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Landlord and Tenant -- Retaliatory Eviction and the Absolute Right to Choose Not to Have Any Tenants

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ment in *Generes*, was sufficient to prevent an unduly broad allowance of deductions in this area. An example of the effect which the *Generes* opinion could have upon *Cremona* would be if a taxpayer paid an employment agency fee to locate a new job in exactly the same trade or business and his dominant motive for changing jobs was a nonbusiness motive, such as a change of climate. If the *Cremona* criterion were used alone, the deduction would be allowed since this was an attempt to get a new job in the same trade or business. However, because the dominant motive for the expense was a nonbusiness purpose, the deduction would not be allowed under *Generes*.

When the Tax Court ceased to use the job-securing requirement for determining the deductibility of employment agency fees, it repudiated a test which was both unfair to the taxpayer and illogical in relation to section 162[41] of the Internal Revenue Code. But the job-securing distinction did have one appealing advantage—it was definite and consequently easy to apply. The same trade or business test, applied alone, is both fair and logical in that it allows a deduction for an expense which is related to the taxpayer's trade or business. Unfortunately, it is presently undeveloped and offers no definite guidelines for the taxpayer. Additionally, it may be difficult to develop clear and definite guidelines due to the difficulty in determining a subjective factor such as the dominant motive and the room for interpretation in determining whether the new employment is within the same trade or business. In the area of educational empense deductions, where the same trade or business criterion has been used for years,[42] the persisting uncertainty as to whether specific deductions will be allowed portends equal future uncertainty in predicting the deductibility of employment agency fees.

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Landlord and Tenant—Retaliatory Eviction and the Absolute Right to Choose Not to Have Any Tenants

When a landlord is unwilling to bring his rental units into compliance with housing code provisions, does his ownership of the property include the absolute right to discontinue rental of all such units? If so,

[41]*See* note 2 *supra*.
[42]*See* note 34 *supra*.

does the same absolute right exist when the landlord elects to discontinue rental of some but not all of his units? The court in *Robinson v. Diamond Housing Corp.*[1] attempted to answer these questions for the District of Columbia.

Under common law principles, the tenant only had the right to possession of the leased premises.[2] Thus, the landlord was under no duty to make repairs or to keep the premises in a habitable condition.[3] In an agrarian society where the tenant rented the land primarily for the production of crops and the buildings located thereon were merely incidental,[4] it may have been equitable to place the burden of repair on the tenant. However, the plight of the low-income urban resident has forced several jurisdictions to make a thorough reassessment of landlord-tenant law as it is applied to the modern residential leasehold.[5]

Much of this judicial activism has been the result of legislative failures. Congress attempted to remedy this situation, and, in promulgating a national housing policy of a "decent home" for every American,[6] expressly recognized the importance of local housing codes by conditioning monetary aid to municipalities on their adoption of such codes.[7] In order to meet the objectives of this federal policy and to qualify for federal funds, thousands of municipalities have promulgated housing codes and regulations.[8] However, local agencies responsible for enforcement of the codes have not been able to significantly halt or reverse the deterioration of urban buildings.[9]

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[1]No. 24,508 (D.C. Cir., Apr. 3, 1972).

[2]1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

[3]For an extremely harsh application of this principle *see* Fowler v. Bott, 6 Mass. 63 (1809). In addition, *see* Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DE PAUL L. REV. 955, 971 n.83 (1971) and citations there listed.

[4]2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 106-17 (2d ed. 1923).

[5]For general discussion on the plight of low-income tenants see Feldman, *Effective Remedies for Tenants*, 93 N.J.L.J. 481 (1970); Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

[6]42 U.S.C. § 1441 (1970).

[7]42 U.S.C. § 1451(c) (1970).

[8]For an example *see* D.C. Housing Regs. (1955), *cited in* Daniels, *Judicial and Legislative Remedies For Substandard Housing: Landlord-Tenant Law Reform In The District of Columbia*, 59 GEO. L.J. 909, 913 (1971).

