The Low-Income Tenant in California: A Study in Frustration

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By DANIEL N. LOEB*

A substantial part of California's low-income population lives in substandard housing.¹ Despite the requirements of the State Housing Law² and the administrative regulations and local housing codes adopted pursuant to that act, the low-income tenant is often powerless to compel his landlord to comply with these codes, even when the landlord is financially capable of compliance.

There are a number of reasons for this impotence. A major factor is one of supply. California, along with the rest of the country, suffers from a severe shortage of adequate housing.³ The low-income tenant, with less dollars to spend for available housing, has his choice of housing severely limited. If he is black he has the additional problem of discrimination. Finally, if the tenant is on welfare and has children, problems of family size and landlord attitudes drastically restrict the available housing. This scarcity of supply, combined with the landlord's absolute power of termination, often forces the tenant to remain in premises unfit for habitation.

Unfortunately, even the legal system exerts coercive influence on the low-income tenant seeking relief from substandard housing conditions. Substantively, the law of landlord-tenant remains largely feudal in nature. Ancient notions of property are often applied without regard to their viability. This may be explained historically as a reflection of economic and political power, judicial attitudes, and inadequate legal representation for indigent tenants. These substantive limitations are reinforced by the procedural stranglehold of the unlawful detainer action. The tenant's opportunities for defensive or affirmative action are severely restricted by the confines of this statutory procedure together with its restrictive judicial overlays.

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1. See, e.g., Oakland Planning Dep't, Oakland's Housing Supply (1968).
3. President's Committee on Urban Housing, A Decent Home (1969).
The net result of the above factors, and others dealt with herein, is that the tenant, for the most part, is powerless to compel his landlord to do what is theoretically required by state law. A major concern of this article is the social significance of the dichotomy between the provisions of housing codes and the realities of enforcement. As will be seen, this dichotomy affects the low-income tenant's attitudes toward the legal system and the prospects of achieving change through traditional channels. In the following pages, I shall review the remedies available to the tenant under existing law in an effort to show their ineffectiveness. In so doing, I hope to paint the anomalous picture of the legal system's efficient support of the landlord who violates the law and its abandonment of the tenant whom the law was meant to protect. After analyzing the existing possibilities, several appropriate changes will be recommended. It is not my intention to delve deeply into either the existing law or my proposed changes; rather, I hope to describe broadly the situation as it exists and to suggest the general contours for the needed changes.

I. Problems of a Hypothetical Low-Income Tenant

In order to picture the position of a low-income tenant and to illustrate in a minor way his frustration and alienation, it may be useful, in law school fashion, to assume a hypothetical situation.

Mrs. A is the mother of three young children. She is black and lives in one of the larger Northern California cities. The neighborhood has a large majority of black residents and housing that is old and often substantially below code standards. Portions of this area are in the throes of redevelopment. The difficulties of finding housing in a city with a depressingly tight supply are thus magnified by the reduction of available units pursuant to urban renewal demolition. In addition, competition is substantially increased by the need to relocate the families living within the condemned properties and by the priority given these families by the government agencies charged with the duty of relocation.

Mrs. A is separated from her husband. Her sole income comes from a salary that she is paid under a work-training program and from payments made by the County Department of Social Welfare under the Aid for Dependent Children's program. Her total income is $390 per month and she pays $150 per month for the two bedroom apartment which she and her children occupy.

4. This includes approximately $221 in AFDC payments and $169 from the work-training program, which is composed of a $25 basic allowance, $9 for transportation expenses, and $135 for child care.
The A family moved into their present apartment some seven months ago. Shortly after moving in, Mrs. A was informed by a representative of the Pacific Gas and Electric Company that the gas heaters in the apartment were leaking and that it was necessary to disconnect them until they were either repaired or replaced. She further discovered that certain of the electrical fixtures did not work and that there was no electrical service outlet in her bedroom. In the larger bedroom, where her children sleep, there was a large hole in one of the windows, which the rental agent promised to repair. Finally, Mrs. A discovered that the apartment was infested with roaches, and she has, on occasion, seen rats.

Mrs. A has complained to the rental agent several times. He always states that the heating, electrical fixtures and windows will be repaired, but no action is ever taken. He advises her to buy poison for the roaches and rats, which she has done numerous times—an expense she can little afford. This has not had any substantial effect since the entire building appears to be infested. Although the roaches temporarily diminish after the application of roach killer, they quickly return.

When cold weather came, Mrs. A tried to heat the apartment with the kitchen stove; nevertheless, most of the apartment remained chilly and drafty. Her children had a succession of colds and other illnesses which forced Mrs. A to take time off from work to care for them. Eventually, she also succumbed to a respiratory infection that laid her up for two weeks, causing her to be dropped from the work-training program.

The shortcomings of Mrs. A's apartment could be magnified, both in the number and in the seriousness of the code violations involved; yet a realistic picture of low-income housing would still be presented. The purpose of this article, however, is not to paint the appalling picture of the condition of much of our low-income (often ghetto) housing, nor to discuss the serious social consequences that flow from such housing. Rather, the focus will be on the nature and adequacy of the remedies open to the low-income tenant in California and the frustrating experience of the tenant who seeks to compel a landlord's compliance with the requirements of the law.

II. Tenant Remedies and Their Effectiveness

In analyzing tenant remedies, we shall first examine California's "repair and deduct remedy." Next, we shall turn briefly to administrative code enforcement. Following this, consideration will be given to the possibilities of rent withholding. In so doing, it will be necessary to examine the operation of the California unlawful detainer action and delineate some of the evolving tenant defenses.

A. Right to Repair and Deduct the Cost of Repairs

At common law, a landlord had no duty to repair in the absence of an express covenant. The lease was viewed as a sale of an interest in land. Accordingly, under the rule of caveat emptor the landlord was under no obligation to put the premises in suitable condition prior to the lease nor to maintain them thereafter. The only obligation of maintenance was that of the tenant to prevent waste of the property.

The common law rule has been modified in California by sections 1941 and 1942 of the Civil Code. Section 1941 obligates a lessor, in the absence of a contrary agreement, to put a building intended for human occupation into a condition fit for such occupation and to repair all subsequent "dilapidations" that render it untenantable. Section 1942 permits a tenant, after reasonable notice to the lessor, either to repair the "dilapidations" that the lessor ought to repair (where the cost of the repairs does not exceed one month's rent), or to vacate the premises without further obligation for rent.

Unfortunately, our hypothetical tenant would find there are many inherent dangers in the use of this remedy. First, she has probably signed an agreement waiving any rights under sections 1941 and 1942.

9. Cal. Civ. Code § 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine."
10. Cal. Civ. Code § 1942 provides: "If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions."
Although leases are infrequent in the rental of slum property, rental agreements are not; a standard provision in such agreements is a waiver of all rights under these sections.

