covenants. The court specifically stated that the doctrine had outlived its historical justification.[245] It held that the tenant's obligation to pay rent and the landlord's obligation to provide habitable premises "are for all purposes mutually dependent."[246] Consequently, a tenant in a substandard dwelling who had been unable to persuade the landlord to make repairs had a viable defense to a summary dispossess action for nonpayment of rent.

In spite of *Berzito*'s development of this defense to a nonpayment eviction, it did not completely relieve tenants of the harshness of the summary dispossess proceeding. A habitability defense

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the escrowed rents in response to the landlord's claim that "possession was not enough, and that if she did not receive the rents as well, her mortgage would be foreclosed." *Id.* The appellate division, in reversing, noted the "inconsistency" of the trial court's rulings:

> The actions were simply for possession on the ground of nonpayment of rent. Brought as they were under the summary dispossess statute, they were not actions for recovery of the rent. To the extent that the rent, held in escrow by direction of the court, was paid over to the landlord, it gave the landlord a remedy not sought and not available in her particular action. To the extent that payment was thus made, the payment abrogated the grounds for possession. . . . [W]e hold to the opinion, as defendants urge, that the court's action in permitting the landlord to have both possession and the rent was error.

Id. at 113–14, 278 A.2d at 423.

[244] *See, e.g.*, Samuelson v. Quinones, 119 N.J. Super. 338, 342–43, 291 A.2d 580, 583 (App. Div. 1972); Sprock v. James, 115 N.J. Super. 111, 115, 278 A.2d 421, 423 (App. Div. 1971); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 583–84, 338 A.2d 21, 24–25 (L. Div. 1975); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 483–85, 268 A.2d 556, 559–62 (Essex County Dist. Ct. 1970); *cf.* Morrocco v. Felton, 112 N.J. Super. 226, 233, 270 A.2d 739, 742–43 (L. Div. 1970).

A set of guidelines listing suggested percentage abatements for major habitability defects was prepared by a Legal Services attorney and recognized by the appellate division in an unreported case. Bruno, *Rent Abatement: A Reasonable Remedy for Aggrieved Tenants*, 2 SETON HALL L. REV. 357, 363–65 & App. I at 366 (1971).

[245] 63 N.J. at 468, 308 A.2d at 21. The court stated:

> It has been persuasively argued that while the doctrine of independent covenants, and the strict application of the rule of *caveat emptor* historically so typical of leasing arrangements, may have resulted in fulfilling the reasonable needs and expectations of landlords and tenants in the agrarian society of medieval England, this is no longer true in modern urban and suburban society. Today the tenant needs and expects more than the mere land itself. He generally needs and expects adequate shelter, heat, light, water, sanitation and maintenance. It is obviously unsatisfactory to tell him that he may sue his landlord for any failure to supply these necessities, but that at the same time he must make recurring rental payments as they fall due.

Id.

[246] *Id.* at 469, 308 A.2d at 21.

was usually preceded by complaints either to the landlord or to local housing code authorities concerning conditions in the apartment. Since most low-income tenants do not have written leases and rent on a month-to-month basis,[247] landlords could rid themselves of complaining, troublesome tenants simply by giving thirty days' notice to quit.[248] The tenant might also be forced out by substantially increasing the rent on thirty days' notice. These practices, known as retaliatory or reprisal evictions, had the effect of dissuading tenants from seeking to improve their living conditions.[249]

The problem was recognized by Legal Services.[250] While a statute enacted in 1967 made it a disorderly persons offense for a landlord to threaten or take reprisals against a tenant who reported housing code violations,[251] no direct relief was available to the tenant in a dispossess proceeding.[252]

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[247] Bruno, *supra* note 165, at 305.

[248] *See* N.J. STAT. ANN. § 2A:18-56(b) (1952).

[249] Bruno, *supra* note 165, at 304–05.

[250] *See* Gibbons, *supra* note 169, at 289–90, 295–302. In this early 1968 handbook for New Jersey Legal Services attorneys, various nonlegal ways of avoiding landlord reprisals to complaints to housing code authorities, such as obscuring the identity of the complaining tenant, were suggested. *Id.* at 296–98.

[251] Law of Oct. 5, 1967, ch. 215, [1967] N.J. Laws 805 (repealed 1970). The constitutionality of the statute was sustained in State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (App. Div. 1969).

[252] Bruno, *supra* note 165, at 305–06. The disorderly persons statute was seen as creating a possible private cause of action for damages or injunctive relief on the theory that it established a standard of conduct, that violation was tortious, and that tenants were within the group of persons intended to be protected by the penal statute. Gibbons, *supra* note 169, at 299. It was also argued in this Legal Services guide that the disorderly persons statute could compel an implied defense in eviction proceedings because of the statement of public policy that it contained. *Id.* Constitutional guarantees were also seen as protecting against retaliatory evictions. Two alternative theories were proposed: protection "from unreasonable interference by *private* parties with the exercise of [a tenant's] right to inform government of violation of its laws" and interference with the fourteenth amendment right "to petition government for a redress of grievances." *Id.* at 299–300 (emphasis in original). The use of the summary dispossess statute to enforce the retaliatory eviction should constitute sufficient "state action" under the fourteenth amendment to invoke the doctrine of Shelley v. Kraemer, 334 U.S. 1 (1948). Gibbons, *supra* note 169, at 301.

The redress-of-grievances argument was recognized in Edwards v. Habib, 397 F.2d 687, 690–99 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). In Alexander Hamilton Sav. & Loan Ass'n v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (Hudson County Dist. Ct. 1969), a non-Legal Services case, the tenant was served with a notice to quit after he signed a petition for repair of housing code violations. *Id.* at 90, 257 A.2d at 7–8. The court found that the petition and the tenant's leadership of a tenants' group were the reasons for the eviction. *Id.* at 91, 257 A.2d at 8. Referring to the policy embodied in the disorderly persons statute, the court held that the tenant had an equitable defense to the retaliatory eviction. *Id.*

Noting the *Whaley* decision and the problem of retaliatory evictions, a legisla-

The new tenants' rights announced in *Marini* in May 1970 intensified the need for protection. In the fall of 1970, the New Jersey legislature responded and enacted the Landlord and Tenant Reprisal Law.[253] This statute prohibited a landlord from evicting a tenant as a reprisal for complaints to governmental authorities regarding the condition of the leased premises or for the tenant's participation in lawful organizing activities.[254]

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tive study suggested that "[t]he penal element . . . could be replaced by the establishment of a civil action for protecting the leasehold of a tenant who exercises" rights of suing the landlord, reporting housing violations, organizing or joining tenants' groups. NEW JERSEY LANDLORD TENANT RELATIONSHIP STUDY COMM'N, INTERIM REPORT TO THE GOVERNOR & LEGISLATURE 19–20 & n.4 (1970).

[253] N.J. STAT. ANN. § 2A:42–10.10 *et seq.* (Supp. 1975–76). The statute has been described as "one of the strongest retaliatory eviction laws in the country." Meiser, *Litigating on Behalf of Mobile Home Tenants*, 5 RUTGERS-CAMDEN L.J. 453, 457 (1974).