[9]The ineffectiveness of housing codes is discussed in F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 113 (1968); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255-56 (1966); Levi, *Focal Leverage Points in Problems Relating*

Due to these legislative shortcomings, several jurisdictions have adopted the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness.[10] In order to protect tenants who elected to exercise these new rights, a few jurisdictions have also prohibited the landlord from terminating a tenancy where he had a legal right to do so, but where he was motivated by a desire to retaliate against the tenant.[11]

The District of Columbia (especially the United States Court of Appeals) has led the way with its innovative judicial response to the plight of low-income tenants. In *Edwards v. Habib*[12] it was held that a landlord could not oust his tenant with a suit for possession in order to punish the tenant for reporting housing code violations to governmental authorities. This decision was followed by *Brown v. Southall Realty Co.*[13] where the court held that a lease purporting to convey property burdened with substantial housing code violations was illegal and void. Thus, under *Brown,* the landlord is not entitled to gain possession for rent due under the invalid lease. *Javins v. First National Realty Corp.*[14] further expanded the rights of tenants by holding that the warranty of habitability was to be measured by the standards set out in the housing regulations and incorporated by implication into all leases, whether oral or written. *Javins* also conditioned the tenant's obligation to pay rent upon the landlord's performance of his obligations, including the im-

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to Real Property, 66 COLUM. L. REV. 275, 280 (1966); Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 824 (1965).

[10]For recent decisions implying the warranty of habitability *see* Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972); Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[11]The leading case is Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969). Other jurisdictions have recognized the defense in the following cases: McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971); Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). On retaliatory evictions generally *see* Moskovitz, *Retaliatory Evictions—The Law and the Facts,* 3 CLEARINGHOUSE REV. 4 (1969); Schoshinski, *supra* note 5, at 541-52; Editorial Note, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia,* 36 GEO. WASH. L. REV. 190 (1967); Note, *Landlord and Tenant—Retaliatory Evictions,* 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1967); Note, *Retaliatory Evictions—Is California Lagging Behind?,* 18 HASTINGS L.J. 700 (1967).

[12]397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969).

[13]237 A.2d 834 (D.C. App. 1968), *cert. denied,* 393 U.S. 1018 (1969).

[14]428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970).

plied warranty to maintain the premises in a habitable condition.

Although *Javins, Brown,* and *Edwards* were all landmark cases in landlord-tenant law, *Robinson v. Diamond Housing Corp.*[15] may well be the most significant of all. The events of the case began on May 2, 1968, when Mrs. Lena Robinson and her four children moved into a row house owned by Diamond Housing. Prior to executing the month-to-month rental agreement, Mrs. Robinson allegedly received assurance from the landlord that major repairs would shortly be made.[16] However, the landlord subsequently reneged on his alleged promise, and Mrs. Robinson began withholding rent. Suit was then instituted for possession. Mrs. Robinson successfully defended this action on grounds that the lease was unenforceable and void due to the existence of substantial housing code violations at the time the lease was signed.[17]

Undaunted by this initial set-back, Diamond instituted a second suit based on the theory that Mrs. Robinson was a trespasser since the first action had declared the lease void. The trial court dismissed the suit and the District of Columbia Court of Appeals affirmed.[18] The court held that Mrs. Robinson was not a trespasser, but that "having entered possession under a void and unenforceable lease [she] became a tenant at sufferance."[19] However, the Court added that the tenancy, "like any other tenancy at sufferance, may be terminated on thirty days' notice."[20] In interpreting the housing code it was further stated:

> The Housing Regulations do not compel an owner of housing property to rent his property . . . . [I]f the landlord is unwilling or unable to put the property in a habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market. . . .[21]

Diamond, relying on the above dicta, instituted a third action for possession based on the statutory thirty-day notice to quit.[22] In support of its action, an affidavit was filed stating that Diamond was unwilling

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[15]No. 24,508 (D.C. Cir., Apr. 3, 1972).

[16]*Id.* at 4; *see id.* at 5 for a listing of the housing code violations existing at the inception of the lease.

[17]*Id.* at 5. Mrs. Robinson's defense was based on Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968), *cert. denied,* 393 U.S. 1018 (1969).

[18]Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969).

[19]*Id.* at 495.

[20]*Id.*

[21]*Id.*

[22]D.C. CODE ANN. §§ 45-902, -904 (1967).

to make the repairs necessary to comply with the housing code and furthermore that it intended to take the unit off the rental market. Mrs. Robinson based her defense on the alleged retaliatory motive of the landlord in seeking to oust her from possession of the premises.[23]

The trial court granted Diamond's motion for summary judgment. On appeal, the District of Columbia Court of Appeals affirmed, holding that the "retaliatory defense" of *Edwards v. Habib* was unavailable as a matter of law in such situations.[24]

On further appeal, the United States Court of Appeals for the District of Columbia was presented with the primary question: Would the landlord be permitted to evade the *Edwards* prohibition of retaliatory evictions?[25] Diamond argued that to permit the defense of retaliatory eviction at such a protracted point may mean that it would never be able to recover possession of its property. Equally important, Diamond contended that all landlords, regardless of any limitations imposed by law concerning the choice of tenants, had an absolute right to choose not to have any tenants.[26]

In response to these contentions, the court found that the attempted partial closing could have a "chilling effect" on the assertion of protected rights by other tenants. In brief, the court feared that such discriminatory closings would intimidate the remaining tenants into nonaction.[27] Accordingly, due to the "inherently destructive" effect such closings may have, the court held that the jury should have been free to presume that the landlord was motivated by the desire to retaliate.[28] "Once [this] presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."[29]

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[23]*See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969).