There are, indeed, a number of arguments questioning the validity of such a waiver. Given the necessity of housing, the limited supply for low-income tenants, and the resultant limitation of any meaningful choice or bargaining power, the elements are present for the treatment of the rental agreement as a contract of adhesion. If the repair rights of the tenant pursuant to section 1942 are construed to be limited by the obligation of the lessor under section 1941,12 the limitation of the lessor's duty by "agreement"13 may likewise be analyzed by adhesion principles to show that there is in actuality no agreement. In the alternative, section 1942 could be construed not only to be independent of section 1941, but also to include the requirements of the State Housing Law and local housing codes within the guidelines defining what the landlord "ought" to repair. If so construed, such a waiver could then be considered an agreement indirectly seeking to exempt the lessor from responsibility for a violation of law. This would be contrary to Civil Code section 1668.14 In any event, courts construe such waivers narrowly; moreover, under the standard language, the waiver applies solely to the leased premises. Thus, our hypothetical tenant's vermin problems resulting from infestation of the building can be construed to be outside the purview of such a waiver.15 Nevertheless, whether or not a judge in the justice or municipal court will strike a standard provision of this sort is unclear. Because of this indefiniteness, the tenant who makes appropriate repairs in the building and deducts the cost from his rent faces the possibility of a speedy eviction for non-payment of rent.16 In most cases the tenant, because he can find no

12. That is to say if the reference in section 1942 to "dilapidations which he ought to repair" is defined in terms of the obligation set out in Cal. Civ. Code § 1941.
13. Cal. Civ. Code § 1941 is effective only "in the absence of an agreement to the contrary."
14. Cal. Civ. Code § 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."
other available housing, desperately needs to remain in possession of the premises and is unwilling to run the risk of eviction no matter what.

Even if the tenant has not waived his rights, section 1942 provides limited relief and raises many unanswered questions. The section sets a limit of one month's rent for the cost of repairs. How often can this be done? Is it limited to one month's rent for the length of the tenancy? If so, the extent of the work necessary in most slum properties makes this section virtually useless. If a tenant does the work himself in order to limit the expense and maximize the number of repairs, can he allow a reasonable amount of his labor? What is meant by "dilapidations"? Does roach and rat infestation constitute a dilapidation? What is encompassed within the confine of "repairs"? One case has drawn a distinction between "repairs" and "improvements."\(^{17}\) Does the addition of an electrical service outlet required by a local housing or building code constitute an improvement?\(^{18}\) Must the repairs actually be made before the rent can be withheld, or can the tenant accumulate the rent first and then apply it to repairs? The ambiguity of the language of section 1942 and the paucity of cases construing it again place the tenant in the difficult position of speculating on what is permitted. An incorrect guess will result, of course, in the tenant either paying for the repairs himself or being evicted for nonpayment of rent.

Were the dangers and problems of section 1942 not sufficient to deter the tenant, the possibility of retaliation by the landlord for the tenant's use of section 1942 would provide the finishing touches. The tenant who resorts to section 1942 or contacts the agency charged with enforcement of housing codes is viewed as a "trouble maker." Landlords usually counter such tenant efforts with a 30 day notice to vacate, or alternatively, a notice that the rent has been raised substantially, which compels the tenant to move as a matter of economics.

The defensive postures toward lessor retaliation are discussed later in connection with code enforcement.\(^{19}\) Although certain constitutional arguments against retaliation may not be relevant to section 1942, a court could nevertheless conclude that landlord retaliation for the tenant's exercise of his right to repair pursuant to section 1942 is against public policy\(^{20}\) and against the policy implicit in the remedial provisions

18. Under the rationale of the Wall Estate Co. case it would seem to be an "improvement" rather than a "repair" and therefore not permitted.
19. See text accompanying notes 45-48 infra.
20. See text accompanying notes 49-54 infra.
of sections 1941 and 1942. Once again, however, our tenant is placed in the doubtful and dangerous position of conjecturing what the response of a given court will be.

In conclusion, it is clear that sections 1941 and 1942 provide doubtful relief for our hypothetical tenant. Although on occasion these sections might be useful for minor repairs, the limitations and ambiguities of this remedy, combined with the problems of waiver and retaliation, render it virtually useless.

B. Code Enforcement

The traditional law of landlord-tenant has been further modified by the State Housing Law,\(^2\) by the administrative regulations adopted pursuant to that act,\(^2\) and by the various local government codes relating to residential housing.\(^2\) Enactments of this kind have as their purpose the preservation of healthful and safe conditions in housing, and the rehabilitation of deteriorated premises.\(^4\) Unfortunately, one look at the large amounts of substandard housing within the state\(^2\) demonstrates that code enforcement has had only limited success.\(^2\)

Many enforcement problems flow from the nature of the agencies charged with the enforcement of the various housing laws. Generally, they are understaffed in both inspectors and clerical personnel;\(^1\) furthermore, enforcement responsibility is often divided between various agencies, each having responsibility for enforcement of the different codes or limited areas of specialization.\(^1\) The result of this division is ineffi-

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22. CAL. ADMIN. CODE tit. 8, §§ 17000-926.
23. See, e.g., INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM HOUSING CODE (1964) and INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM BUILDING CODE (1964), with which all local codes in California are required to be reasonably consistent. CAL. HEALTH & SAFETY CODE §§ 17922, 17951.
24. See Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801 (1965) [hereinafter cited as Note, 78 HARV. L. REV.]. This Note encompasses an excellent analysis of code enforcement and numerous references will be made to it.
25. See note 1, supra.
27. Comment, supra note 26; Note, 78 HARV. L. REV. supra note 24, at 804. The Superintendent of Inspection in San Francisco states that he needs four additional environmental health inspectors to add to the present 12 and at least two additional people in the complaint division to supplement the present five. Interview with Alfred Goldberg, Superintendent of Building Inspection for San Francisco, in San Francisco, May 6, 1969.
ciency, added strain on already limited resources, confusion for the tenant seeking to enforce the code, and areas of enforcement for which the existing agencies each disclaim responsibility. 29

Problems also arise from the nature of the remedies used by the agencies. Code enforcement is provided with two principal weapons: (1) criminal sanctions in the form of fines or jail sentences; 30 and (2) abatement 31 through the eviction of all the tenants and, possibly, demolition of the building. Neither of these remedies are usually successful against a recalcitrant landlord. Moreover, criminal sanctions have not been sympathetically received by the courts. 32 Jail sentences are virtually never imposed; 33 fines, when imposed, are often minimal and may be treated by the landlord simply as a cost of doing business. 34 Abatement orders, in turn, can have disastrous consequences for the tenants; what is more, their large scale use can intensify the already critical shortage of housing.

The shortcomings of these remedies are magnified by the long periods of delay involved in the imposition of any penalty. 35 Numerous

29. Id.
30. CAL. HEALTH & SAFETY CODE § 17995, provides: "Any person who violates any of the provisions of this part or any rule or regulation promulgated pursuant thereto is guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars ($500) or by imprisonment not exceeding six months, or by both such fine and imprisonment." See also INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM HOUSING CODE § H-204 (1964).
32. As a result, in San Francisco the District Attorney's office refuses to file criminal prosecutions for housing violations. Interview with Alfred Goldberg, supra note 27.

Judicial attitudes toward criminal penalties have been explained in one article as follows: "The failure of the criminal sanction in code enforcement is largely due to its conceptual and logical inappropriateness. . . . Criminal courts are unwilling to recognize housing violations as true 'crimes,' and, in the traditional sense, this is not an indefensible attitude. However inexact the age-old distinction may be in the criminal law between malum in se—the true crime, the 'wrong in and of itself' like murder, assault, robbery, or larceny—and malum prohibitum—a wrong . . . which does not necessarily bespeak inherent moral delinquency—it is clear that the unintentional failure to . . . replace a broken window pane in the hallway of a multiple dwelling falls into the latter category . . . .