[254] N.J. STAT. ANN. § 2A:42–10.10 (Supp. 1975–76) provides:

> No landlord of premises or units to which this act is applicable shall serve a notice to quit upon any tenant or institute any action against a tenant to recover possession of premises, whether by summary dispossess proceedings, civil action for the possession of land, or otherwise:
>
> a. As a reprisal for the tenant's efforts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey or its governmental subdivisions, or of the United States; or
>
> b. As a reprisal for the tenant's good faith complaint to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code or ordinance, or State law or regulation which has as its objective the regulation of premises used for dwelling purposes; or
>
> c. As a reprisal for the tenant's being an organizer of, a member of, or involved in any activities of, any lawful organization; or
>
> d. On account of the tenant's failure or refusal to comply with the terms of the tenancy as altered by the landlord, if the landlord shall have altered substantially the terms of the tenancy as a reprisal for any actions of the tenant set forth in subsection a, b, and c of section 1 of this act. Substantial alteration shall include the refusal to renew a lease or to continue a tenancy of the tenant without cause.
>
> Under subsection b of this section the tenant shall originally bring his good faith complaint to the attention of the landlord or his agent and give the landlord a reasonable time to correct the violation before complaining to a governmental authority.
>
> A landlord shall be subject to a civil action by the tenant for damages and other appropriate relief, including injunctive and other equitable remedies, as may be determined by a court of competent jurisdiction in every case in which the landlord has violated the provisions of this section.

The validity of the statute was sustained over several constitutional challenges in Troy Hills Village, Inc. v. Fischler, 122 N.J. Super. 572, 301 A.2d 177 (L. Div. 1971), *aff'd mem.*, 122 N.J. Super. 525, 301 A.2d 153 (App. Div. 1973). Although not applied retroactively, the policy of the statute was implemented in cases arising before its effective date. *See* E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 224–25, 281 A.2d 544, 546 (App. Div. 1971); Engler v. Capital Management Corp., 112 N.J. Super. 445, 447–49, 271 A.2d 615, 616–17 (Ch. 1970).

In *E. & E. Newman, Inc. v. Hallock*,[255] the tenant made complaints and organized a tenants' meeting.[256] A little over a month after the meeting, the tenant received a notice increasing his rent from $70 to $200 a month.[257] When the increased rent was not paid, the landlord instituted a summary dispossess action and received a judgment for possession.[258] In order to reach the tenant's retaliatory eviction defense, the appellate division was confronted with the nonreviewability provisions of the summary dispossess statute.[259] The court adopted the view of jurisdiction developed in *Marini*:

> Since the landlord-tenant court is a statutory creation, all the statutory prerequisites must be met in order for the County district court to gain jurisdiction. In the instant case one of these prerequisites is the "default" in the payment of rent. If defendant's contention is correct, the landlord would not have lawfully raised the rent and therefore there would have been no "default." The County district court would thus have had no jurisdiction.[260]

The statute is applicable "to all rental premises or units used for dwelling purposes except owner-occupied premises with not more than two rental units." N.J. STAT. ANN. § 2A:42–10.13 (Supp. 1975–76). The scope of the statute's applicability has been examined, and arguments for protection in its absence have been made. *See* Meiser, *supra* note 253, at 457–60. The arguments are based upon public policy and the fourteenth amendment. *Id.* at 459–60. The likelihood of a finding of sufficient state action in judicial enforcement of an eviction is doubted because of "[t]he specter of limitless state action springing from *every* judicial decision." *Id.* at 460 (emphasis in original). An additional argument in support of protection from landlord reprisals could be framed in terms of the state constitution. There is no state-action requirement in the state guarantees of equal protection and petition for redress of grievances. *See* N.J. CONST. art. 1, ¶¶ 1, 18. *See also* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 174–75, 336 A.2d 713, 725, *appeal dismissed*, 96 S. Ct. 18 (1975); State v. Shack, 58 N.J. 297, 299–303, 277 A.2d 369, 370–72 (1971). While the legislative policy in limiting the applicability of the statute seems to be a balance of the landlord's interest in closer control over premises used as a home by the landlord's family, a tenant still should have some protection against arbitrary eviction. Such a tenant is still entitled to the benefits of the warranty of habitability. Is the tenant to be denied the means of enforcing the warranty?

[255] 116 N.J. Super. 220, 281 A.2d 544 (App. Div. 1971).

[256] *Id.* at 222–23, 281 A.2d at 545. The tenant informed the landlord's agent of a lack of water pressure in his apartment. When no action was taken, he contacted the local housing code authorities who made several inspections. *Id.* at 222, 281 A.2d at 545. The tenant also held a tenants' meeting in his apartment. The day after the meeting the landlord's agent said "there would be no more meetings in their apartment; that it was against fire regulations." *Id.* at 223, 281 A.2d at 545.

[257] *Id.* at 223, 281 A.2d at 545. The landlord claimed that increased expenses required raising the rent, but only one of the other nine tenants received a rental increase, from $80 to $100 a month. *Id.*

[258] *Id.*

[259] *Id.* (citing N.J. STAT. ANN. § 2A:18–59 (1952)).

[260] 116 N.J. Super. at 224, 281 A.2d at 545–46. The court held that although the statute could not be applied because it became effective after the events in the case,

The reprisal statute creates a rebuttable presumption that a notice to quit is retaliatory if it is given after the tenant seeks to enforce rights, complains to authorities, or participates in organizing activities.[261] The scope of this presumption was explored in *Silberg v. Lipscomb*.[262] A tenants' association was formed to negotiate with the landlord regarding conditions in the apartments. When no satisfactory response was obtained, the tenants filed a petition on June 30, 1971 to place the building in receivership.[263] On July 2, the court ordered the appointment of an administrator for the building. The same day the landlord prepared and immediately served notices to quit on all tenants, terminating the tenancies as of September 1. Summary dispossess proceedings were instituted when the tenants did not move.[264]

The landlord claimed that he intended to remodel the premises, subdivide the property, and sell the buildings as two-family dwellings. The presence of the tenants increased the difficulty and expense

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it recognized the statute as a codification of existing policy proscribing reprisals and remanded the action for consideration of the equitable defense. *Id.* at 224–25, 281 A.2d at 546.

[261] N.J. STAT. ANN. § 2A:42–10.12 (Supp. 1975–76) provides:

> In any action or proceeding instituted by or against a tenant, the receipt by the tenant of a notice to quit or any substantial alteration of the terms of the tenancy without cause after:
>
> a. The tenant attempts to secure or enforce any rights under the lease or contract, or under the laws of the State of New Jersey, or its governmental subdivisions, or of the United States; or
>
> b. The tenant, having brought a good faith complaint to the attention of the landlord and having given him a reasonable time to correct the alleged violation, complains to a governmental authority with a report of the landlord's alleged violation of any health or safety law, regulation, code or ordinance; or
>
> c. The tenant organizes, becomes a member of, or becomes involved in any activities of, any lawful organization; or
>
> d. Judgment [that a notice to quit or an action to recover possession is retaliatory] is entered for the tenant in a previous action for recovery of premises between the parties; shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such attempt, report, complaint, or for being an organizer of, a member of, or involved in any activities of, any lawful organization. No reprisal shall be presumed under this section based upon the failure of a landlord to renew a lease or tenancy when so requested by a tenant if such request is made sooner than 90 days before the expiration date of the lease or tenancy, or the renewal date set forth in the lease agreement, whichever later occurs.