[24]Robinson v. Diamond Housing Corp., 267 A.2d 833, 835 (D.C. App. 1970).

[25]In Cooks v. Fowler, 437 F.2d 669, 673 (D.C. Cir. 1971), the same court had taken judicial notice of the apparently rising incidents of possessory actions based on notices to quit following closely on the heels of possessory actions based on nonpayment of rent.

[26]No. 24,508, at 17-18; *cf.* Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 950 (D.C. Cir. 1960) (suggesting that landlord take unit off market if unwilling or unable to repair the premises).

[27]No. 24,508, at 10. "There is thus a real danger that landlords may find it in their interest to sacrifice the profits derived from operation of a few units in order to intimidate the rest of their tenants." *Id.*

[28]*Id.* at 19.

[29]*Id.*; *cf.* NLRB v.Brown, 380 U.S. 278, 287 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228, 231 (1963).

In rejecting Diamond's contention that it had an absolute right to go out of business, the court relied on a passage from the labor law case of *Textile Workers Union v. Darlington Manufacturing Co.*:[30]

> The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording the employer leverage for discouraging the free exercise of § 7 rights among the remaining employees . . . .[31]

In the *Darlington* case, Deering Milliken Corporation, which operated seventeen textile manufacturing plants in the South, decided to cease operations at its Darlington, South Carolina, plant after the union won a representation election. Following the closing of the plant, the union filed unfair labor practice charges alleging that the closure was based on an anti-union motivation.

The Labor Board, by a divided vote, upheld the charges against Deering Milliken,[32] but the court of appeals refused to enforce the Board's decision.[33] On appeal, the United States Supreme Court reversed and held that a closing in one part of a large enterprise is an unfair labor practice if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer reasonably could have forseen that such closing would likely have that effect.[34]

The *Robinson* court, in reliance on *Darlington,* thus drew a distinction between a landlord's absolute right to go out of business altogether and his more limited right to discontinue part of his enterprise so as to benefit the rest. Specifically, the court held:

> While the judiciary may be powerless to control landlords who no longer wish to remain landlords, it can prevent landlords from conducting their business in a way that chills the legally protected rights of tenants . . . .
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[30]380 U.S. 263 (1965).

[31]*Id.* at 274-75.

[32]Darlington Mfg. Co., 139 N.L.R.B. 241 (1962).

[33]Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963).

[34]380 U.S. at 274-75.

> . . . Thus we hold that the landlord's right to discontinue rental of all his units in no way justifies a partial closing designed to intimidate the remaining tenants.[35]

It is interesting to note that the *Robinson* decision does not completely follow the actual holding in the *Darlington* case. *Darlington* required proof of an illegal purpose on the part of the employer to "chill unionism" in any of his remaining plants;[36] *Robinson,* on the other hand, allowed a presumption that the intent of the landlord was to coerce his remaining tenants into non-assertion of their rights.[37] Hence it is arguable that the *Robinson* court overlooked an important limiting factor which the *Darlington* decision recognized: the right to go out of business even in view of the protected rights of the employees. Because of the collision of these disparate rights, the *Darlington* court refused to base its decision on a presumption of motive. Thus it is arguable that if the landlord's motive in *Robinson* was to "chill" the legally protected rights of his remaining tenants, proof of such motive was an essential condition precedent for the tenants' cause of action. In fact, based on the *Darlington* analogy, it was mandatory.[38]

However, the *Robinson* court resolved this apparent conflict with *Darlington* by drawing a further analogy to labor law. In particular, the court employed a labor law test used to determine when the employer's acts have constituted discrimination in violation of the National Labor Relations Act.[39]

The majority of labor law cases in this area have required proof of an "unlawful purpose" on the part of the employer.[40] However, under some circumstances, the employer's actions have been determined so "inherently destructive" of important employee rights that no proof of an anti-union motivation is needed.[41] Under those circumstances, the

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[35]No. 24,508, at 10, 23.

[36]380 U.S. at 274-75.

[37]No. 24,508, at 21.

