Chapter 10: Poverty Law

Paul Garrity
CHAPTER 10

Poverty Law

PAUL GARRITY

§10.1. Introduction. The 1970 Survey year was characterized by retrenchment and stagnation in many areas of endeavor, including, lamentably, that of poverty law. For example, those pursuing constitutional arguments in public welfare litigation before the United States Supreme Court turned in rather poor box scores.1 One instance of legislative stagnation would be that of the Federal Housing and Urban Development Act of 1970,2 which effected an administrative consolidation of existing HUD programs at a time when housing production was at its lowest ebb in two decades, and when imaginative solutions were required to reverse the tide. Locally, poverty law advocates achieved rather dismal results.3 This last observation can be illustrated by three judicial decisions covering diverse substantive areas, but all involving the common theme of access to the courts by poor people.

§10.2. Standards for leave to file in forma pauperis: Right to counsel. In Coonce v. Coonce,4 a domestic relations case, the Supreme Judicial Court affirmed the probate court’s denial of a libellant’s motion, on the filing of a libel for divorce, for permission to proceed in forma pauperis. The probate judge in his report of material facts determined that the applicable statute did not allow for waiver of fees by the probate court. He found that the libellant, although a recipient of public assistance, was not within the meaning of “destitute” as required by the Superior Court before it grants motions to proceed in forma pauperis. The Supreme Judicial Court affirmed and decided the libellant did not factually prove her eligibility to proceed in forma

PAUL GARRITY is Assistant Professor of Law at Boston College Law School and a Fellow in Urban Law at Harvard Law School. Professor Garrity wishes to acknowledge the valuable assistance of Ronald S. Perlman, a second year student at Boston College Law School, in the preparation of this article.

3 The Massachusetts Law Reform Institute, 80 Boylston Street, Boston, publishes quarterly the Law Reform Newsletter, which reports pending as well as decided litigation and legislation in the area of poverty law.


Published by Digital Commons @ Boston College Law School, 1970
pauperis but ruled that the probate court "has the power to grant such a waiver in an appropriate case."\(^2\) The Court appeared to make every effort to avoid establishing a definitive "destitute" test as a prerequisite to the probate court's action in such a case. This decision seems to stand for the proposition that a welfare recipient, without proof of additional facts relating to his or her poverty, will not be allowed to proceed in forma pauperis. Although the Supreme Judicial Court explicitly did not reach federal and state constitutional issues,\(^3\) one wonders whether the fact that this was a civil proceeding affected the Court's finding in this case. The following decision might shed some light on this query.

In *Aiello v. Commissioner of Public Welfare*,\(^4\) the Supreme Judicial Court reversed a decree of the Superior Court which had required that the legal fees of welfare recipients appealing adverse welfare administrative determinations be paid by the Commonwealth. The Supreme Judicial Court quoted from *Goldberg v. Kelly*,\(^5\) in which the United States Supreme Court stated: "We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires."\(^6\) Although the Supreme Court in *Goldberg* did not decide the issue of whether counsel must be provided in a case where the welfare recipient cannot pay for one, the Supreme Judicial Court made that determination and quoted with approval a Louisiana federal district court opinion which held that "it is elementary that the Constitution does not provide a requirement that the government provide lawyers for litigants in civil matters."\(^7\) The Supreme Judicial Court concluded by observing that "[t]he law is equally applicable to all those who wish to pursue 'avenues of appellate review.' . . . This is so irrespective of the fact that some potential [welfare] recipients may be able to afford counsel and others may not."\(^8\) The Court's conclusion is rhetorically logical but it is absurd in all other respects. An indigent defendant found guilty of murder and sentenced to death is furnished counsel at state expense in his appeal to reverse his conviction. Is the Court in *Aiello* saying that recipients, totally dependent upon, but denied, welfare assistance, are not to be furnished counsel when appealing such denial to, say, the Superior Court?\(^9\)

\(^2\) Id. at 158, 255 N.E.2d at 332.
\(^6\) Id. at 270.
In re Garland,\(^{10}\) decided by the United States Court of Appeals for the First Circuit, involved an appeal from an affirmance by the district court of a referee's refusal to allow a husband and wife without any assets to proceed in forma pauperis upon their filing of voluntary individual petitions in bankruptcy. The court advanced several cogent reasons for its decision and, noting that a bankruptcy discharge is a privilege and not a right, determined that since bankruptcy is an administrative rather than a litigative remedy, it would be up to Congress to provide for the waiver of filing fees. The court felt that if a debtor had no assets, he would not realistically require a discharge unless (1) he really did have assets but wished to conceal them or (2) he expected to obtain future assets and preferred to be rid of creditors. However, this latter result is exactly what bankruptcy contemplates, i.e., a "fresh start." Moreover, the assetless debtor may well require discharge to forestall such creditor harassment tactics as successive wage attachments, dunning letters and telephone calls.\(^{11}\)

§10.3. Legal services. In 1970 it is again appropriate to begin this report and analysis of developments in the area of legal services from the perspective of the developers.\(^1\) It was noted last year that aggressive advocacy by legal services attorneys had generated political opposition. This year the opposition flowered in the form of a proposal by the director of the Office of Economic Opportunity (OEO) to decentralize the operations of the Legal Services Program by delegating most decision-making to OEO officials at the regional level. The authority formerly exercised by the national director of the Legal Services Program would be severely restricted. Legal services attorneys waged an intense lobbying campaign against the proposal and enlisted the support of the American and several state and local bar associations.\(^2\) It was pointed out that in most cases authority would be vested in non-attorneys who invariably were political appointees and presumably would allow political considerations to interfere with attorney-client relationships. A typical argument advanced was that pressure would be applied, for example, to terminate representation of community groups litigating as a class to achieve such politically unpopular results as increased public assistance benefits. As of this time, the issue is still in doubt. One indication of the ultimate result was the discharge of the director of the Legal Services Program, a foe of decentralization, in the midst of the dispute.\(^3\)

In Massachusetts, a more promising development arose in the form

---

\(^{10}\) 428 F.2d 1185 (1st Cir. 1970).