(Footnote omitted.)

[262] 117 N.J. Super. 491, 285 A.2d 86 (Union County Dist. Ct. 1971).

[263] *Id.* at 492, 285 A.2d at 86. *See* N.J. STAT. ANN. § 2A:42–85 *et seq.* (Supp. 1975–76).

[264] 117 N.J. Super. at 493, 285 A.2d at 86–87.

of the landlord's work and, realizing that the court had the discretionary power to stay the evictions for up to six months, he was attempting to " 'coordinate' " the various activities.[265]

While the trial judge found no "actual malice or hostility" directed toward the tenants and that the dominant motive for the eviction was economic, it held that this alone did not dispose of the issue of reprisal.[266] The court observed that prior to serving the notices to quit the landlord did not consider the possibility and economic feasibility of performing the work with the tenants in possession.[267] It found that the institution of the receivership proceeding by the tenants prompted the landlord's decision and precluded "further and more complete consideration" of alternatives to the eviction.[268] Therefore, the court ruled

> that where a landlord, in reaching a decision to evict a tenant, considers as one of the factors favoring that decision the activities of the tenant described in [the statute], then the notice to quit is a "reprisal" within the meaning of the act, although other factors may also be present or even dominant.[269]

The statutory presumption of reprisal could be rebutted only by demonstrating "that the decision to evict was reached independent of any consideration of the activities of the tenants protected by the statute."[270]

The use of the retaliatory eviction defense to prevent discriminatory treatment of a tenant in a multiple-dwelling was achieved

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[265] *Id.* at 493–94, 285 A.2d at 87.

[266] *Id.* at 494, 285 A.2d at 87.

[267] *Id.* at 495, 285 A.2d at 88. The court reasoned:

> Here the court finds, as stated, that the dominant reason was the economic consideration of having the work performed at less cost. But obviously, to reach that decision on an economic basis alone, the landlord had to consider possible counterbalancing factors such as the receipt of rent while the work was in progress.

Id.

[268] *Id.*

[269] *Id.* at 496, 285 A.2d at 88.

[270] *Id.* Although the language of the court is clear, the testimony of a Legal Services attorney before a legislative hearing suggests that despite the statutory presumption the defense is difficult to sustain:

> [T]he landlord merely states—and this is the practice in court—that this is no reprisal. Even in the case where the court finds there is a reprisal motive to notice for a tenant to terminate their tenancy, the typical situation is that the landlord testifies that this is not a reprisal. This testimony also puts the burden back on the tenant to prove the reprisal.

Hearing on Assembly Bills 58, 232, 284, 940, 943, 946, 947, 951, 953, 954, 1048 & 1060 Before the N.J. Assembly Comm. on Commerce, Industry and Professions 68 (Mar. 5, 1974) (statement of Philip Steinfeld, Esq.)

in *PMS Realty Co. v. Guarino*.[271] A notice to quit had been served[272] on three tenants who belonged to a tenants' association and had lodged complaints regarding conditions in their apartments.[273] There was no dispute that children of the tenants, "among others," had damaged the premises.[274] The landlord therefore argued that the evictions were not retaliatory.[275] The court held that although a landlord did not have "to sit idly by and watch his property be destroyed deliberately," the landlord cannot discriminate in the use of dispossess proceedings to remove destructive tenants.[276] The evidence indicated that children of other tenants had also done damage but no other evictions were instituted. The landlord was required to show either that only the children of the tenants served with notices to quit had participated or that proceedings had been instituted against all families involved.[277]

At the same time that Legal Services attorneys were attempting law reform on behalf of low-income tenants, a predominantly middle-class based tenants' group—the New Jersey Tenants Organization (NJTO)—was formed. This group has proved to be a dominant force in changing state law. Legal Services attorneys worked closely with NJTO and were actively involved in the legislative activities of the association.[278] This coalition was successful in having a number of reform statutes enacted in New Jersey.[279] In 1974, the combination

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[271] 126 N.J. Super. 134, 312 A.2d 898 (Essex County Dist. Ct. 1973).

[272] Judge Albano extensively reviewed the time requirements for service of a notice to quit terminating a month-to-month tenancy. *Id.* at 135–37, 312 A.2d at 898–900.

[273] *Id.* at 138, 312 A.2d at 900.

[274] *Id.*

[275] *Id.*

[276] *Id.* at 139, 312 A.2d at 900.

[277] *Id.*

[278] Legal Services attorneys have filed briefs and appeared as amici curiae on behalf of NJTO. *See, e.g.*, Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Iganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973); Leone Management Corp. v. Board of Comm'rs, 130 N.J. Super. 569, 328 A.2d 26 (L. Div. 1974). They have also testified at hearings on legislation in which NJTO was actively involved. *See, e.g., Hearing on Assembly Bills 58, 232, 284, 940, 943, 946, 947, 951, 953, 954, 1048 & 1060 Before the N.J. Assembly Comm. on Commerce, Industry and Professions* 37, 48, 64, 65 (Mar. 6, 1974).

[279] In June 1971, the legislature amended the statute concerning self-help distraint for rent to exclude residential leaseholds. *See* Law of June 21, 1971, ch. 228, [1971] N.J. Laws 1144 (codified at N.J. STAT. ANN. § 2A:33-1 (Supp. 1975–76)). At the same time it eliminated self-help evictions. *See* Law of June 21, 1971, ch. 227, [1971] N.J. Laws 1143 (codified at N.J. STAT. ANN. § 2A:39-1 (Supp. 1975–76)). The legislature also enacted the receivership statute in June 1971. *See* Law of June 21, 1971, ch. 224, [1971] N.J. Laws 1124 (codified at N.J. STAT. ANN. § 2A:42-85 *et seq.* (Supp. 1975–76)). It also passed significant amendments to the security-deposit statute. *See*

of the efforts of concerned tenants' associations, spearheaded by NJTO, and the litigation-thrust of Legal Services attorneys resulted in the passage of a package of four landlord-tenant bills by the legislature.[280] Perhaps the most important is the "Good Cause Eviction Act," which allows the landlord-tenant relationship in "other than owner-occupied premises with not more than two rental units" to continue as long as both parties act in good faith.[281] The statute

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Law of June 21, 1971, ch. 223, [1971] N.J. Laws 1121 (codified at N.J. STAT. ANN. § 46:8–19 *et seq.* (Supp. 1975–76)).

[280] Law of June 24, 1974, ch. 47, [1974] N.J. Laws 116 (codified at N.J. STAT. ANN. §§ 2A:42–10.15, –10.16 (Supp. 1975–76)) (Fair Eviction Notice Act requiring three days' notice before execution of warrant of removal); Law of June 25, 1974, ch. 48, [1974] N.J. Laws 117 (codified at N.J. STAT. ANN. §§ 46:8–38 to –42 (Supp. 1975–76)) (landlord required to provide tenant with information concerning federal crime insurance); Law of June 25, 1974, ch. 49, [1974] N.J. Laws 119 (codified at N.J. STAT. ANN. §§ 2A:18–61.1 to –61.5 (Supp. 1975–76)) (removal of tenants for stated causes and requiring certain notices); Law of June 25, 1974, ch. 50, [1974] N.J. Laws 123 (codified at N.J. STAT. ANN. §§ 46:8–27 to –37 (Supp. 1975–76)) (landlord registration statement of names and addresses of agents).