. . . It is not surprising that judges in criminal courts, who generally regard intent as a necessary element of crime, are reluctant to impose criminal sanctions on a defendant who may have become a criminal without knowledge, or by inadvertent negligence." Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254, 1279 (1966) (footnotes omitted).
34. See Gribetz & Grad, supra note 32, at 1277.
35. In San Francisco some owners in the past have been able to string out com-
hearings at different levels within the agency are required to gain the owner's compliance. Failure to secure compliance at the administrative level necessitates a reliance on the city attorney or county counsel to bring suit. These offices, in turn, are frequently short of manpower and the unglamorous code enforcement work may assume a low priority for the attorney assigned. Finally, the court may grant numerous continuances to the owner in an effort to achieve compliance. Thus, an owner can often string out the enforcement process for years.

Although the code enforcement agency may have the power to repair, the power is infrequently used because of limited funds and problems of administration. San Francisco has recently enacted a code section providing for repairs by the city. Any expenses incurred are advanced from a revolving fund. These costs, plus a 15 percent fee, become an assessment lien on the property upon action by the Board of Supervisors. The success of such a program, however, is questionable because it is doubtful that any significant amount of money will be appropriated for the revolving fund. Similar programs elsewhere have made it clear that recovery of funds may not be successful and that the city may have to be prepared to subsidize the repairs at substantial cost. Furthermore, without an increase in the size of the code enforcement agency, it is hard to see how a substantial number of projects could be undertaken.

What then can our hypothetical tenant expect from the code enforcement agency? She may find total confusion and frustration when she attempts to locate the appropriate agency among those sharing the responsibility for residential property; she might even be faced with a disclaimer of responsibility by all agencies. The agency respon-

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36. For instance, in San Francisco informal hearings are held at two levels, first before the Division Head of the Multifamily Dwelling Division and then before the Superintendent of Building Inspection. If unsuccessfully dealt with, the matter is then referred to the department's complaint division for a formal hearing before the Director of Public Works. San Francisco, Calif., Building Code §§ 203.B-.D (1969). After the decision of the Director, the owner is entitled to appeal to the Abatement Appeal Board. Id. § 203.I. Only then, in the absence of an emergency situation, would the matter be referred to the City Attorney to file suit in court. Interview with Alfred Goldberg, supra note 27.

38. See note 35 supra.
40. Id. §§ 203.K-.L.
41. Id. §§ 203.P-.R.
42. For a description of the New York experience, see Grad, supra note 26, at 62.
sible for the particular violation may also exclude the hypothetical tenant's housing from those assigned priority for inspection. This may result in a complete refusal to inspect. Even if the agency inspects, notes the violations, and directs repairs to be made, the landlord may disobey such orders without penalty, thereby extending agency action for months and years. Furthermore, if the procedure terminates in a trial, the landlord pays only a miniscule fine for the violations. Finally, the tenant may find herself faced with the disastrous prospect of being ordered to move by the agency, which, after inspecting the premises, may find violations well beyond the tenant's limited complaints, resulting in abatement proceedings which force her to vacate.

In all likelihood, however, the tenant will not have to wait an extended period before being forced to move from the leased premises. As with an attempt by the tenant to use Civil Code section 1942, the predictable response of the landlord in this situation will be an attempt to rid himself of a "troublemaker." On the day that the landlord is contacted by the building inspector, or the tenant voices her intention to contact the department of public works, the landlord will serve the tenant with a 30 day notice to vacate or a notice of substantial rent increase. If the tenant protests this retaliatory eviction, a predictable judicial response would be a reference to the unlimited power of the landlord to terminate a periodic tenancy and the discomforting observation that "if the tenant doesn't like it, then why doesn't she move?"

There is a trend toward limiting the landlord's power to retaliate against a tenant. Some states have passed specific prohibitions against retaliation; several courts have refused to sustain the landlord's action on several bases. At the constitutional level, two possible grounds have been proposed. The first rests upon the view that action by the court would be a violation of the citizen's right of petition and redress. The second relies on the constitutional right of a citizen to inform the government of a violation of the law and to be protected by the govern-

43. An example of the bureaucratic morass that confronts the tenant can be found in Comment, supra note 26, at 317 n.67.
ment for so doing.\textsuperscript{48}

The leading case of \textit{Edwards v. Habib},\textsuperscript{49} however, relies instead on public policy and the inherent purpose of the housing and sanitary codes. The court held that given the concern of Congress to secure decent and sanitary housing for slum dwellers and the importance of tenant complaints in reporting violations, to permit retaliatory evictions clearly frustrates the purposes of the legislative action.\textsuperscript{50} The court concluded by stating:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.\textsuperscript{51}

The status of retaliatory eviction in California is unclear. The case of \textit{Abstract Investment Co. v. Hutchinson}	extsuperscript{52} clearly enables the tenant to question on constitutional grounds the propriety of the court practice of assisting the landlord in retaliating against the tenant. The statutory construction and public policy arguments in \textit{Edwards v. Habib} would seem to apply equally well to the State Housing Law\textsuperscript{53} and local housing codes.\textsuperscript{54} Nonetheless, the tenant is again in an area of conjecture. The tenant's taking advantage of a remedy requiring the landlord to perform duties imposed by law necessitates a dependence on a favorable judicial construction of the housing laws; yet, the courts have been notably unsympathetic and blind to any change, based on social considerations, in the application of these laws. Once again, the price for the tenant's actions may well be speedy eviction.

From the above discussion, it is clear that administrative code enforcement does not provide meaningful relief for the low-income tenant. The administrative limitations, the inadequacy of the remedies, and the danger of eviction through abatement or retaliation make it impossible for our hypothetical tenant to turn to a code enforcement agency with any assurance of success.

\textsuperscript{49} 397 F.2d 687 (D.C. Cir. 1968).
\textsuperscript{50} Id. at 700-01.
\textsuperscript{51} Id. at 701-02.
\textsuperscript{52} 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).
\textsuperscript{53} \textsc{Cal. Health & Safety Code} §§ 17910-95.
\textsuperscript{54} California courts, in the analogous situation of employment at will, have afforded relief where the employer's reasons for termination were against public policy. Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
C. Rent Withholding

Suppose, in frustration, the tenant simply stops paying the rent. She realizes that the landlord is not going to make the promised repairs or comply with the applicable housing regulations. She decides, therefore, that he is not entitled to rent. What response can she expect from the landlord and the courts?

1. The Immediate Dangers—The Landlord's Lien and the Noose of the Unlawful Detainer Procedure

The first action that might be expected from the landlord is some form of self-help, either authorized or unauthorized by law. If the tenant lives in a furnished apartment house, the landlord could avail himself of the Draconian remedy provided by Civil Code section 1861. In accordance with recent amendments, this section gives the landlord a limited right to enter the rented premises without liability for conversion, trespass, or forcible entry. He may take *everything* lawfully within the tenant's possession, except prosthetic or orthopedic appliances, or a musical instrument used by a tenant to earn his living. The landlord can remove and retain, for example, the clothing, food, and medicine of our hypothetical family. If the amount demanded by the landlord is not paid within 60 days, he is authorized by law to sell these items at public auction.

Even if the tenant lives in an unfurnished apartment building, the landlord has a similar right of entry. Although the exemptions provided are more extensive, they are still limited and do not include the family's food, medicine, and clothing (unless it is necessary for the tenant's work).