\(^{11}\) See generally Shaffer, Proceedings in Bankruptcy In Forma Pauperis, 69 Colum. L. Rev. 1203 (1969).


\(^2\) Resolution of the Council of the Boston Bar Assn. on OEO Legal Services Program (Dec. 3, 1970).

\(^3\) Poverty Lawyers for Effective Advocacy (PLEA) Bulletin (Nov. 23, 1970).
of a rule of the Supreme Judicial Court. On October 1, 1970, the Court added General Rule §19, allowing attorneys engaged in legal services and public defender work, in certain circumstances, to practice prior to admission to the bar of the Commonwealth.

§10.4. Public assistance. Cases presenting issues affecting public welfare recipients have been reaching the United States Supreme Court with increasing frequency. It could be said, though, that the period of constitutional litigation focusing on the substance of welfare assistance with results favorable to recipients, which began with Shapiro v. Thompson, is perhaps over. In the recent case of Dandridge v. Williams, the Supreme Court upheld the constitutionality of a regulation of the Maryland Department of Public Welfare which imposed an absolute limit of $250 per month on the amount of Aid to Families with Dependent Children (AFDC) payments irrespective of the size of families and their actual needs. A three-judge federal district court had ruled that this regulation was in violation of the equal protection clause. The Supreme Court disagreed and, in construing provisions of the Social Security Act, determined that the Maryland regulation did not contravene the federal statutory requirement that aid "shall be furnished with reasonable promptness to all eligible individuals." The Court remarked that "[g]iven Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family." In Rosado v. Wyman, decided the same day as Dandridge, the Supreme Court reaffirmed its ruling, previously made in King v. Smith, that if a conflict should occur between the terms of the Social Security Act and state welfare legislation or regulations, the federal law would control. However, the Rosado case was disappointing to those advocates of the concept of a "right" to public assistance. On this issue, the Court, by way of dictum, noted that "[w]hile participating States must comply with the terms of the federal legislation ... the program is basically voluntary ... ." In sum, if a state accepts federal public assistance monies, it must play by federal welfare rules. However, there is no federal constitutional or statutory requirement that states provide help to those in need of it.

As to welfare disputes centering around procedural due process issues, the prospects are less bleak. What could be considered a landmark case, Goldberg v. Kelly, was decided this 1970 Survey year. Although in Goldberg the Supreme Court left open for future ad-

§10.4. 1 394 U.S. 618 (1969).
3 Id. at 479.
6 See, e.g., Reich, New Property, 73 Yale L.J. 733 (1964).
judication more than it decided, its general holding that welfare recipients cannot be denied welfare benefits except after a full "due process-type" hearing is a significant precedent long sought by welfare rights advocates.

Welfare litigation decided in Massachusetts can, for the most part, be rationalized in the context of the introductory report sketched above. In an Opinion of the Justices, the Supreme Judicial Court considered the constitutionality of House Bill 336 which proposed, in the case of newly arrived "citizens" of Massachusetts, to limit public assistance payments for two years to a sum equal to the amount of money allowed to a recipient under the laws of his prior domicile. The Court rather quickly disposed of this issue on the basis of the United States Supreme Court's decision banning welfare residency requirements in Shapiro v. Thompson. If the bill was so obviously defective, one might well ask why it was proposed in the first place, and why the legislature eventually submitted it to the Court. The Court, which has not been subdued in its comments in the past as to what it considers frivolity, was conspicuously silent in this case.

In Cambridge v. Commissioner of Public Welfare, the Supreme Judicial Court determined that liens acquired by municipalities which had extended old age assistance prior to the assumption of welfare payments by the Commonwealth in 1967 were allowably abolished by legislation enacted in 1969. The crux of the Court's decision is that such activity, i.e., the acquisition of liens by municipalities, is purely governmental and as such is subject to legislative control. The broader issue of whether imposition of liens is consistent with federal welfare legislation was not reached. This issue, which has been phrased in terms of whether a former welfare recipient has an obligation to repay for assistance previously received, is at the essence of pleadings which have been filed in the federal district court but which, as of this time, have not been ruled upon. In that case, Federici v. Ott, a welfare recipient's lump-sum social security disability payment was attached by the Department of Public Welfare in order to gain reimbursement for public assistance payments previously granted. One issue the federal court will have to consider is why public welfare benefits should be considered differently than other governmental programs, some with and some without "insurance" aspects, which do not involve repayment by the recipient. The response to this question will obviously depend on how the applicable federal legislation is construed.