[38]*Cf.* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) (employwer may hire replacements during a strike in order to continue his business and is not required to discharge them afterwards even if it means denying reinstatement to strikers).

[39]*See* NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

[40]*See, e.g.,* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1953), *cert. denied,* 321 U.S. 778 (1944). *But cf.* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[41]Both the Labor Board and the United States Supreme Court have generally applied the "inherently destructive" terminology to situations where the actions of the employer substantially impinge upon the right of the employees to strike. Usually, the actions of the employer operate to

Labor Board can find an unfair labor practice even after the employer has introduced evidence that his conduct was motivated by legitimate business considerations.[42]

In adopting this labor law presumption of motive, the *Robinson* court appears to have promulgated the following guidelines:

> (1) If the tenant produces specific evidence of the landlord's retaliatory motive, then the landlord, absent proof of any legitimate business motive, will be prohibited from evicting the tenant.[43]
>
> (2) If the landlord fails to come forward with a legitimate business justification for the removal of the unit, then the jury may presume the landlord's actions to be retaliatory.[44]
>
> (3) If the landlord's removal of the unit is both retaliatory and is supported by a legitimate business justification, then the jury must determine which motive was the causative factor.[45]

Notwithstanding this apparent resolution of the conflict with the *Darlington* case, it is important to note one further discrepancy. In particular, the labor law cases relied on for the presumption-of-motive test were all related to employer actions taken against lawful strikers which did not involve, as did *Darlington,* the decision to completely go out of business.[46] These two situations are distinguishable in that a decision to terminate the entire business extinguishes by implication the protected rights of the employees by precluding any remedial response by the Labor Board. In short, the employer cannot be ordered to reinstate the discharged employees in a business that no longer exists. On the other hand, the cases pertaining to discrimination against lawful strikers all involve continuing business enterprises. As a result, the reinstatement order is a realistic remedy in such situations. Thus, it is arguable that the *Robinson* court made an erroneous analogy.

Finally, after holding that the landlord could not close the rental

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discriminate between strikers and non-strikers. The leading examples are NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) (employer refused to pay strikers vacation benefits accrued prior to the strike); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (employer offered 20 years additional seniority both to replacements and to strikers who agreed to return to work).

[42]In these cases it is necessary for the Labor Board and the court to balance the significance of the employer's interest against the impingement of such interest upon the exercise of protected employee rights.

[43]This is basically the *Edwards v. Habib* "retaliatory defense."

[44]No. 24,508, at 21.

[45]*Id.* at 23.

[46]*See* note 41 *supra.*

unit and that his retaliatory motive could be presumed, the *Robinson* court confronted the problem of the landlord who is unwilling, but not unable, to repair code violations and is therefore prevented from either evicting the tenant or collecting rent.[47] Under such circumstances, it was held that the tenant is entitled to have the premises made habitable through a code enforcement action by the housing authorities or by a proper suit instituted by the tenant.[48]

Although the District of Columbia case law provided substantial remedies for tenants prior to *Robinson,* the effectiveness of such remedies was questionable due to the apparent statutory eviction procedure left open to the landlord.[49] For instance, the *Javins* opinion itself appeared to hold out to the landlord a means of eviction based on retaliation when it stated: "Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground."[50] Thus *Javins* implied that the landlord could evict that same tenant who had the month before proven the existence of housing code violations by simply giving the thirty-day statutory notice to quit.

Therefore the *Robinson* decision is important in that it closes most of the "gaps" left by the prior decisions. The opinion is based on the fundamental premise that "the scope and effectiveness of tenant remedies for substandard housing will be determined by the degree of protection given tenants against retaliatory actions by the landlord."[51]

In response to these "gaps," the *Edwards v. Habib*[52] decision provided that the tenant may defeat an eviction based on a thirty-day notice

[47]However, the court stated that [n]one of this is to say that the landlord may not go out of business entirely if he wishes to do so or that the jury is authorized to inspect his motives if he chooses to commit economic hara-kiri." No. 24,508, at 23.

[48]This right of the tenant was recognized in Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970), where the court stated, "In extending all co tract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability." *Id.* at 1082 n.61.

[49]*See, e.g.,* 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, 374 (1971); Recent Cases, *Landlord and Tenant—Warranty of Habitability—Proof of Housing Code Violations Which Occur During the Term of a Lease Are Admissible When Offered as a Defense to an Eviction Action for the Nonpayment of Rent,* 39 U. CIN. L. REV. 600 (1970).

[50]428 F.2d at 1083 n.64.