Indeed, the tenant may come home one day to find that the landlord not only has removed all of her property but also has changed the lock on the door, thereby, in effect, evicting her without complying with any of the legal requirements. If she sought aid from the police for the landlord's unlawful action, she would most likely be advised that it is a "civil matter" and that she should see a lawyer. If she should be fortunate enough to secure legal representation, she may still find herself and her family without shelter for several days.

Suppose the landlord follows the unlawful detainer procedure rather than resorting to self-help. In contrast to the delays of code

56. Id. § 1861a.
57. Id. § 1861a(a)-(d).
enforcement, the statutory framework of the unlawful detainer action combined with judicial attitudes unsympathetic to the tenant will often result in the precipitous removal of the tenant from possession. This action is instituted by the service of a three day notice to either pay rent or quit. Shortly thereafter, the tenant would be served with a summons and complaint in unlawful detainer. This special summons gives the tenant only three days to file a pleading. It has been observed that, whether by design or chance, a large percentage of complaints in unlawful detainer are served on Friday nights or Saturdays. Frequently, the unsophisticated tenant will not realize the extent of the peril facing her and consequently will allow a few days to pass before seeking help. Furthermore, a tenant aware of the importance of filing a responsive pleading on time may simply be unable to meet the deadline. If the tenant is served with process on Friday night, she has, in essence, one day in which to answer. This means that within one day she must take care of her other obligations and arrange to see an attorney (assuming any representation is available). In that same day the attorney must secure filing fees, and prepare and file the answer. Obviously, in a fair percentage of the cases, a default judgment will have already been entered before the client is able to make use of whatever legal assistance may be available. The tenant can only hope that the court will use its judicial discretion to stay execution under the judgment and set aside the default.

The tenant may, indeed, until recently, have found herself in an even more precarious position. Before trial, the sheriff may have served not only a complaint and summons but also a writ of possession ordering the tenant to surrender possession "forthwith." The landlord secured this relief pursuant to section 1166(a) of the Code of Civil Procedure by establishing that the defendant was, inter alia, insolvent or that the property subject to execution was insufficient to satisfy the amount of damages sought to be recovered. Although this remedy was patently unconstitutional and socially inadvisable, it has been used in num-

59. Id. § 1161(2).
60. Id. § 1167.
61. As early as 1937, the year in which this provision was originally enacted, section 1166a was declared unconstitutional by a specially convened three judge panel of the San Francisco Municipal Court. Dillon v. Cockell (S.F. Mun. Ct. 1937) in the S.F. Recorder, September 22, 1937. The unconstitutionality of section 1166a would appear to be clear a fortiori under the reasoning of the California Supreme Court in Mendoza v. Small Claims Court, 49 Cal. 2d 668, 21 P.2d 9 (1958), and the recent United States Supreme Court decision in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). In Mendoza the court held unconstitutional an amendment to CAL. CODE CIV. PROC. § 117 which permitted unlawful detainer cases to be heard in small claims court. Since
erous areas. The tenant continues to face the same danger, albeit after a hearing limited solely to the presence of the factors indicated.

Suppose our tenant succeeds in securing legal counsel before a default has been entered and the attorney is in a position to file a responsive pleading within the time allowed. She still must face many pitfalls inherent in the unlawful detainer procedure. A questionable judicial interpretation probably forecloses the tenant from filing a coun-

no stay of the eviction was provided as a matter of right, and since the tenant could not have counsel in the small claims court, the court concluded that the tenant was in effect denied a hearing and hence deprived of his property (i.e., possession of the premises) without due process of law. The *Sniadach* case struck down prejudgment wage garnishments as a deprivation of property without due process, since the garnishments issued without any opportunity for notice and hearing. Section 1166a provides for no hearing, let alone a hearing without counsel as in *Mendoza*; certainly the loss of possession of the rented premises is of at least equal magnitude with the temporary loss of possession of the $31.59 wages in *Sniadach*. The Municipal Court of the City and County of San Francisco has recently reiterated the unconstitutionality of section 1166a. *Auburn v. Jones*, No. 623689 (S.F. Mun. Ct., July 7, 1969) (order quashing writ.)

Since this article was written, section 1166a was amended to provide for notice and a hearing. The hearing, however, is limited to a determination of whether “the defendant is insolvent, or has no property that is subject to execution sufficient to satisfy the amount of damages sought to be recovered by the plaintiff, or resides out of the State, or has departed from the State, or cannot, after due diligence be found within the State, or conceals himself to avoid the service of summons.” Cal. Stats. 1969, ch. 903, § 1, at 492 (Deering's Adv. Leg. Serv. No. 5, 1969). To the extent the tenant stands to lose possession after a hearing limited solely to these issues, there appears to be the same due process objection. Further, since the right to have a full hearing will depend on the wealth or economic status of the tenant, the section appears, additionally, to violate the equal protection clause of the United States Constitution.

62. The undesirability and hardship of simply putting families on the street is obvious enough. The social implications, however, may go beyond the great hardships to the individual family. The first direct experience the author had with this provision involved a black family consisting of a mother, her eight children, and her elderly mother. They were living in the Western Addition section of San Francisco, a black ghetto in the throes of redevelopment where racial tensions have on occasion reached a high level. My client had been living in a rundown apartment, which the owners, who are white, had refused to repair. The owners are well-known as the landlords of numerous similar buildings in the area and, additionally, are well-known as money lenders, generally at extremely high interest rates. The client, in the face of the owner's refusal to make repairs, stopped paying rent. The landlords served a writ of immediate possession before trial. The writ was served on the morning after the assassination of Dr. Martin Luther King when feelings in all black communities had reached a fever pitch. Only by the greatest good fortune was a potentially explosive incident avoided. When the other attorney was advised of the facts of the matter he withheld execution. The Redevelopment Agency, sensitive to the implications of the situation, fortunately was able to relocate the family to one of its units that was in the process of being rehabilitated, but that was sufficiently complete as to be habitable. Without the cooperation of opposing counsel and the assistance of the Redevelopment Agency, a disastrous confrontation might have been triggered.
terclaim. Although the statute appears to permit the filing of a counter-claim, as opposed to a cross-complaint, the repeated lumping together of the two in judicial pronouncements would appear to negate chances of success. This prohibits the tenant from setting off as damages the injuries attributable to the landlord's violations of the law, even though the economic loss resulting from these injuries has prevented her from paying rent.