Of the four decisions handed down in Massachusetts involving

procedural due process issues, *Banner v. Smolenski*\(^\text{15}\) is clearly the most significant. In that case, the petitioner, acting on behalf of a class of welfare clients, i.e., all recipients of AFDC in Massachusetts, attacked the Welfare Department’s appeals procedures as being inconsistent with Massachusetts and federal legislation and as contravening Fourteenth Amendment due process guarantees. The court, while allowing the litigation to be brought as a class action and also recognizing several procedural “rights” as guaranteed by the Fourteenth Amendment and applicable federal and state statutes, declined to issue a preliminary injunction, noting that “[f]urther evidence of both the need for and the consequences of prospective relief must be presented. . . .”\(^\text{16}\) In its discussion of one of the several procedural rights the petitioner requested that it protect, the court observed that federal and state legislation did not require that a welfare recipient be allowed access to “his entire case record.” Relying on *Goldberg v. Kelly*,\(^\text{17}\) the court determined that this type of right is beyond the “minimum procedural safeguards of rudimentary due process.”\(^\text{18}\) The court also abstained from applying a constitutional test to procedural rights asserted by the petitioners which were mandated by state law and not contained in federal legislation. The court retained jurisdiction pending adjudication of these rights in the Massachusetts courts.

As noted previously, the Supreme Judicial Court held, in *Aiello v. Commissioner*,\(^\text{19}\) that the Commonwealth is not obligated to provide or to pay for counsel at welfare appeals hearings. Subsequent to the *Aiello* decision, the United States Supreme Court denied certiorari in *Granger v. Finch*,\(^\text{20}\) which announced a holding that the Social Security Act permits, but does not require, legal counsel at evidentiary hearings. This decision reinforces a Department of Health, Education and Welfare regulation which specifies that states merely have to provide information to claimants to help them make use of any legal services in the community.\(^\text{21}\)

In *Haley v. Troy*,\(^\text{22}\) the Massachusetts federal district court declined to issue a temporary restraining order requested by welfare recipients who alleged that pressure had been brought to bear upon them by the presiding justice of a lower Massachusetts court to compel them to institute criminal nonsupport actions against their spouses. Although a final decision has not, as of this writing, been handed down in that

\(^{16}\) Id. at 1081.
\(^{21}\) See generally Comment, Indigent Has “Choice” But No “Right” to Counsel, 5 Legal Aid Digest 1 (1970).
case, the denial of the temporary restraining order is inexplicable in the light of the Supreme Court's affirmance per curiam of *Doe v. Shapiro.* This case held that the receipt of public assistance could not be conditioned upon an applicant's instituting criminal nonsupport action against the father of her illegitimate child.

In the final decision involving procedural due process, *Harrison v. Department of Public Welfare,* the issue was the legality of the defendant department's issuance of a welfare regulation without compliance with the provisions of the State Administrative Procedures Act. This case was mooted by the department's later withdrawal of the regulation but, in its rescript opinion, the Supreme Judicial Court referred to a former decision where it had "discussed the importance of careful compliance with §3 [of G.L., c. 30A] in taking departmental administrative action which may have the effect of a regulation." This very brief decision should be considered a major victory by the proponents of welfare recipient participation in administrative decision-making.

Contrasted with the events of recent years, which witnessed much legislative activity organizing and then reorganizing the administration of public assistance in Massachusetts, there were but three relevant bills enacted in the 1970 survey year. In what has become perennial legislation, the "leisure time activity allowance" of recipients of Old Age Assistance was again increased and, for the first time, this same benefit was extended to recipients of Disability Assistance. Predictably, recipients of Aid to Families with Dependent Children did not share in this largess. Finally, the relatives' responsibility sections of the public welfare laws were amended to eliminate the liability of parents for support of children twenty-one years of age or over except in the case of totally disabled children.

Before turning to an evaluation of surplus food legislation and litigation, which logically falls within the parameters of the report as to public assistance, it would be worthwhile to consider briefly the impact of this year's welfare law developments. Although the significant increases both in number of welfare recipients and in monies appropriated for public assistance purposes are somewhat distorted due to the current economic depression, the leaders of the welfare rights movement have almost achieved their announced, and perhaps justified, goal of bankrupting the system. State and local treasuries have been depleted by welfare demands, and in the view of many, often at the expense of other legitimate priorities such as higher education and health. While vigilant as to the procedural rights of welfare recipients,

25 Id. at 1105, 260 N.E.2d at 142.
the Supreme Court has begun to evince a concern, albeit disguised, for the fiscal dilemmas of the states. The Court is certainly not unmindful of the impracticality of a state’s privilege of withdrawing from participation in federal welfare programs but the import of the *Dandridge v. Williams*\(^2\) and *Rosado v. Wyman*\(^3\) cases is clear. Rosado primarily involved federally mandated increases in public assistance. The Court was very explicit in stating that “[a] State may . . . accommodate any increases in its standard by reason of ‘cost-of-living’ factors to its budget by reducing its level of benefits.”\(^4\) In other words, if the Social Security Act requires a 6 percent cost-of-living increase in benefits to welfare recipients, a state may reduce the percentage of need it pays by a similar figure. One could say that the handwriting is on the wall.

In August, 1970, the Court of Appeals for the First Circuit issued its decisions in *Tucker v. Hardin*\(^5\) and in *Briggs v. Kerrigan*.\(^6\) In the *Tucker* case, litigation was brought by residents of communities not having commodities distribution programs. The gist of their complaint was a denial of equal protection inasmuch as equally needy persons in other communities received surplus food solely because those other communities were willing to pay local distribution costs. The court held that the program was intended to assist farmers and the failure of the Secretary of Agriculture to pay for local distribution costs was justified. In the *Briggs* case, petitioners pointed out that a city of Boston pupil participated in the benefits of the National School Lunch Program only if a school had kitchen facilities on the premises. The court determined that such a classification, though it resulted in some inequality, was justified in the light of the substantial additional expenditure to provide kitchen facilities. Although the federal statute requires state officials to disburse funds to individual schools “taking into account need and attendance,” the court found that this mandate is addressed to cases in which the limited federal funds available under the statute are insufficient to satisfy all the requests for aid from schools willing and able to participate.