[281] N.J. STAT. ANN. § 2A:18–61.1 *et seq.* (Supp. 1975–76). The statute only allows eviction

> upon establishment of one of the following grounds as good cause:
>
> a. The person fails to pay rent due and owing under the lease whether the same be oral or written;
>
> b. The person has continued to be, after written notice to cease, so disorderly as to destroy the peace and quiet of the occupants or other tenants living in said house or neighborhood;
>
> c. The person has willfully or by reason of gross negligence caused or allowed destruction, damage or injury to the premises;
>
> d. The person has continued, after written notice to cease, to substantially violate or breach any of the landlord's rules and regulations governing said premises, provided such rules and regulations are reasonable and have been accepted in writing by the tenant or made a part of the lease;
>
> e. The person has continued, after written notice to cease, to substantially violate or breach any of the covenants or agreements contained in the lease for the premises where a right of re-entry is reserved to the landlord in the lease for a violation of such covenant or agreement, provided that such covenant or agreement is reasonable;
>
> f. The person has failed to pay rent after a valid notice to quit and notice of increase of said rent, provided the increase in rent is not unconscionable and complies with any and all other laws or municipal ordinances governing rent increases.
>
> g. The landlord or owner seeks to permanently board up or demolish the premises because he has been cited by local or State housing inspectors for substantial violations affecting the health and safety of tenants and it is economically unfeasible for the owner to eliminate the violations. In those cases where the tenant is being removed because of the existence of substantial violations of law affecting health and safety, no warrant for possession shall be issued until [N.J. STAT. ANN. § 52:31B–1 *et seq.* (Supp. 1975–76)] has been complied with.

abolished the holdover grounds of eviction which had previously allowed arbitrary termination of a tenancy,[282] thus providing substantial protection of the tenant's home.

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h. The owner seeks to retire permanently the building or the mobile home park from the rental housing market.

i. The landlord or owner proposes, at the termination of a lease, reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof, which the tenant, after written notice, refuses to accept.

j. The person, after written notice to cease, has habitually failed to pay rent.

Id. § 2A:18–61.1. A landlord may not evict or refuse to renew a lease, which is tantamount to an eviction, "except for good cause" as defined by the statute. *Id.* § 2A:18–61.3. These provisions may not be waived. *Id.* § 2A:18–61.4. The statute also prescribes the notice and time of service necessary to terminate a tenancy. *Id.* § 2A:18–61.2. Tenants not within the scope of the statute are still subject to the provisions of N.J. STAT. ANN. § 2A:18–53.

The constitutionality of the statute has been upheld in general. Stambolous v. McKee, 134 N.J. Super. 567, 573, 342 A.2d 529, 532 (App. Div. 1975); Bradley v. Rapp, 132 N.J. Super. 429, 433–34, 334 A.2d 61, 63 (App. Div.), *cert. denied*, 68 N.J. 149, 343 A.2d 437 (1975); Sabato v. Sabato, 135 N.J. Super. 158, 168, 342 A.2d 886, 891 (L. Div. 1975); Barry Gardens v. Passaic, 130 N.J. Super. 369, 377, 327 A.2d 250, 254 (L. Div. 1974); 25 Fairmount Avenue, Inc. v. Stockton, 130 N.J. Super. 276, 285–86, 326 A.2d 106, 111 (Bergen County Dist. Ct. 1974). In *Sabato*, however, the court held the statute unconstitutional insofar as it prevented a landlord from evicting a tenant for the landlord's personal occupancy. 135 N.J. Super. at 178, 342 A.2d at 897. A similar exception for an owner-occupancy was achieved in *Bradley* by viewing a two-family house leased to tenants as being constructively owner-occupied as of the date of purchase and thus not subject to the statute. 132 N.J. Super. at 433–34, 334 A.2d at 63–64.

For a more extensive examination of this statute see Note, *New Rights for New Jersey Tenants—"Good Cause" Eviction and "Reasonable" Rents*, 6 RUTGERS-CAMDEN L.J. 565 (1975). Amendments to the statute were recently enacted. Law of Feb. 19, 1976, ch. 311, [1976] N.J. SESS. L. SERV. 839–45.

[282] Note, *supra* note 281, at 566–67. The possibility of eliminating notices to quit "arbitrarily and without cause" had been identified as meriting consideration by a joint legislative commission. NEW JERSEY LANDLORD TENANT RELATIONSHIP STUDY COMM'N, INTERIM REPORT TO THE GOVERNOR & LEGISLATURE 13 (1970).

Related to the arbitrary termination of a tenancy through a notice to quit without good cause is the use of oppressive terms in a written lease. *See generally* Gibbons, *supra* note 169, at 314–15. In Lee v. Housing Authority, 119 N.J. Super. 72, 290 A.2d 160 (Union County Dist. Ct. 1972), Legal Services attorneys challenged a public housing lease which contained a provision in which the tenant waived " 'all notice required by law to terminate his tenancy and all legal proceedings to recover possession.' " *Id.* at 74, 290 A.2d at 161. This provision as well as other clauses violated HUD public housing regulations. *Id.* at 74–75, 290 A.2d at 161–62. The regulations included a requirement that the tenancy be terminated "for good cause only" and provided for an administrative hearing. *Id.* at 74, 290 A.2d at 161. The court held that the housing authority was bound by the regulations and that the lease provisions denied the tenants due process. *Id.* at 78–79, 290 A.2d at 163–64. The court reasoned:

> It is clear that local housing authorities are necessarily subject to greater restrictions than private landlords. Their goal is not financial profit but to provide housing to needy persons who otherwise might not be able to

Procedural aspects as well as the substantive law of the summary dispossess action have been challenged by Legal Services attorneys. The summary dispossess statute contains authority for broad substituted service of process. Whenever a summons or complaint cannot be personally served, a copy may be posted or affixed "upon the door or other conspicuous part of such premises. Such posting shall be deemed to be lawful service."[283] Many low-income tenants were subjected to abuses of the substituted service of process.[284]

In *Ortiz v. Engelbrecht*,[285] a default judgment had been entered against the tenant in a dispossess proceeding.[286] Alleging that she had never received any notice of the action, the tenant challenged the constitutionality of the posting provision of the statute.[287] A class action was filed and the convening of a three-judge court requested, but the federal district court denied the application and dismissed the complaint.[288] The Third Circuit reversed, holding that "a valid cause of action against the landlord and the constable" had been stated.[289] It remanded the matter to the district court for

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obtain adequate living quarters. The facilities which they manage are merely tools to be used to meet the public need for low-rent housing. This objective is thwarted if eligible tenants are wrongfully evicted; even the most undeserving and undesirable tenant is entitled to due process.

Id. at 78, 290 A.2d at 163–64. Self-restraint on the part of the housing authority in the exercise of the power did not validate the lease provision. *Id.* at 78, 290 A.2d at 164. The court rendered both declaratory and injunctive relief against enforcement of the lease provision. *Id.* at 79, 290 A.2d at 164.