The speed in setting unlawful detainer cases for trial presents an additional hurdle. Usually, the day after the answer is filed a request for setting is received in the mail. Shortly thereafter (sometimes on the same day), a clerk's notice is received setting the trial a few days later. Although a defendant in an unlawful detainer action clearly has the right to utilize available discovery procedures, to subpoena witnesses, and generally to prepare for trial, judicial attitudes in the scheduling of these proceedings significantly impair these rights. The preparation of defenses based on code violations may require the acquisition of expert witnesses and the subpoena of building inspectors. Moreover, a retaliatory eviction case may require extensive investigation to prove the motivation of the landlord. Where the dispute is simply the

64. Cal. Code Civ. Proc. § 1170 permits the defendant to "answer or demur." Cal. Code Civ. Proc. § 1177 makes applicable to unlawful detainer proceedings the provisions of part two of the Code of Civil Procedure "except as otherwise provided in this chapter." Cal. Code Civ. Proc. § 437 provides that the answer of defendant shall contain, inter alia, "[a] statement of any new matter constituting a defense or counterclaim" (emphasis added). Since a counterclaim is part of the answer and since the chapter containing the unlawful detainer procedure does not forbid the answer containing a counterclaim, it would seem that the statute in fact permits filing of a counterclaim.
66. Such as her loss of income and medical bills.
67. It is even possible that a court might later conclude that the tenant's claim arose out of the same transaction as the unlawful detainer proceeding and is foreclosed by Cal. Code Civ. Proc. § 439. This provides: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."
68. From the author's experience, this appears to be the standard practice in San Francisco Municipal Court.
69. This right to discovery is evident only through analysis of the relevant code section and judicial decisions. Cal. Code Civ. Proc. § 2030 simply gives either "party" a right to discovery. Section 2016 provides that depositions, for purposes of discovery, may be taken in any action or special proceeding. An unlawful detainer proceeding is a "special proceeding." Turem v. Texaco Inc., 236 Cal. App. 2d 758, 46 Cal. Rptr. 389 (1969). Thus it follows that a party in an unlawful detainer proceeding is entitled to discovery.
amount of rent owed, the tenant is certainly entitled to ascertain through discovery procedures the factual contentions of the landlord and to prepare his case for trial. Although the monetary amount involved may seem small, it can be large in relation to the income of a low-income defendant. This is especially true if the tenant loses at trial because there is a danger that she will be liable for treble damages.\footnote{CAL. CODE CIV. PROC. § 1174 provides for treble damages. In the author's experience treble damages are infrequently, if ever, awarded in cases involving residential property. In view of the limitations of available low-income housing and other practical problems of the low-income tenant, it would seem infrequent that a court would be justified in finding the requisite wilfulness justifying treble damages. Yet the danger of an unsympathetic court so finding does exist.}

Shortly after judgment is entered, the sheriff will serve the tenant with a notice to vacate, together with a writ of restitution.\footnote{See CAL. CODE CIV. PROC. § 1174.} If the tenant has not moved within five days,\footnote{Prior to an amendment in 1968 to section 1174, the tenant was not entitled to any time to vacate after service of the writ. See Cal. Stats. 1967, ch. 1600, § 2, at 3830-31.} she will be removed and her property, without exemption, may be placed in storage and sold after 30 days.\footnote{CAL. CODE CIV. PROC. § 1174.} Under a recent amendment, the landlord may elect to store the property on the premises (after having it inventoried by the sheriff) and sell it himself after 30 days at a public sale.\footnote{Id.} Thus, if a tenant is unable to find new housing and get assistance in moving, she is in danger of losing all her property.

It must again be stressed that beyond the question of damages and the liability for rent, the critical concern of tenants in most cases is possession. In the face of the severe housing shortage, continued possession of the rental premises is often of paramount importance to the tenant; consequently, a judgment granting the landlord possession entails great potential hardship for the tenant.

\section*{2. The Emerging Defenses}

Having considered the difficulties presented by the unlawful detainer procedure and its application by the courts, let us now turn to a consideration of the defenses available to a tenant who withholds rent.\footnote{Although available defenses in unlawful detainer proceedings have historically been drastically limited, much of this limitation might be attributed to a historical failure to deal with the contractual aspects of the rental of property insofar as they affect the right to possession. Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423 (1915); D'Amico v. Ridel, 95 Cal. App. 2d 6, 212 P.2d 52 (1949). Numerous cases, however, have relied on the equitable nature of the unlawful detainer proceeding to permit defenses against eviction.}

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Since these defenses have been generally treated elsewhere, this discussion will be limited to their application in California.

Historically, the rental of premises was viewed as a conveyance of an interest in land rather than as a contract. In addition, the doctrine of caveat emptor was applied to such a conveyance. Consequently, a tenant confronted by defects in the premises had no right to refuse to pay rent since his landlord was under no duty to repair. Even where a lease contained the landlord's express covenant to repair, the courts generally treated that covenant as independent of the duty to pay rent. Thus, a substantial breach of the covenant to repair by the landlord did not relieve the tenant of his duty to pay rent.

Just as the legislature has modified the common law rule denying any duty on the part of the landlord to repair and maintain his premises, the courts have slowly undermined the traditional view of the lease as a conveyance. The modern tendency is to regard a lease as a contract as well as a conveyance. Consequently, the rights and duties of the parties are construed in accordance with the rules pertaining to the construction of contracts. Furthermore, the thrust of the case law based on equitable considerations to an action for possession. Schubert v. Lowe, 193 Cal. 291, 223 P. 550 (1924); Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962); Strom v. Union Oil Co., 88 Cal. App. 2d 78, 198 P.2d 347 (1948); Rishwain v. Smith, 77 Cal. App. 2d 524, 175 P.2d 555 (1947). From the standpoint of unlawful detainer procedure, the defenses discussed here should be permissible either as equitable considerations or as directly affecting the lessor's entitlement to the rent claimed. In Giraud v. Milovich, 29 Cal. App. 2d 543, 85 P.2d 182 (1939), the court permitted a tenant in possession to raise the defense of partial eviction (discussed infra), concluded that the landlord was entitled to no rent since he was not permitted to apportion his wrong, and denied the landlord's action for possession. Of course, substantively, the availability of these defenses may depend on the court's increasing willingness to apply contractual principles to the rental of property. See, e.g., F. Grad, Legal Remedies for Housing Code Violation (National Comm'n on Urban Problems, Research Report No. 14, 1968); Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254 (1966); Schoenbrenner, Remedies of the Indigent Tenant: Proposal for Change, 54 GEO. L.J. 519 (1966). Note, Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code, 56 GEO. L.J. 920 (1968).


77. 1 AMERICAN LAW OF PROPERTY § 3.45, at 267 (A.J. Casner ed. 1952).

78. Id.


81. See text accompanying note 9 supra.

82. Bennett, The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach And Interdependency of Covenants), 16 TEXAS L. REV. 47 (1938); Note, supra note 80.

has been to create an interdependence between the duty to pay rent and the duty to repair.

This interdependence first arose with the judicial doctrine of constructive eviction. The theoretical underpinning for constructive eviction is the covenant of quiet enjoyment, which is implied by law in the rental of all property.

Two elements have traditionally been required for the operation of the doctrine of constructive eviction. First, the tenant must demonstrate that the lessor has either substantially interfered with the tenant's beneficial enjoyment of the premises or made them unfit for the purposes for which they were leased. It is sufficient if the interference arises from the landlord's failure to take some action required by law, such as the making of necessary repairs. Second, the tenant must abandon the premises within a reasonable period of time. The requirement of abandonment appears to be based on the theory that by maintaining possession the tenant waives the landlord's breach. This requirement, of course, presents a potentially insuperable barrier for our hypothetical tenant. Although she may be able to show that the landlord's violation of the housing laws substantially interferes with her enjoyment of the premises, she may be unable to move because of the existing housing shortage. In view of the lack of suitable alternatives, it would appear reasonable to conclude that the indigent tenant does not "waive" the landlord's breach. The courts, then, should recognize some remedy whereby the tenant can assert a right accruing under


84. 1 American Law of Property § 3.47 (A.J. Casner ed. 1952). The scope of this covenant has ordinarily been held to include both an assurance against a defective title, and a guarantee that the lessee shall enjoy the premises, uninterrupted by the acts of the landlord. Id. § 3.49.