Fortunately, both the Congress and the General Court came to the rescue. Federal legislation effective January 1, 1971, makes free or reduced price lunches mandatory (in participating schools) for poor children and pays up to 75 percent of the cost of lunchroom facilities.\(^7\) The Massachusetts legislation requires school lunches be made available in all public schools.\(^8\) In other legislation, the 1970 General Court authorized school lunches for the elderly.\(^9\)

---

\(^{30}\) Id. at 149.  
\(^{31}\) 430 F.2d 737 (1st Cir. 1970).  
\(^{32}\) 431 F.2d 967 (1st Cir. 1970).  
\(^{34}\) Acts of 1970, c. 871, §1, amending G.L., c. 15, §1G.  
\(^{35}\) Acts of 1970, c. 753, adding §1L to G.L., c. 15.
§10.5. Housing: Rent control. Last year, most of the litigation and legislation in this area focused on tenants' remedies. This year attention has shifted, and perhaps rightly so, to measures more appropriately designed to respond to the low-income housing "crisis" by increasing its supply and by controlling its costs.

Rent control is an obvious method of preventing the overcharging of tenants by rent gougers who would exploit an inadequate supply of housing. Rent control is viewed by opponents and proponents alike as a temporary regulatory measure which is to be rescinded once the supply of housing is equivalent to the demand. Unfortunately, history, at least in the case of New York City, has shown (1) that it is politically impossible to decontrol rents and (2) that rent control actually lessens the available supply of housing both by stimulating abandonment and also by discouraging new construction. However, rent control as a political issue is hard to beat. It appeals to most voters, who are tenants, and requires very little in appropriations. In the late 1960's, with general economic conditions causing a significant reduction in new building by private industry sources and with government failing to deliver on its housing promises, a residential housing supply crunch occurred. In Massachusetts, attention was turned to rent control.

Late in 1969, the Supreme Judicial Court declined to pass on the "constitutionality" of a House bill empowering Boston, in general terms, to establish rent control by city ordinance. The Justices rationalized their forbearance by pointing out that the issue involved was one of determining "the power of the city council" rather than that of the legislature. Thus the requisite "solemn occasion" was not triggered. The Court in its opinion noted the substantial modification of the "Dillon rule" by the Home Rule Amendments of 1966 (quoting several sections verbatim), and pointed out that it is beyond municipal power to enact private or civil law governing civil relationships except as an incident to an exercise of "independent municipal power." It then added: "The meaning of 'independent municipal power is unclear.'" The Court gratuitously alluded to what it considered several defects in the bill as presented but left open the issue of whether municipal or state legislation was appropriate for the enactment of rent control.

In June, 1970, by its decision in Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, the Supreme Judicial Court

---

2 In capsule, the rule states: "Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the [municipal] corporation, and the power is denied." 1 Dillon, Municipal Corporations §237 (5th ed. 1911). For an analysis of the Home Rule Amendment, see 1967 Ann. Surv. Mass. Law c. 16.
3 Mass. Const. amend. art. 89.
passed on the validity of municipal rent control enacted without the benefit of state enabling or authorizing legislation. Recall that in the opinion of the Justices referred to above, the issue was one of the constitutionality of proposed state enabling legislation. In *Marshal House*, the Court concluded that Brookline could not, on its own initiative, adopt a scheme of municipal rent control because Section 7(5) of the Home Rule Amendments denies to cities and towns the power "to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The Court conceded that this language was "ambiguous" but observed that the only independent municipal power that rent control would be incident to would be rent regulation:

We conclude that it would be, in effect, a contradiction (or circuitous) to say that a by-law, the principal objective and consequence of which is to control rent payments, is also merely incidental to the exercise of an independent municipal power to control rents. We perceive no component of the general municipal police power, other than the regulation of rents itself, to which such regulation fairly could be said to be incidental.  

Unfortunately, the language just quoted is characteristic of the entire decision which is less than adequate.

First of all, rather than analyze the interrelation of the various provisions of the Home Rule Amendments, the Court preferred to restate them. The first question that should have been considered by the Court is the extent to which the amendments repeal "Dillon's Rule." Sections 1 and 6 appear to go quite far in this regard. The Court refers to the language of Section 6 as containing "a broad grant of powers to cities and towns." Section 7 precludes municipalities from acting in respect to certain substantive areas, e.g., in the regulation of elections and the levying of taxes, and Section 8 reserves certain legislative powers to the General Court. The question, it seems, is not how much power has been granted to cities and towns but rather how much power remains with the General Court after the adoption of the Home Rule Amendments. The areas of specifically impermissible municipal activity listed in Section 7 may be of some interpretive value. With the exception of Section 7(4) ("to dispose of park land"), the policy would seem to be that municipalities should not legislate as to matters requiring statewide uniformity of treatment. That would appear to be the rationale for the language of Section 7(5) where municipalities are denied the power "to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The verbiage, which is more opaque than ambiguous, could be translated to mean that unless a "compelling municipal interest" is, as the Court infers, a "police"

---

6 Id. at 1039-1040, 260 N.E.2d at 207.
power interest, a city or a town cannot enact civil law on its own. This seems to be what the Court is saying and is a very significant limitation of municipal home rule which the draftsmen of Section 7 should have specifically articulated. There would be no problem if there were, for example, a Section 7(7) which read that municipalities do not have the power "to legislate as to matters requiring state-wide uniformity of treatment." However, there is no such Section 7(7) nor is there any meaningful discussion by the Court of the impact of the Home Rule Amendments upon Dillon's rule in Massachusetts.