[51]Daniels, *supra* note 8, at 943.

[52]397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969).

if the action of the landlord was improper.[53] However, the *Edwards* decision did not go so far as to say that the landlord's decision to take the rental unit off the market would be sufficient to raise the presumption of a retaliatory motive. Therefore, *Robinson* now has established such a presumption and represents a substantial victory for the tenant.

The use of labor law analogy, by the court was questionable, but it must be recognized that Washington, D. C., "is confronted by a serious shortage of housing . . . rentals."[54] Much of the city's good housing is plagued by over-use and insufficient maintenance.[55] In addition, a substantial percentage of the housing units in the District are substandard or overcrowded.[56] When these factors are combined with the express holdings of *Edwards, Javins,* and *Brown* (as well as the District of Columbia Landlord-Tenant Regulations patterned after them),[57] it appears that there was no alternative holding by which the *Robinson* court could have preserved the rights of tenants.

Any other decision would have in effect permitted retaliatory evictions. Such a course would have violated both the *Edwards* prohibition and the District of Columbia Housing Regulations. However, in another sense, the decision is extraordinary. The landlord may never be able to evict the tenant so long as he is motivated by a desire to rid himself of the tenant, even if he has a legitimate business reason for such an eviction. More importantly, the "mere desire to take the unit off the market is by itself [never] a legitimate business reason which will justify an eviction."[58]

Thus, in the final analysis, the *Robinson* decision appears to raise difficult questions regarding the supply, maintenance, and availability of adequate low-income housing.[59] Specifically, they include:

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[53]*Id.* at 699.

[54]NATIONAL CAPITAL PLANNING COMM'N, PROBLEMS OF HOUSING PEOPLE IN WASHINGTON, D.C. 53 (1966).

[55]*Id.* at 51; *see* Brief for Appellee at 38-40, Robinson v. Diamond Housing Corp., No. 24,508 (D.C. Cir., Apr. 3, 1972).

[56]METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, HOUSING GAP QUANTIFICATION: A METHODOLOGY 34-35 (1968), *cited in* Brief for Appellee at 41 n.42, Robinson v. Diamond Housing Corp., No. 24,508 (D.C. Cir., Apr. 3, 1972).

[57]D.C. Landlord-Tenant Regs. §§ 2902.1(a), (b), 2902.2, 2910 (1970), *quoted in* Daniels, *supra* note 8, at 958, 960.

[58]No. 24,508, at 20.

[59]*See* REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING: A DECENT HOME 68-73 (1968).

(1) Will it be impossible for landlords to absorb the cost of bringing their units into compliance with the housing code, thus driving additional low-cost housing off the market?[60]
(2) If this decision does result in the decrease of low-cost housing, then who shall develop, own, and manage such housing?
(3) If private enterprise is unable or unwilling to finance these massive repairs, should the government assume full responsibility for the construction, maintenance, and operation of a nationwide system of low-income housing?

It must be remembered that the only justification for this decision is that it will serve to "increase rather than decrease the stock of habitable housing in the District of Columbia."[61] In the event this result does not follow, the justification collapses, and there is no further policy basis for the decision.

O. MAX GARDNER III

Medical Jurisprudence—Determining the Time of Death of the Heart Transplant Donor

Over the past twenty years medical science has made phenomenal strides in the areas of resuscitation, life support, and organ transplantation.[1] With the first human heart transplant[2] the medical and legal communities were forced to re-assess their positions on many legal and ethical issues. Because the heart is a vital and non-paired organ, a heart transplant necessarily results in the death of the donor.[3] Also, it is necessary to remove the heart from the transplant donor as soon as possible after respiratory failure occurs. Because the heart tissue begins to deteriorate immediately upon termination of its oxygen supply, delay

[60]The Robinson court concluded that this danger is largely imagined, citing only Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

[61]No. 24,508, at 27-28.

[1]*See* Harvard Medical Shool Ad Hoc Committee to Examine the Definition of Brain Death, *Report: A Definition of Irreversible Coma*, 205 J.A.M.A. 337 (1968).

[2]The first human heart transplant was performed on Dec. 3, 1967 by Dr. Christiaan Barnard on Louis Washkansky at Groote Schuur Hospital in Cape Town, South Africa. R. PORZIO, THE TRNSPLANT AGE 17 (1969).

[3]*See, e.g.*, Timmes, *The Cardiac Surgeon's Viewpoint*, in THE MOMENT OF DEATH 14 (A. Winter ed. 1969). The living donor from whom a kidney has been removed can survive on one normal kidney.