89. 1 American Law of Property § 3.51 (A.J. Casner ed. 1952); 16 R.C.L. § 172 (1917).

90. See Schoshinski, supra note 76, at 530-31.
a breach of the covenant of quiet enjoyment without having to comply with the removal element of constructive eviction.\textsuperscript{91}

In some situations, a tenant may be able to rely on the related theory of partial eviction, which has no requirement of abandonment.\textsuperscript{92} In a California case,\textsuperscript{93} the lessor of a piece of property conveyed a portion of the leased parcel of land to the state. The court found a partial eviction and held that the tenant was excused from paying rent since the rent obligation could not be apportioned.\textsuperscript{94} Similarly, if the tenant was unable to use a portion of the rented apartment because of disrepair, then arguably he would have no obligation during the period of this “partial eviction.”

The second major defense that has evolved for our hypothetical tenant is the strictly contractual one of implied warranty of habitability. This implied warranty, analogous to those applicable to the sale of goods, is based on the duties placed on the landlord by the state and municipal housing ordinances.\textsuperscript{95} Development of this warranty theory has been stimulated by a judicial recognition that application of the rule of caveat emptor does not realistically give the tenant a meaningful choice.

The warranty of habitability was first implied in connection with furnished rooms. It was felt that in such a situation the parties normally intend an immediate occupancy without an opportunity for the tenant to inspect the premises or make them tenantable.\textsuperscript{96} This reasoning would seem equally applicable to the usual situation involving low-income tenants.\textsuperscript{97} The opportunity for any meaningful inspection or choice by the tenant is virtually nonexistent. He is usually in desperate need of housing. The choices are generally limited to apartments which are not in conformity with housing and health code requirements; moreover, many of the defects (such as vermin, faulty wiring, de-

\textsuperscript{91} See Note, Partial Constructive Eviction: The Common Law Answer in the Tenant’s Struggle for Habitability, 21 Hastings L.J. 417 (1970). Two cases have regarded the housing shortage as instrumental in the failure of the tenant to remove, and have allowed for a reduction (but not a total suspension) of the rent where the landlord brought an action for rent and the tenants could not assert constructive eviction because they had not vacated. Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153 (N.Y. Mun. Ct. 1950), and Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 153 (N.Y. Mun. Ct. 1946).

\textsuperscript{92} 1 American Law of Property § 3.52 (A.J. Casner ed. 1952).


\textsuperscript{94} Id. at 548, 85 P.2d at 185.

\textsuperscript{95} Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Comment, Housing—Warranty of Habitability Gives Efficacy to Housing Code Enforcement. 13 N.Y.L.F. 383 (1967).

\textsuperscript{96} 1 American Law of Property § 3.45 (A.J. Casner ed. 1952).

\textsuperscript{97} Levine, The Warranty of Habitability, 2 Conn. L. Rev. 61, 74 (1969).
fective heating) are not apparent to the tenant on a cursory examina-
tion. 98

The doctrine of implied warranty of habitability has been endorsed
in a recent California case. In Buckner v. Azulai, 99 a tenant sued for
damages caused by infestation of the unfurnished apartment by vermin.
In granting judgment for the tenant, the trial court awarded as damages
the return of the deposit for the last month's rent. The appellate de-
partment of the superior court affirmed the decision rejecting the com-
mon law rule of no implied warranty of habitability. 100 The Wiscon-
sin case of Pines v. Perssion 101 was quoted with approval:

To follow the old rule of no implied warranty of habitability in
leases [of accommodations for housing] would in our opinion, be
inconsistent with the current legislative policy concerning housing
standards. The need and social desirability of adequate housing
for people in this era of rapid population increases is too important
to be rebuffed by that obnoxious legal cliche, caveat emptor. 102

Although the Buckner case has endorsed an implied warranty of
habitability, numerous uncertainties remain for the tenant who withholds
rent. Will a local municipal court follow the rule enunciated by an
appellate department of the superior court when previous higher appel-
late court decisions 103 have rejected any duty of the landlord? Will it
analyze the significance of the housing legislation? If the court does
find a breach of implied warranty, what relief will be given? If the
relief is an adjustment in the rental figure, what is the measure of dam-
ages? One commentator 104 suggests that the measure be the difference
between the agreed rental and the actual value of the premises with the
code violations. A court might conclude, however, that in light of the
housing shortage, the agreed rent was the "reasonable" value of the prem-
ises even with the defects. Another author has suggested as an appro-
priate measure the difference in the value of the rented premises in
their nonconforming condition and their value if they met the standard
implicit in the warranty. 105 Acceptance of this measure would osten-

98. Any theory of "waiver" of defects by the tenant should be rejected for much
the same reasons. See Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806
(Super. Ct. App. Dep't 1967); Schoshinski, Remedies of the Indigent Tenant: Proposal
for Change, 54 GEO. L.J. 519 (1966); Comment, supra note 95.
100. Id. at 1015, 59 Cal. Rptr. at 808.
101. 14 Wis. 2d 590, 111 N.W.2d 409 (1947).
102. 251 Cal. App. 2d at 1015, 59 Cal. Rptr. at 808, quoting Pines v. Perssion,
14 Wis. 590, 596, 111 N.W.2d 409, 412-13 (1947).
103. See text accompanying notes 6-8 supra.
104. Schoshinski, supra note 98, at 527.
105. Comment, supra note 95, at 388.
sibly defeat an initial unlawful detainer proceeding because the amount demanded by the landlord in his three day notice would exceed the amount to which he was entitled. But what if the landlord then gave a 30 day notice? Would the court, using an analysis similar to that suggested in connection with retaliatory evictions, consider this to be contrary to public policy?

Another theory that the tenant might utilize in a rent withholding situation is that of illegal contracts. A landlord who rents premises he knows to be in violation of housing regulations is entering into an agreement contrary either to an express statutory enactment or at least to the policy behind these statutes. In Shephard v. Lerner, the parties entered into a commercial lease of property used for hotel apartment purposes. During the term of the lease, the City and County of San Francisco ordered several rooms closed and filed a condemnation proceeding based on violations of municipal codes and the State Housing Law. The tenant then filed an action for declaratory relief to ascertain the status of the lease; the lessor counterclaimed for the balance of the rent and damages. The trial court found that both parties knew the premises were being used in violation of local ordinances and state regulatory statutes. It held that the contract was for an illegal purpose, and since the parties were in pari delicto, no enforcible rights or obligations arose. In affirming the trial court's decision, the court of appeal stated:

In these cases, the underlying transactions involved a violation of law and the courts considered them to be against public policy. The rule does not rest upon consideration of justice between the parties but on the principle that public policy requires that certain transactions be discouraged. The same policy considerations apply with equal force to contracts that involve a violation of valid regulations designed to promote public health and safety.

The appellate court denied the lessor any recovery either under the lease or on the basis of unjust enrichment.