Assuming, as the Court does, that the "municipal power" of Section 7(5) is "police power," one is hard pressed to rationalize the distinctions advanced as to, on one hand, taxicab and housing inspection regulations, and on the other, rent control. In referring to Cambridge Taxi Co. v. City Manager of Cambridge, the Court concluded that a municipality's setting of rates "was incidental to the exercise of a clearly defined, delegated power to regulate a transportation service" under G.L., c. 40, §22. The Court also noted that the regulation of the relationship of taxi driver and customer was "temporary." The Court should have observed that Chapter 40 is a prototype Dillon's rule statute, of little relevance in an era of home rule. Without making this crucial distinction, the Court then pronounced that the rent control by-law enacted in Brookline, as contrasted with taxi regulations, "at least as a matter of degree, more directly intervenes in the continuing landlord-tenant relationship." However, in its housing inspection example, the Court salvaged matters to some extent:

... Doubtless, under art. 89, §6, a town possesses . . . broad powers to adopt by-laws for the protection of the public health, morals, safety, and general welfare, or a type often referred to as the "police" power. We assume that these broad powers would permit adopting a by-law requiring landlords . . . to take particular precautions to protect tenants against injury from fire, badly lighted common passageways, and similar hazards.

The Court cannot be disputed on this point. Again, however, the Court concluded that "[s]uch by-laws, although affecting the circumstances of a tenancy, would do so (more clearly than in the case of the present by-law) as an incident to the exercising of a particular aspect of the police power." Arguably, the housing inspection analogy should compel a sustaining of rent control. In any event, the "more directly" and "more clearly" language employed by the Court is almost too subtle a distinction. Perhaps, however, the result in this

9 Id. at 1039, 260 N.E.2d at 206.
10 Ibid.
case is appropriate since rent control may be a matter for statewide legislation.

Three rent control bills were in fact enacted a few months after the decision in *Marshal House*. One is a general enabling statute applicable to all cities and towns with a population of 50,000 or more which opt to accept it\(^{11}\) and the other two are specifically applicable to Boston\(^{12}\) and Brookline\(^{13}\) respectively. Before noting the specific provisions of these items of legislation, it is necessary to consider their general significance with respect to the Home Rule Amendments.

Chapter 842, the general enabling statute, is in effect a local option law applicable to all cities and a specified class of towns which accept it. Chapter 843, applicable to Brookline, and Chapter 863, applicable to Boston, are specific delegations by the General Court to these cities of the power to adopt municipal rent control. Section 8 of the Home Rule Amendment reserves to the General Court "the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all cities and towns, or to a class of not fewer than two . . . ." Chapter 842 applies to all cities and to a class of towns, presumably not fewer than two, but at the option of the particular city and town. The second paragraph of Section 8 specifically allows the General Court to furnish options to cities and towns to adopt a particular mode of municipal government. Does this by implication preclude the general local option laws such as Chapter 842? Put another way, Chapter 842 is not directly applicable to any town since it is optional, and is not an option to adopt a particular form of government. The General Court can delegate to cities and towns powers denied to them under Section 7 (Limitations on Local Powers), including Section 7(5), but such a delegation must be "in conformity . . . with §8."

Chapters 843 and 863 are laws which apply to specifically designated municipalities, and Section 8 of the Home Rule Amendments allows the General Court to act in relation to cities and towns "by special laws enacted (1) on petition filed or approved by the voters of a city or town . . . ; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor. . . ." Chapters 843 and 863 are "special laws" but were they adopted as per Section 8?

Chapter 842 contains a comprehensive scheme of municipal rent control which is currently being scrutinized by the Supreme Judicial Court. Chapters 843 and 863 are somewhat less inclusive. To analyze the various provisions of these three items of legislation is beyond the scope of this report and merits separate treatment. However, it should be noted that Chapter 842 contains several alternatives among which

\(^{11}\) Acts of 1970, c. 842.

\(^{12}\) Id., c. 863.

\(^{13}\) Id., c. 843.
a municipality may choose. Moreover, Chapters 843 and 863 contain provisions which differ from those included in Chapter 842. If the rationale of Marshal House is that rent control requires statewide uniformity, what impact does this have in the disparate approaches and options of Chapters 842, 843 and 863? Is this the ultimate inconsistency inevitable from that decision?