Where a lease does comply with requirements of specific grounds for removal and contains provisions for required notices, it must be strictly adhered to. Housing Authority v. Isler, 127 N.J. Super. 568, 572–73, 318 A.2d 432, 434–35 (App. Div. 1974). For an earlier Legal Services challenge to the eviction practices of local public housing authorities see Randell v. Newark Housing Authority, 384 F.2d 151 (3d Cir. 1967), *cert. denied*, 393 U.S. 870 (1968).

[283] N.J. STAT. ANN. § 2A:18–54 (1952).

[284] Bruno, *supra* note 165, at 306–07. The author states:

Too often, however, process servers do not even attempt to serve the tenant personally, but rather rely strictly upon the substituted service. Many tenants state that they first discovered the complaint and summons stuffed in their mailbox or wedged into the crack of their apartment door. Such methods are not only unlawful but are demeaning to the court's dignity and credibility in the eyes of the community. Other tenants emphatically state, after being evicted from their apartment, that they never received any kind of court notice about a pending lawsuit by their landlord.

Id. at 306 (footnotes omitted). As an alternative the author suggests a combination of posting and mailing in order to give the tenant adequate notice. *Id.* at 306–07.

[285] 474 F.2d 977 (3d Cir. 1973).

[286] *Id.* at 978.

[287] *Id.* at 977–78.

[288] *Id.*

[289] *Id.* at 978.

consideration of the class action issue and whether the controversy had become moot.[290]

On remand,[291] the district judge found that the case had become moot as a result of the tenant's having moved, but decided to examine the issue because of its "importance."[292] The tenant's absence also deprived the class of a representative.[293] Addressing the request for a three-judge court to consider the constitutionality of service by posting, the court held that the claim was "insubstantial" for several reasons.[294] It emphasized the inadequacy of the factual record before it. There was no way of knowing "whether the court officer did in fact attempt and exhaust the preferred methods of service with failure before making service by posting on the door."[295] The court reviewed the New Jersey cases, statutes, and related court rules in the area.[296] Apparently because he perceived the summary dispossess action as an in rem proceeding and "an action of exceedingly narrow scope, culminating in a judgment of very limited effect," the district judge found no significant problems with the use of this form of substituted service to evict a tenant.[297] In passing, the court had noted the unreliability of current mail deliveries as an alternative means of service.[298] Although it refused to certify the class and convene a three-judge court, the district court declined to dismiss the action. It ordered a plenary hearing after which it would render a declaratory judgment.[299] There is no final published decision.

While the direct federal court challenge was unsuccessful, the manner of service of process has been reformed. Effective September 8, 1975, the rules of court for district court practice were

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[290] *Id.*

[291] 61 F.R.D. 381 (D.N.J. 1973).

[292] *Id.* at 386.

[293] *Id.* Judge Biunno further commented that the alleged class was "far too broad and diffuse." *Id.* at 395. He found no data to support a class of tenants against whom defaults had been entered after service by posting. Additionally, he stated: "Notice is inherently inevitable." The tenant would find out about the dispossess action when a constable came to execute the warrant of removal. *Id.*

[294] *Id.* at 388–95.

[295] *Id.* at 387, 393. The tenant's affidavits indicated that no papers were received, but did not explicitly address whether "no knocking on the door, or no ringing of the bell or buzzer [was heard], or that the bell or buzzer was out of order." *Id.* at 393–94. Another affidavit stated that neighborhood children came into the building and tore down notices and removed mail from mailboxes. *Id.* at 394.

[296] *Id.* at 388–93.

[297] *Id.* at 389.

[298] *Id.* at 387.

[299] *Id.* at 395.

amended to require that service in landlord-tenant dispossess proceedings be effected "by ordinary mail *and* by either delivery personally . . . or by affixing a copy of the summons and complaint on the door of the subject premises."[300] The combination of mailing and posting should reduce the number of default judgments for possession.

The procedure of a landlord-tenant trial is generally informal. Nevertheless, a court rule was believed to authorize a complete jury trial on one day's notice.[301] In *Alfour Inc. v. Lightfoot*,[302] however, the trial judge held that tenants in a summary dispossess proceeding had no right to a jury trial.[303] The tenants in *Alfour* had based their demand upon the state constitution,[304] a statute,[305] and the court rule.[306] The court held that since there is a constitutional right to a jury trial only in actions recognized by the common law at the time the state constitution was adopted in 1776 and the summary dispossess act had been passed only in 1847, there was no such right.[307] Reviewing the history of the summary dispossess action from its creation in 1847, the court noted that while there had originally been a jury provision,[308] that clause was omitted in a supple-

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[300] N.J.R. 6:2-3(b) (emphasis added). Previously the court rules only recognized some mode of personal service if the tenant was within the state. *See* N.J.R. 6:2-3(b) (1973). However, despite the obvious textual requirement of the rule, the practice of posting under the statute continued and was construed as personal service under the rule. A short-lived amendment to the rule was made in April 1975. It authorized service "by ordinary mail *or* by delivery personally . . . and by affixing a copy" of the court papers on the tenant's door. N.J.R. 6:2-3(b) (1975) (emphasis added). This amendment was made "in apparent response to the voiced difficulty of landlords in effecting traditional service." S. PRESSLER, CURRENT NEW JERSEY COURT RULES, N.J.R. 6:2-3, comment 2 (1975).

[301] Bruno, *supra* note 165, at 299-300. *See* N.J.R. 6:5-3(a) (1972), *as amended*, N.J.R. 6:5-3(a). The rule originally provided:

> In summary actions between landlord and tenant . . . the demand shall be filed and served and the fee paid by the demanding party at least one day before the return day of the summons.

N.J.R. 6:5-3(a) (1972). Jury trials, however, were extremely rare. Bruno, *supra* at 300 & n.10.

[302] 123 N.J. Super. 1, 301 A.2d 197 (Essex County Dist. Ct. 1973).

[303] *Id.* at 3-4, 301 A.2d at 198.

[304] *Id.* at 3, 301 A.2d at 198. *See* N.J. CONST. art. 1, ¶ 9.

[305] 123 N.J. Super. at 3-4, 301 A.2d at 198. *See* N.J. STAT. ANN. § 2A:18-16 (1952) which provides: "Either party to *any* action commenced in a county district court may demand a trial by jury." (Emphasis added.)

[306] 123 N.J. Super. at 4, 301 A.2d at 198. *See* N.J.R. 6:5-3(a) (1972), *as amended*, N.J.R. 6:5-3(a). The relevant text of this rule is reproduced in note 301 *supra*.

[307] 123 N.J. Super. at 8-9, 301 A.2d at 201.