107. See text accompanying notes 49-51 supra.
108. CAL. CIV. CODE § 1667 is a rather broad provision classifying unlawful contracts into three classes: First, those contracts contrary to an express provision of law; second, those contracts contrary to the policy of express law; and finally, those otherwise contrary to good morals. It would appear that many leases could be invalidated on any of the above provisions. Another approach has been to view the lease as a contract of adhesion where circumstances prevent equality of bargaining. 1 U.S.F.L. REV. 306, 317 (1967).
110. Id. at 749, 6 Cal. Rptr. at 434.
111. Referring to cases involving licensing statutes.
112. 182 Cal. App. 2d at 750-51, 6 Cal. Rptr. at 435.
The theory of *Shephard v. Lerner* is even more applicable to the residential tenant who is clearly within the class for whose benefit the legislation was enacted.\(^{113}\) Since the underlying agreement would be void, the landlord should not be entitled to rent.\(^{114}\)

If the court voids the rental agreement, does the tenant have any right to possession? The landlord will probably resort immediately to the use of a 30 day notice in an attempt to relet the premises to a more compliant tenant. The court must choose between allowing the tenant to maintain possession rent free\(^{115}\) or allowing the landlord to circumvent the purpose behind the housing legislation. Here also, the tenant must put his possession in jeopardy to determine what choice the court will make.

In fact, any tenant who seeks to compel a landlord to comply with housing code requirements by withholding rent clearly does so at his peril. Each of the defenses discussed has major uncertainties which create a risk that the tenant who withholds rent will lose possession.\(^{116}\) This is a risk most low-income tenants can ill afford. Although individual rent withholding\(^{117}\) may compel a landlord to make minor repairs rather than go to the expense of an eviction, it does not appear, at present, to be an effective means of securing landlord compliance.

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113. Note that the theory is applicable because when a person is a member of a class protected by a statute he is usually not regarded as in pari delicto with the person whom the statute is designed to protect him against. 1 B. Witkin, *Summary of California Law Contracts* § 160, at 172 (7th ed. 1960). Thus the rule in the *Shephard* case would operate only against the landlord.

114. The leading case is Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968), where a lease transferring premises in violation of the housing regulations conferred no rights on the landlord to extract rent. *But see* Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. App. 1968), which would not extend the doctrine of *Brown v. Southall* to situations where the defects did not exist at the time of the rental.


116. Defenses in addition to those discussed may be constructed on the equitable nature of the unlawful detainer proceeding, see cases cited note 75 *supra*, such as unclean hands, relying on the illegality of the landlord’s performance of fraud, or simply a straight reliance on fraudulent representations of the landlord. These defenses obviously suffer from uncertainties similar to those discussed.

117. Although collective rent withholding—where a number of a landlord’s tenants withhold rent—may occasionally be effective because of the increased economic impact on the landlord, organization of low-income tenants is difficult and the same dangers remain where a landlord chooses to institute an unlawful detainer action. Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 Calif. L. Rev. 304 (1965).
III. The Need for a Change

We have now surveyed the position of the low-income tenant; clearly, the law of landlord-tenant is in need of a major overhaul. Existing law has demonstrated its ineffectiveness. Housing codes are largely unenforced. As a result, a substantial percentage of low-income families are compelled to live in housing that is inadequate, unsafe and unsanitary. The enormity of their plight is more sharply brought into focus if one considers the far-reaching social and psychological consequences that these people are forced to suffer. If the situation is to be alleviated, new devices are necessary to make code enforcement more effective and more responsive to the needs of the tenant.

There is an even stronger, although related, reason for change, beyond that of simply making housing regulations more effective. As the demands on our urban housing resources have increased, they have created a dangerous dichotomy between the theoretical legal obligations of the landlord and the current realities. The unrest in our urban society today indicates the potential for undesirable social consequences if this gap is not eliminated.

We live in times of increasing polarization of the society at large — white against nonwhite, “haves” against “have-nots” (and to a large degree the poor are also nonwhite), young against old. Characteristic of this polarization is an increasing distrust in the established societal institutions, particularly in the legal system. Feelings of hostility, engendered by a life of deprivation in a society of general affluence, are reinforced by the apparent discriminatory applications of the law and by a sense of impotence and impossibility of bringing about change through traditional means.

Our hypothetical tenant lives in an apartment that is obviously in violation of housing regulations. Her landlord is responsible for these violations, yet she is virtually powerless to compel him to make the needed corrections. Attempts by the tenant to compel performance by the landlord usually culminate in a court ordering immediate eviction. It is not surprising that our tenant would react to her impotence with hostility when she discovers not only that she is denied relief but also that the landlord’s illegal agreement is enforced by the courts.

In conclusion, changes are needed to accomplish the following: First, to secure greater realization of the aims of housing regulations by

118. See Report of the National Advisory Committee on Civil Disorders (1967); M. Harrington, The Other America (1962).
providing effective means for tenant enforcement; second, to elimi-
nate the unfairness found in much of the existing landlord-tenant law;
third, to eliminate the undesirable and dangerous situation in which the
courts not only refuse relief to a tenant seeking to enforce the law, but
also penalize the tenant for his efforts.

IV. Proposed Areas for Change

In light of the preceding discussion, specific changes are needed in
certain areas. Several of the changes proposed below could be achieved
through judicial action if there were a reversal of what the author be-
lieves to be the prevailing judicial attitude in the lower trial courts.
Legislative action, however, will more reliably supply the needed im-
provements.

A. Modifying the Unlawful Detainer Procedure

1. Repeal Section 1166(a)

This provision, which permits a writ of possession before trial
without an adequate hearing, is manifestly unconstitutional,\textsuperscript{120} grossly
unfair, and socially dangerous.\textsuperscript{121} A low-income tenant should not be
deprived of the right to possession before receiving a meaningful day in
court.

2. Extend the Time to Answer

The three day period now provided\textsuperscript{122} is unrealistically short, partic-
ularly since it includes nonbusiness days. The effect of this provision is
deprive numerous people of the opportunity to contest the eviction.

3. Provide Adequate Time to Prepare for Trial

This problem is obviously a matter for judicial consideration. Al-
though an unlawful detainer action is entitled to preferential setting,\textsuperscript{123}
the present practice of scheduling it for trial within just a few days of
the answer obviously permits little or no time for trial preparation and
effectively deprives the tenant of his right to discovery. In addition,
emerging defenses may involve inquiries more complex than the sim-
ple question whether or not rent has been paid.

\textsuperscript{120} See note 61 \textit{supra}.
\textsuperscript{121} See note 62 \textit{supra}.
\textsuperscript{122} \textit{CAL. CODE CIV. PROC.} § 1167.
\textsuperscript{123} \textit{Id.} § 1179a.
4. Permit Counterclaims and Cross-Complaints Relating to the Lessor's Performance of His Duties

The tenant in an unlawful detainer proceeding should be permitted to counterclaim or cross-complain (if the plaintiff is different from the owner of the premises) for damages he has sustained as a result of the landlord's failure to perform his obligations. Although this occasionally will complicate the proceeding, there will often be a substantial overlap between the landlord's right to rent and the tenant's right to damages. Moreover, with the important right of possession hanging in the balance, considerations of fairness should outweigh the potential complications.

B. Limiting the Sections Providing a Landlord's Lien and Execution on an Unlawful Detainer Judgment

The provisions for a landlord's lien, and the provisions for execution on an unlawful detainer judgment, should provide for the same exemptions found in the sections providing for the general execution of judgments. Although section 1861(a) provides substantial exemptions, a landlord should not stand in a different position from any other creditor in terms of depriving a debtor of the necessities of life. If it is necessary for the sheriff to remove all of the tenant's property from the premises, the tenant should be given the opportunity to claim that property necessary to everyday living.