§10.6. Landlord and tenant. In May, 1970, the United States Court of Appeals for the District of Columbia Circuit, in Javins v. First National Realty Corp.,1 issued an opinion which altered, for that jurisdiction, the traditional underpinnings of the law of landlord and tenant. The court decided that a warranty of habitability was implied, by operation of law, in leases of urban dwelling units which are covered by the District's housing code and that a violation of this warranty gives rise to the typical remedies for breach of contract. More specifically, as held by the court, a tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including a warranty that he maintain the premises in a habitable condition. In Massachusetts, a similar result was sought by legislation which failed to pass the General Court.2

Much of the reported landlord-tenant litigation in Massachusetts in the 1970 Survey year was adjudicated in federal courts and revolved around efforts by tenants to establish certain procedural responsibilities of landlords of governmentally subsidized housing. In Hahn v. Gottlieb,3 the United States Court of Appeals for the First Circuit held that tenants in privately owned low-income housing which was financed by the Federal Housing Authority (FHA) were neither constitutionally nor by the terms of the Administrative Procedure Act entitled to an administrative hearing before the FHA on their landlord's proposals to that agency for rental increases. The court further decided that FHA approval of requested rent changes is not subject to judicial review. In its response to the tenants' due process claims the court applied what it termed a "constitutionally relevant" test. The court observed that a "trial type hearing" would discourage private investors and that a particular "[rent] increase may be small, and rent supplement programs are available to those in greatest need."4 Concluding its opinion, the court noted that "the government interest in a summary procedure for approving rent increases outweighs the tenants' interest in greater procedural safeguards."5 Parenthetically, the FHA passes on all proposed rent increases requested by landlords and, in language second-guessing the capabilities of low-income tenants, the court remarked that "tenants are unlikely

2 Senate Bill 1172; House Bill 2265.
3 430 F.2d 1243 (1st Cir. 1970).
4 Id at 1247.
5 Id. at 1249.
to have special familiarity with their landlord's financial condition, the intricacies of project management, or the state of the economy in the surrounding area." In denying judicial review of rent increases allowed by the FHA, the court assigned the following reasons: (1) "[C]ourts are ill-equipped to superintend economic and managerial decisions of the kind involved here" and (2) "less participation by private investors" would result.

In *McQueen v. Druker*, also involving tenants of FHA subsidized 221(d)(3) housing, the federal district court decided that private landlords who had received financial assistance from the federal government could not evict tenants without furnishing them a notice specifying "good cause" for termination of their tenancies. The Court also ruled that provisions in leases giving landlords power to terminate without cause on the expiration of a fixed term are invalid. The opinion alluded to cases where it had been held that a tenant of public housing, as opposed to subsidized housing (as in this situation), could be evicted only for good cause and after informative notice of that cause. The court, in its analysis of the public housing cases, seemed to apply the constitutional relevancy test utilized in *Hahn* and observed that "on the whole, the disadvantages the government will suffer from being required to allege good cause for eviction are not to be compared with the disadvantages that a tenant will suffer if he is evicted capriciously." The court went on to determine that "[a]ll the arguments which favored imposing the obligation of a good-cause notice in the case of a governmental landlord apply to a §221 (d)(3) landlord." The decision did not directly refer to the factor of the discouragement of private investors relied upon in *Hahn*, but noted that "[t]he §221(d)(3) landlord chose to enter into a project he knew was primarily for the tenants' benefit and in which he would be closely regulated."

In the final landlord-tenant case decided in the federal courts, *Fosdick v. Dunwoody*, the court of appeals had before it a situation where a tenants' group had been sued in the Massachusetts Superior Court by a landlord for interference with his contractual relations with some of his other tenants. The tenants countered by alleging that they were sued by the landlord in retaliation for reporting alleged housing code violations to housing code enforcement authorities. The tenants' group removed the action to the federal district court where

6 Id. at 1248.
7 Id. at 1249, 1250.
9 Id. at 1128-1129.
10 430 F.2d 1243 (1st Cir. 1970).
12 Ibid.
13 Ibid.
14 420 F.2d 1140 (1st Cir. 1970).
the landlord's motion to remand was granted. The court of appeals affirmed, holding that the tenants' group had no standing to remove under the general removal statute, 28 U.S.C. §1443 (1964). Strangely, in *McQueen v. Druker*,¹⁶ decided eight months later, the district court enjoined a threatened state court proceeding to evict the tenants because of their organizational efforts on behalf of other tenants.

In reported litigation decided in the courts of the Commonwealth, the Supreme Judicial Court, in *Massachusetts Commission Against Discrimination v. Franzaroli*,¹⁶ held, on the facts of the case, that the Superior Court improperly disregarded an award of damages by the commission which had been supported by substantial evidence. The Supreme Judicial Court also decided that an award by the commission of damages for mental suffering was not improper due to "the recognition in our cases that damages for mental suffering may be awarded in appropriate cases . . . ."¹⁷ In another decision, surprisingly one of first impression, the Supreme Judicial Court held that under Chapter 186 of the General Laws, the delivery of notice to quit at a tenant's last and usual place of residence did not constitute presumptive evidence that the tenant had actual notice as required by Section 12 of that statute.¹⁸

The General Court enacted three items of legislation having considerable importance to low-income tenants. First, the current six-month discretionary stay of judgment and execution in actions of summary process, which was to expire this year, was extended to 1972.¹⁹ Second, the 1969 statute prohibiting security deposits in excess of two months' rent was amended to respond to the abuse of the unscrupulous landlord who makes a practice of retaining security deposits.²⁰ Under the amended statute, a landlord holding a security deposit in excess of one year must pay interest to the tenant at the end of the following year at the rate of 5 percent. The amendment, however, is unclear as to whether a landlord can avoid the operation of the statute by a succession of one-year leases. The amendment also provides that within 30 days after a lease or tenancy is terminated, the landlord must return the security deposit less damages to the premises. If the landlord "wilfully" fails to so return the security deposit, the tenant has a claim for double damages. Unfortunately, very few tenants, in view of the amounts involved, have either time or inclination to pursue this remedy, unless perhaps — and this is not clear — such litigation could be brought in Small Claims Court. Also, if a claim is brought in the Small Claims Court and the amount of deposit

¹⁷ Id. at 346, 256 N.E.2d at 313.
²⁰ Id., c. 666, amending G.L., c. 186, §15B.
withheld is below the amount of that court's jurisdictional limits but above it when doubled, could the court award the latter amount?