[308] *Id.* at 4-5, 301 A.2d at 198-99. *See* Law of Mar. 4, 1847, § 5, [1847] N.J. Laws 143 (jury of six), *as amended*, Law of Mar. 8, 1848, § 1, [1848] N.J. Laws 185 (jury of twelve).

mental enactment in 1888.[309] The proceedings were thereafter characterized as " 'summary actions.' "[310] The court found that this statutory characterization precluded a jury trial.[311] Comparing the relief available in a summary dispossess action with that in an ejectment proceeding,[312] it concluded that only the latter type of action was covered by the constitutional provision, statute, and rule cited by the tenants.[313] The court also held, in effect, that the rule authorizing a jury trial in a dispossess proceeding was meaningless. A "summary action" with a jury trial was a contradiction in terms.[314] The court added another reason for denying the jury demand, which was "peculiar" to the court's location in the Newark area.[315] The caseload of tenancy actions was very heavy; requiring jury trials would cause intolerable backlogs and result in burdens on landlords who could not regain possession, thus increasing the possibility of residential abandonment by owners.[316]

The court's constitutional-common law conclusion may be questionable.[317] Its determination that the statute providing that "[e]ither party to any action commenced in a county district court may demand a trial by jury"[318] applies only to landlord-tenant eject-

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[309] 123 N.J. Super. at 5, 301 A.2d at 199. *See* Law of Apr. 23, 1888, ch. 308, [1888] N.J. Laws 462–63.

[310] 123 N.J. Super. at 5, 301 A.2d at 199. *See* N.J. STAT. ANN. § 2A:18–53 (1952), *as amended*, N.J. STAT. ANN. § 2A:18–53 (Supp. 1975–76).

[311] 123 N.J. Super. at 5, 301 A.2d at 199.

[312] *Id.* at 5–8, 301 A.2d at 199–201. *See* N.J. STAT. ANN. § 2A:35–1 *et seq.* (1952).

[313] 123 N.J. Super. at 8, 301 A.2d at 201.

[314] *Id.* at 10–11, 301 A.2d at 202.

[315] *Id.* at 11, 301 A.2d at 203.

[316] *Id.* at 11–12, 301 A.2d at 203.

[317] In Pernell v. Southall Realty, 416 U.S. 363 (1974), the Supreme Court held that the seventh amendment required a jury trial in a District of Columbia eviction action for nonpayment. It found that distinctions between title (the usual issue in ejectment) and possession were immaterial to the common law for jury trial purposes. *Id.* at 370–71. The test for a jury trial was not whether the particular action was known to the common law, but whether "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty." *Id.* at 375. The seventh amendment civil jury guarantee has not been made enforceable against the states. 1 C. ANTINEAU, MODERN CONSTITUTIONAL LAW § 7:17, at 549 (1969). Nevertheless, the position of the Court may be persuasive authority. Justice Marshall also addressed the question of the landlord's speedy recovery of the premises:

> Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

416 U.S. at 385.

[318] N.J. STAT. ANN. § 2A:18–16 (1952).

ment actions and not landlord-tenant dispossess proceedings[319] is undoubtedly erroneous. Ejectment actions cannot be brought in the district court.[320]

In any event, the holding in *Alfour* has been effectuated through a court rule on procedure. The district court jury demand rule was amended to delete any reference to landlord-tenant matters.[321] The general provisions of the rule require a jury demand to be made within ten days after an answer is filed.[322] However, no answers are permitted to be filed in summary dispossess actions.[323]

Legal Services attorneys and some trial courts have challenged the warrant of removal, the procedure for enforcing eviction judgments. A statute authorizes the court to stay the issuance of the warrant of removal of a residential tenant for up to six months if it appears that "the tenant will suffer hardship because of the unavailability of other dwelling accommodations."[324] The statute further provides that the stay may be granted and may continue only if all rent arrearages plus court costs and current rent are paid, future rent due during the stay is paid, the tenant is not disorderly, and the tenant does not willfully damage the premises.[325]

In *Ivy Hill Park Section Five, Inc. v. Handa*,[326] a judgment for possession on grounds of nonpayment was entered. The trial judge stayed the warrant of removal for two and a half months. The landlord appealed. The appellate division summarily reversed, holding that "the plain language" of the statute required that a stay could only be granted "on the payment of past and future rent due to the landlord."[327] The court held that the county district court judge had no jurisdiction to issue such a stay.[328]

Jurisdictional limitations were also imposed in *Housing Authority v. West*,[329] where the trial judge attempted to cope with a landlord that had inordinately delayed bringing suit, with the re-

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[319] 123 N.J. Super. at 8, 301 A.2d at 201.

[320] N.J. STAT. ANN. § 2A:35–1 (1952).

[321] *See* N.J.R. 6:5–3(a). Citing *Alfour*, the comment to the rule states: "This rule was further amended . . . to make clear that there is no right to a jury trial in a summary dispossess action." S. PRESSLER, CURRENT NEW JERSEY COURT RULES, N.J.R. 6:5–3, comment 1 (1975).

[322] N.J.R. 6:5–3(a).

[323] N.J.R. 6:3–1.

[324] N.J. STAT. ANN. § 2A:42–10.6 (Supp. 1975–76).

[325] *Id.*

[326] 121 N.J. Super. 366, 297 A.2d 201 (App. Div. 1972).

[327] *Id.* at 367, 297 A.2d at 201–02.

[328] *Id.* at 367, 297 A.2d at 202.

[329] 132 N.J. Super. 229, 333 A.2d 290 (App. Div.) (1975), *aff'd*, 69 N.J. 293, 354 A.2d 65 (1976).

sponsibility of the tenant to pay rent, and with the realities of the housing shortage. Judgment for possession had been entered, but the warrant was stayed on the condition that the tenant pay arrearages at the rate of $100 a month in addition to her regular rent.[330] Because of the large amount of arrearages that had accumulated, this denied the landlord possession of the premises for twenty-two months.[331] The Housing Authority appealed. Relying upon *Ivy Hill*, the appellate division tersely vacated the stay and ordered the issuance of the warrant of removal.[332]

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[330] 132 N.J. Super. at 230, 333 A.2d at 291.

[331] *Id.* The total amount of the arrearages was $2,199. *Id.* The Housing Authority landlord had delayed instituting suit for almost two years.

[332] *Id.* The New Jersey supreme court recently affirmed this determination of the appellate division. Housing Authority of Newark v. West, 69 N.J. 293, 295, 354 A.2d 65, 69 (1976).

A majority of the court held that the landlord was entitled to appeal a summary dispossess judgment in its favor where there was an issue of " 'lack of jurisdiction' " and that the trial court had lacked the jurisdictional power to enter the order staying execution of the judgment for nearly two years. *Id.* at 297–98, 300–01, 354 A.2d at 67–68, 69 (quoting from N.J. STAT. ANN. § 2A:18–59 (1952)). It found that the county district court had no general equitable power to stay the dispossess judgment and that the statute authorizing stays in hardship situations was to be construed strictly. 69 N.J. at 300–01, 354 A.2d at 69 (citing N.J. STAT. ANN. § 2A:42–10.6 (Supp. 1975–76)). In reaching this conclusion, the majority held that the landlord was not "estopped to bring the action for 'prejudicial delay' in instituting it." 69 N.J. at 296, 354 A.2d at 67. Writing for the majority, Judge Conford stated that the delay resulting from the landlord's failure to immediately respond to a rent strike and the tenant's failure to place the rent money in escrow did not give rise to prejudice "in any sense as to which we can take cognizance." *Id.*

Justice Pashman filed a lengthy dissent. He would have found jurisdictional authority for the county district court's stay in an "inherent equitable power" of courts to control their cases and judgments. *Id.* at 313–16, 354 A.2d at 76–77. However, he considered the resolution of that question and the resulting issue of the landlord's right to appeal the stayed judgment for possession to be "of secondary importance." *Id.* at 302, 354 A.2d at 70.