The last piece of landlord-tenant legislation was an amendment to the Commonwealth's statutory rent-withholding scheme by bestowing upon district courts original jurisdiction in rent receivership cases and "equity powers only to the extent necessary." However, the legislature did not appropriate monies to the revolving fund authorized in 1965 which is required to make most receiverships work. By way of explanation, those rents withheld, at least at the beginning, are usually insufficient to effect immediately necessary repairs and most tenants must relocate before enough monies accumulate to, for example, repair or replace a faulty furnace. This is indeed regrettable since the primary legislative purpose of the scheme is thereby frustrated.

§10.7. Publicly subsidized housing. In 1969 the General Court recodified and revised the Commonwealth's housing and urban renewal laws. The 1970 housing legislation, while not as comprehensive as that of the previous year, was in many respects equally, if not more, significant. Certain housing programs were added and others revised, increased funding was authorized, and specific benefits were granted to elderly occupants of public housing. The most important legislation involved a tenfold increase in the bonding authorization of the Massachusetts Housing Finance Agency from $50 million to $500 million.

As to new programs, the Massachusetts Housing Finance Agency (MHFA) was authorized to commence a home ownership program for low-income families and also to finance the construction and rehabilitation of cooperatively owned and condominium developments. The idea for these two programs was obviously borrowed from similar recently enacted federal legislation. The home ownership program allows eligible families to purchase one-, two- and three-family residences. It should be noted, however, that welfare regulations significantly restrict recipient ownership of income-producing property and also impede the obtaining of mortgage financing even in the case of single-family dwellings. It is hoped that the MHFA will resolve these problems, since welfare recipients would and should constitute a large portion of the likely beneficiaries of both of the new programs.

The home ownership program restricts the number of low-income families eligible for its benefits to "one per cent of the total number


§10.7. 1 Acts of 1970, c. 852, adding §19C to G.L., c. 218.

2 Id. §2.

3 Ibid.
of families resident in a city or a town" and requires the MHFA to make a finding, apparently in all cases, that there will not be created "an undue concentration of low income families in any one neighborhood." This latter requirement, if strictly enforced, might preclude the home ownership program from ever getting off the ground. This conclusion is compelled when one considers that this program is restricted to low-income families; assumes an MHFA mandated ceiling on the costs of the housing such families will be allowed to purchase; and lastly recognizes the economic realities of the current housing market.

Both the home ownership and cooperative and condominium programs allow to eligible families a subsidy equal to the difference between ownership expenses (including amortization, interest, taxes, insurance and maintenance) and 25 percent of the family's annual income as defined by MHFA. The cooperative and condominium program presupposes ownership of a number of units by other than low-income families in a development subsidized by MHFA. This skewing of occupancy was sustained as to multi-unit rental developments in Massachusetts Housing Finance Agency v. New England Merchants National Bank of Boston. The MHFA is now required by a further amendment to its enabling legislation to make certain findings, apparently extrapolated from that decision, "prior to any loan commitment." These findings are applicable to home ownership as well as rental development loans extended by MHFA.

As part of this same legislation, the General Court also authorized the MHFA to operate an interest subsidy program similar to the interest reduction program carried out under Section 236 of the National Housing Act. In both cases, there is a subsidy paid by the government agency amounting to the difference between the mortgagor's interest payments and 1 percent. The effect of this subsidy is to reduce significantly the rentals paid by an eligible tenant.

The MHFA enabling legislation was further amended in several aspects. The MHFA may now loan a nonprofit sponsor 100 percent of a development project's costs. In rental projects financed by the MHFA, tenants selected for occupancy may have an annual income not in excess of six (formerly five) times the amount of the annual rental designated for an apartment. Also, a tenant's rent will not be increased until his annual income is in excess of seven (formerly six) times the designated annual rental.

Chapter 121B, the Commonwealth's omnibus housing legislation, was also significantly programatically amended. Cities and towns are

---

6 Id. §10.
7 Id. §4.
8 Id. §7.
9 Id. §8.
now authorized to enter into agreements establishing regional housing authorities. This makes sense especially in the case of municipalities which on their own could not "tool up" to take advantage of state housing programs. The provisions of Chapter 121B relating to the Commonwealth's leased housing program were also revised. The permissible percentage of units in a dwelling or development that a local public housing authority is allowed to lease was increased. Housing authorities are now specifically allowed, and in fact required to do so within 30 days if so requested, to lease a dwelling unit occupied by an eligible tenant, assuming the rent is reasonable and the landlord in agreement. The housing authority "shall make application" for the necessary funds, including monies now available for "negotiating leases," to the department of community affairs. Also, local authorities which were unwilling or slow to participate in the leased housing program have been prodded. Finally, a residency preference was written into the leased housing program requiring that residents of the Commonwealth be given priority in the selection of leased housing tenants. Along these lines, Section 32 of Chapter 121B, which contains requirements pertaining to the general operations and administration of public housing, was amended by the insertion of an antiresidency requirement provision: "No inhabitant of the city or town . . . in which the project is located shall be refused eligibility . . . solely upon the grounds of a residency prerequisite." Section 32 retained a residency preference worded almost identically to the one added to the leased housing provisions.