His primary concern was the validation of the judgment "in the face of the landlord's substantial and unexplained delay in bringing suit." *Id.* at 304, 354 A.2d at 71. Rather than pertaining to a defense of estoppel or laches, the nearly two-year delay was perceived by Justice Pashman as raising an issue of whether the landlord's action was still within "the jurisdictional power of the District Court sitting in a summary dispossess proceeding." *Id.* "[O]n the basis of the summary nature of the proceedings brought under *N.J.S.A.* 2A:18–53 *et seq.* and the legislative intent behind that statute," Justice Pashman concluded that the trial court lacked jurisdiction to entertain the action. *Id.*

The dissent reviewed the lack of formality and procedural safeguards in a summary dispossess proceeding, the expeditiousness with which such actions are handled, and the statute's acknowledged purpose " 'to give the landlord a quick remedy for possession.' " *Id.* at 304–06, 354 A.2d at 71–72 (quoting from Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 462, 173 A.2d 270, 272 (1961)). The speedy possessory remedy of the statute not only allowed a landlord to regain possession promptly but also to secure "a resumption of rental income from that property as quickly as possible." 69

These cases do not satisfactorily resolve the authority of a district court to stay execution of a judgment for possession. The statute speaks of "sound discretion" in granting stays.[333] It is not clear that the statutory provisions constitute absolute limits on the court's power. For example, despite the lack of explicit authority, a court undoubtedly has the discretion and jurisdictional power to stay the warrant of removal to allow an attempt at an appeal.[334]

N.J. at 305, 354 A.2d at 71. This observation by Justice Pashman that a landlord is not normally interested in bare possession of the premises but in the rental income to be derived from the leasing of possessory rights seems unquestionable. Justice Pashman accordingly concluded: "[N]ot only does the legislative scheme entail *summary disposition* of eviction cases, but it presupposes *prompt institution* of such cases as well." *Id.* at 306, 354 A.2d at 72 (emphasis in original).

Justice Pashman bolstered his argument as to legislative intent regarding this jurisdictional limitation on the county district court in two ways. He referred to the existence of a specific alternative remedy where there were rent arrearages for a year or more. *Id.* at 307, 354 A.2d at 72–73. *See* N.J. STAT. ANN. § 2A:42–7 (1952). The provisions of this statute are outlined in note 218 *supra*. The remedy of this proceeding is not as expeditious as that of a summary dispossess action. Justice Pashman found this "logical." If the landlord allows the statutory amount of arrearages to accumulate, "then it would seem that the landlord lacks a substantial interest in a quick remedy." 69 N.J. at 307, 354 A.2d at 73. Allowing use of the summary dispossess action in such a situation would render this alternative remedy meaningless. *Id.* The other basis of support for the dissent's position came from several New York cases interpreting an eviction statute comparable to the summary dispossess act. These decisions found that the New York statute imposed jurisdictional limits of the nature perceived by Justice Pashman in the legislative intent of the summary dispossess act. *Id.* at 308–09, 354 A.2d at 73–74. *See, e.g.*, Maxwell v. Simons, 77 Misc. 2d 184, 187, 353 N.Y.S.2d 589, 591–92 (N.Y.C. Civ. Ct. Kings County 1973); Gramford Realty Corp. v. Valentin, 71 Misc. 2d 784, 786, 337 N.Y.S.2d 160, 163 (N.Y.C. Civ. Ct. N.Y. County 1972) (construing N.Y. REAL PROP. ACTIONS LAW § 711 (McKinney 1963)).

[333] N.J. STAT. ANN. § 2A:42–10.6 (Supp. 1975–76).

[334] The New Jersey supreme court tacitly approved this procedure in Kruvant v. Sunrise Mkt., Inc., 58 N.J. 452, 279 A.2d 104, *judgment amended*, 59 N.J. 330, 282 A.2d 746 (1971). A commercial lease provided for arbitration of disputes. 58 N.J. at 454–55, 279 A.2d at 105. The district court entered judgment for possession because the tenant failed to pay rent pending arbitration, but stayed the issuance of the warrant pending appeal on condition that the rent was paid into escrow. *Id.* at 454, 279 A.2d at 105. The supreme court stated that the tenant could not be dispossessed pending arbitration but nevertheless affirmed the judgment and stayed the warrant until after arbitration was concluded. *Id.* at 456, 279 A.2d at 105–06.

A 1974 landlord-tenant statute also suggests that the district court has discretion beyond the express limits of N.J. STAT. ANN. § 2A:42–10.6 (Supp. 1975–76). The new enactment requires that when a warrant of removal is issued the tenant must receive written notice of the tenant's right to apply to the district court "for a stay of execution of the warrant." *Id.* § 2A:42–10.16. There is no express limit placed upon the power of the court to grant the stay. It is unlikely that the legislature intended to require a tenant to go to court to find out that all rent must immediately be paid. Refusal to recognize discretion such as was exercised in *Ivy Hill* and *West* rapidly enforces the landlord's right to possession. But the landlord is interested in the rent—not possession. A stay conditioned upon installment payments of the arrearages in

The right to appeal summary dispossess judgments is also involved in *Ivy Hill* and *West*. Review under the act is not available "except on the ground of lack of jurisdiction."[335] The statute does provide for pretrial discretionary removal to the superior court if the case presents an issue of "sufficient importance."[336] There is a normal right of appeal, as well as other procedural rights such as jury trials, in a transferred action.[337] However, there is little guidance for the use of the removal device.[338]

Despite the statutory language, appellate courts have circumvented this limitation on judicial power by holding that "[w]hatever 'jurisdiction' means in other settings, here it uniquely connotes the existence of one of the factual situations" giving rise to a cause of action under the statute.[339] Not only the effectiveness[340] but also the wisdom of the limitation on appeals has been questioned. Writing in *Marini*, Justice Haneman stated:

> We see no sound reason for any distinction between the right to appeal from a District Court judgment and a Superior Court judgment for possession. It might well be urged that there should be no difference between the scope of review from a District Court judgment and a Superior Court judgment.[341]

The landlord has a legitimate interest in quickly regaining possession and being protected from frivolous appeals. However,

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addition to current rent provides this remedy. While the supreme court in its recent affirmance in Housing Authority of Newark v. West, 69 N.J. 293, 354 A.2d 65 (1976) did not adopt this view, it stated:

> The foregoing is not to say that the court does not have inherent discretion, as district court judges have assumed for decades, to stay the warrant for a reasonable time to permit a tenant in distressed circumstances to arrange for his voluntary removal from the premises.

Id. at 300–01, 354 A.2d at 69.

[335] N.J. STAT. ANN. § 2A:18–59 (1952).

[336] *Id.* § 2A:18–60.

[337] *Id.* § 2A:18–61.

[338] The lack of guidance in the statute was noted in Marini v. Ireland, 56 N.J. 130, 140 n.1, 265 A.2d 526, 531 (1970). For a case allowing transfer see Morrocco v. Felton, 112 N.J. Super. 226, 270 A.2d 739 (L. Div. 1970). Removal was denied in Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 261 A.2d 413 (L. Div. 1970).

[339] Marini v. Ireland, 56 N.J. 130, 138–39, 265 A.2d 526, 530 (1970).

[340] In Vineland Shopping Center, Inc. v. De Marco, 35 N.J. 459, 173 A.2d 270 (1961), Chief Justice Weintraub noted that there was some doubt whether the legislative objective of nonappealability had ever been achieved because of judicial hostility to it. *Id.* at 462, 173 A.2d at 272.

[341] 56 N.J. at 140 n.1, 265 A.2d at 531. Just before *Marini* was decided, the need for possible revision of the statute was identified as an issue for further study in NEW JERSEY LANDLORD TENANT RELATIONSHIP STUDY COMM'N, INTERIM REPORT TO THE GOVERNOR & LEGISLATURE 16 (1970).

that interest must be balanced against the interest of tenants in remaining in their homes and preventing the break-up of their families because adequate shelter cannot immediately be obtained in the current housing shortage. Trial judges do make errors. The competing interests of landlord and tenant may be best reconciled by repealing the limitation on appealability. The sifting of frivolous and unmeritorious appeals can be accomplished by the discretionary power to grant stays.[342] The "jurisdiction" bar of the statute and the resulting judicial interpretations are an unnecessary artifice.

Access to Housing

Many of the problems that result in the landlord-tenant relationship are caused by a statewide housing shortage. Landlords often have little interest in maintaining or rehabilitating their buildings because they know that regardless of the condition, someone in need of a modicum of shelter will rent the apartment. When a tenant complains about an uninhabitable situation, the landlord need not fear significant rent loss from eviction because the demand for housing far exceeds the supply. The summary dispossess action has aided in implementing the landlord's economic objectives.

The landlord's power position in the housing market has received substantial support from local zoning practices. Restrictions on minimum lot size and floor area and prohibitions of multiple-dwelling use have intensified the housing shortage and the plight of the low-income tenant trapped in urban slums.[343]

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[342] N.J.R. 2:9–5(a) provides that the filing of an appeal does not stay a judgment. A stay may be ordered "with or without terms." *Id.*

In addition to recommending repeal of the limitation on appeals, an earlier writer noted that pretrial discovery could still be restricted and an early trial date given in order to retain "the basic summary nature of the proceeding." Bruno, *supra* note 165, at 308 & n.51.

Elimination of the jurisdictional bar to appeal was urged even earlier, with strong language and a firm grasp of the consequences of an eviction:

> The statute should be amended. District Court judges should not be the courts of last resort in matters of such great importance as the possession of real property. The remedy by suit for damages is in fact wholly inadequate and the ruling of the Court of Errors and Appeals that money damages can fully compensate for illegal deprivation of possession is unrealistic.

Fulop, *The Course of a Civil Action in the District Courts*, 3 RUTGERS L. REV. 180, 215 n.18 (1949). For a recent call for legislative action see Housing Authority of Newark v. West, 69 N.J. 293, 298, 354 A.2d 65, 68 (1976) ("an undertaking obviously needed").

[343] The impact of zoning on the conditions under which tenants live was recognized in NEW JERSEY LANDLORD TENANT RELATIONSHIP STUDY COMM'N, INTERIM REPORT TO THE GOVERNOR & LEGISLATURE 2, 40 (1970). It identified "abusive local zoning practices" as one of the factors indicating "dismal prospects for relief from the overall housing shortage." *Id.* at 2.

Legal Services attorneys secured a significant victory over exclusionary zoning practices in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel.*[344] After an extensive review of the exclusionary devices employed by developing municipalities in the line of urban expansion,[345] Justice Hall, writing for the supreme court, held:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[346]

The court found that the need for housing was inherent in the "general welfare" that must be advanced by a municipality's enactments: "There cannot be the slightest doubt that shelter, along with food, are the most basic human needs."[347] It further stated that the municipality "must permit multi-family housing, without bedroom or similar restrictions."[348] The court also noted "at least a moral

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[344] 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 96 S. Ct. 18 (1975), *aff'g as modified* 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972).

For a discussion of remedies for exclusionary zoning in light of *Mt. Laurel* see Mytelka & Mytelka, *supra* note 39.

[345] 67 N.J. at 161–73, 336 A.2d at 718–24.

[346] *Id.* at 174, 336 A.2d at 724–25 (footnote omitted). The court's determination was based upon the state constitution and not federal constitutional principles. *Id.* at 174, 336 A.2d at 725.

[347] *Id.* at 178, 336 A.2d at 727. *See* N.J. STAT. ANN. § 40:55–32 (1967). The court emphasized that promotion of the general welfare was also a constitutional requirement. 67 N.J. at 175, 336 A.2d at 725. For purposes of constitutional scrutiny, it characterized "the basic importance of housing and local regulations restricting its availability to substantial segments of the population" as being a "fundamental" question. *Id.* Federal courts, on the other hand, have consistently denied the status of "fundamental interest" to access-to-housing claims. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 73–74 (1972); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1068 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

[348] 67 N.J. at 187, 336 A.2d at 732. Because of the context of the case, involving as it did low-income plaintiffs, the court must have envisioned "multi-family housing" as meaning apartments as opposed to condominiums or duplexes. This is an implicit overruling of cases holding that the zoning power cannot regulate the form of ownership or occupancy but only the physical use. *See* Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219, 221–22, 273 A.2d 397, 398–99 (App. Div. 1971);

obligation" on the part of the municipality to implement its statutory power to establish a local public housing authority "to provide housing for its resident poor now living in dilapidated, unhealthy quarters."[349]

CONCLUSION

The cases discussed in this article are among the most controversial and successful of those initiated by Legal Services attorneys. Furthermore, many of these cases have had an enduring impact on the evolution of a more equitable body of substantive law. Yet, it is all too easy to overemphasize these more dramatic, law-reform directed cases and to forget that they comprise only a small percentage of the day-to-day caseload handled by the 2500 Legal Services attorneys. It is through this daily regimen of service provided by dedicated attorneys that our nation's disaffected and alienated poor are slowly coming to believe that, properly used within the system, the law *can* function to assist them.

Moreover, the success of Legal Services in the representation of the poor has had the collateral effect of focusing the attention of the bar to the legitimate demand of middle-class Americans that they, too, be afforded reasonably-priced legal assistance. Not poor enough to qualify for free legal aid, yet unable to afford high-priced private counsel, the middle class has become justifiably embittered.

As a response to these demands, new programs such as prepaid legal services, public interest law firms, and middle income legal clinics have been springing up throughout the nation. Furthermore, some states have been experimenting with agencies which act as ombudsmen for its citizens, and New Jersey has gone even further, establishing a Department of the Public Advocate. Thus, an initial awareness of the inadequacy of legal representation for the nation's poor, an awareness which gave rise to the Legal Services projects, has blossomed into a national concern over the quality and availability of legal services at every income level. Despite restrictions which may hinder representation, the country and the profession have committed themselves to a concept long articulated and only belatedly in the process of being achieved.

Maplewood Village Tenants Ass'n v. Maplewood Village, 116 N.J. Super. 372, 377–78, 282 A.2d 428, 431 (Ch. 1971).

[349] 67 N.J. at 192, 336 A.2d at 734. *See* N.J. STAT. ANN. § 55:14A–1 *et seq.* (1964).