The final programatic addition to the Commonwealth's housing efforts involved a redesignation of legislation dealing with housing for the elderly to "housing for the elderly and the handicapped." The only modification of substance was an assignment of 5 percent of newly constructed units for "elderly persons of low income" to "handicapped persons of low income."

The General Court in two instances authorized increased funding for public housing in response to current inflationary conditions. In May the Commonwealth's annual contribution to public housing projects for the elderly was increased. In August this additional annual contribution was further supplemented and also extended to veterans and to families occupying low-income public housing. Paralleling similar appropriations at the federal level for federally assisted public housing, the legislature authorized funding for the

---

10 Acts of 1970, c. 851, adding §3A to G.L., c. 121B.
12 Ibid.
modernization and rehabilitation of state-subsidized public housing. One might ask whether the General Court will be continually compelled to intervene fiscally vis-à-vis public housing. As financing and operating costs continue to spiral upwards, especially the operating costs of older and aging developments, and as receipts to local housing authorities from their low-income constituencies remain relatively constant, further funding seems inevitable. The remaining two items of housing legislation to be considered further emphasize the need for additional funding. As to projects constructed after January 1, 1971, local housing authorities must furnish “central common rooms, and central cooking facilities” in housing for the elderly poor. It could also be suggested that gymnasiums be provided in future public housing occupied by low-income families. The crucial question must direct itself to the effect such requirements have on the feasibility of public housing.

In other legislation, the General Court imposed a ceiling of 20 percent of income (25 percent if the rent includes utilities) on the rent to be paid by the elderly poor occupying public housing units. The Commonwealth is responsible for the balance necessary to meet the rental charge. This statute is similar to recent federal legislation applying to all federally subsidized public housing. (This federal legislation was proposed by Massachusetts Senator Edward Brooke.) The only occupants of public housing currently unaffected by such ceilings on income provisions are nonelderly occupants of state-subsidized public housing.

§10.8. Economic development. The preamble to Chapter 848, one of the last bills enacted during the 1970 legislative session, is as good an articulation of the methods of economic development as has been devised: “An Act establishing an urban job incentive bureau in the department of community affairs to develop manpower training and assistance programs, neutralize urban tax barriers and encourage industrial development and job potential in depressed areas.” Under this legislation, specified business corporations, domestic or foreign, are allowed state corporation tax credits and deductions for new business activity in eligible areas and for employing and training residents of these areas. Administratively, an Urban Job Incentive Bureau was established to organize, develop and coordinate this program.

As to the details of this legislation, the bureau first determines and designates “eligible sections of substantial poverty” presumably in accordance with the standards outlined in the definitional portion of the act. The bureau would then, upon application, certify a business


§10.8. 1 Acts of 1970, c. 848, §1, adding §§11-15 to G.L., c. 23B.
2 Id. §11(a).
facility as "eligible." To be "eligible," a business facility must have an impact on an area larger than the "eligible section of substantial poverty" which it serves; must be engaged primarily in manufacturing and wholesaling activity; and must draw 20 percent (including not less than five employees) of its work force from the "eligible section" where it is located.\footnote{3 Id. \S 13.} The act further requires that

... The facility, except where a corporation is displaced by a public land taking or purchase, shall not be a replacement of an existing place of business or expansion thereof. It shall be a new place of business, separate and apart from its other facilities and represent expanded activities of the corporation.\footnote{4 Id. \S 13(4).}

What this ambiguous language seems to require is that to be eligible the business expansion activity must be housed in new quarters rather than be a distinctly different type of venture.

Assuming an eligible business facility operating in an eligible section of substantial poverty, the jobs provided must be "meaningful." Thus, it is mandatory that

... the corporation ... provides an approved training ... program which prepares residents ... for jobs created ... and which assures such residents opportunities for job upgrading and for entry into supervisory positions ....\footnote{5 Id. \S 13(5).}

Once all of these requirements are met, the eligible facility, for up to ten years, is awarded the following two tax incentives:

(1) To the extent real property is owned by the business facility, a credit against the state corporation excise based upon that portion of the firm's real property tax bill which is in excess of the average property tax rate state-wide.\footnote{6 Acts of 1970, c. 848, \S 2, adding \S 88E(b) to G.L., c. 63.}

(2) A deduction in arriving at net income in the amount of 25 percent of the compensation paid to employed residents.\footnote{7 Ibid.}

Assuming that the subsidies involved are sufficiently large to constitute a realistic incentive, the question is whether the administration and paperwork required of a participating firm will cancel out the benefits from the subsidies. Only time will tell on this issue. The act is quite specific in requiring "new" business effort for a firm to establish its eligibility. Under current actual conditions the problem is one of manufacturing and wholesaling businesses relocating from rather than stagnating in depressed areas. Perhaps a subsidy, compensating for the increased costs of operating in such areas, should be extended to these businesses to keep them there.

\footnotesize{3 Id. \S 13.}  
\footnotesize{4 Id. \S 13(4).}  
\footnotesize{5 Id. \S 13(5).}  
\footnotesize{6 Acts of 1970, c. 848, \S 2, adding \S 88E(b) to G.L., c. 63.}  
\footnotesize{7 Ibid.}
In a second and final matter of economic development interest, the General Court by special law “chartered” the Greater Lowell Business Development Corporation. Among the more noteworthy provisions of this legislation are the corporation's purposes, i.e., among other things, to solicit, encourage and induce business organizations to locate in Greater Lowell; its nonliability for state income taxes; and its exemption, for ten years, from local property taxes.