C. Expanding and Clarifying California's "Repair and Deduct Remedy"

Numerous changes should be made in sections 1941 and 1942 to improve both the tenant's right to make the premises tenantable and the right to deduct the cost of these repairs from the rent. Section 1941 should be amended to prohibit any waiver of this right to make the premises tenantable, thereby eliminating the present invitation to waiver.

Section 1942 should be thoroughly amended to expand and clarify the remedy. The term "dilapidations" should be eliminated, and reference should be made to the requirements of state and local housing regulations. In so doing, the distinction between "repairs" and "im-

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124. See note 64 supra.
126. Id.
127. Id. §§ 690 to 690.50.
128. The author has had clients who were without food or necessary medicine, or who were unable to report to their jobs because of the lack of proper clothing.
129. See text accompanying notes 9-15 supra.
improvements” should be rejected as irrational in view of the purpose of the remedy.¹³⁰

The rental period permitted for needed repairs should be lengthened to allow more substantial improvements to be made without resort to the alternative remedies previously suggested.¹³¹ To protect the landlord from the possibility that the tenant may pay an excessive price, the section could require that the tenant submit to the landlord bids for the proposed work when the cost exceeds a specified dollar amount. This would also provide the landlord with an opportunity of doing the work himself. However, the lessee should be permitted to make the repairs himself and be compensated at prevailing wage rates provided he gives the landlord a cost estimate that does not exceed the specified amount requiring bids. Additionally, the section should clarify the frequency with which a tenant may use this remedy. To protect both landlord and tenant, the code section should specify how much notice need be given the landlord before any repairs can be made.

D. Providing New Remedies

The most striking feature of code enforcement in California is the paucity of effective remedies. A number of states have provided additional tools to effectuate compliance with housing codes, which go beyond the manifestly inadequate remedy of administrative action leading to criminal penalties or condemnation proceedings.¹³² California

¹³⁰ See note 17 & accompanying text supra.
¹³¹ The remedies of receivership or court action to compel performance.

Some states authorize the deposit of the rent into an escrow account set up either by the court or by the enforcement agency. Mass. Gen. Laws Ann. ch. 111, § 127f (Supp. 1969); Mich. Comp. Laws Ann. § 125.530(4) (Supp. 1969); N.Y. Real Prop. Actions & Proc. Law § 755 (McKinney Supp. 1969-70); N.Y. Mult. Dwelling Law § 302a (McKinney Supp. 1969-70); Pa. Stat. Ann. tit. 35, § 1700-1 (Supp. 1969). Payment into the account is a defense to eviction proceedings. The funds in some cases may be applied by the court or the code enforcement agency to repair of the premises (e.g., Massachusetts and Michigan) or may be simply held in escrow until repairs or assurances of repair are made with a time limit for retention of the funds in escrow (e.g., New York and Pennsylvania).

Rhode Island has recently enacted a provision providing specifically for an implied warranty of habitability and maintenance of habitability in all leases of residential property. R.I. Gen. Laws Ann. § 34-18-16 (Special Supp. 1968). Massachusetts provides for rent abatement or rent withholding where premises are in violation of standards of fitness for human habitation established by health codes if the violation
law should be changed to provide at least the following:

1. **Explicit Warranties of Habitability**

   The holding of *Buckner v. Azulai*\(^{133}\) should be codified to eliminate any doubt that inherent in any rental agreement for residential purposes is an implied warranty that the premises are fit for habitation and will be kept in compliance with applicable state and local housing and health requirements.\(^{134}\) It should be made explicit that the landlord’s right to rent payments under any rental agreement is dependent\(^{135}\) upon this implied covenant. Finally, substantial breach by the landlord should be a defense in an unlawful detainer proceeding seeking possession for nonpayment of rent.

2. **More Extensive Enforcement Remedies**

   The obvious aim of housing and health codes is to bring non-conforming structures into compliance and to prevent owners from permitting their buildings to fall into disrepair. Although protected rent withholding may bring about these objectives, it does not insure that the withheld money will be spent on rehabilitating the rented premises. A low-income tenant may often spend his rent money for things other than repair. Consequently, a means should be provided to assure not only that whenever economically feasible rehabilitation and maintenance of residential housing will be brought about, but also that the income from the property will be applied to this purpose. To achieve this objective, new remedies are needed. A broad range of weapons providing for specific performance, escrow accounts, and receiverships should be provided.\(^{136}\) Michigan has recently amended its housing code legislation

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5. *See text accompanying note 80 supra.*
6. *For reference to laws in other states providing these remedies, see authorities cited note 132 supra.*
to seek this result. Under this legislation, if the premises do not comply with the regulations, the obligation to pay rent ceases and the suspended rental must be paid into an escrow account administered by the local code enforcing agency. The money in this account is to be used to pay for repairs with any balance going to the landlord.

Either the enforcing agency or the occupant may file suit to compel compliance with the housing act. The court has general jurisdiction to enforce the act; its powers include enjoining violations, ordering the owner to repair, authorizing agency action, imposing a lien on the property for the cost of repairs, and establishing, within limits, the lien’s priority. Furthermore, the court is specifically authorized to appoint a receiver of the premises with broad powers to manage the property and apply the proceeds toward repairs.

While the author questions some of the specific aspects of the Michigan legislation, particularly the dependence of the tenant on administrative action and the limitations of the repair lien, it basically provides a desirable framework for change.

The provision of an escrow account protects against “leakage” of the rent and gives assurance that it will go toward repairs. In addition, it guards against the situation where the tenant is using the violations of the housing act simply as a means of avoiding the payment of rent.

The availability of a receivership having broad powers of management and repair provides a potentially effective means of assuring rehabilitation and maintenance of the property. Numerous aspects of the receivership remedy deserve analysis. Substantial areas of inquiry center around who may institute the proceeding, what substantive standard justifies invoking this remedy, who will be the receiver, and what means may be used to generate funds for rehabilitation. Since the

138. Id. § 125.530(3).
139. Id. § 125.530(4).
140. Id.
141. Id. § 125.536.
142. Id.
143. Id. § 125.535.
144. Where the tenant has filed suit the enforcing agency may be substituted for the tenant in the discretion of the court. Id.
145. The lien will be subordinate to a mortgage which was recorded at a date when a certificate of compliance issued by the code enforcing agency was in effect. Id. § 125.534(7).
146. Id. § 125.530.
purpose of this article is not to set out in detail the proposed changes with an exhaustive analysis of their ramifications, but rather to point out general areas for reform, these questions will not be pursued. However, any remedy provided should assure substantial control and participation by the tenant. The tenant should not be dependent on action by an already overburdened and understaffed agency. He should have an effective say in the priority of repairs.

3. **Damages for Breach of the Landlord’s Obligations**

Existing law should be clarified to provide explicitly for recovery by the tenant for personal injury or property damages arising from the failure of the landlord to comply with his obligations under the state or local housing codes.

E. **Prohibition of Retaliation**

From the viewpoint of tenant attitudes, the law ideally should require a showing of “just cause” as a condition for eviction. Landlords in the present housing market have substantial economic power and are extensively regulated by statute. Consequently, they are analogous to public utilities or businesses endowed with a public interest.148

A specific provision should be made prohibiting, at a minimum, retaliatory eviction or rent increases.149 This protection should include within its ambit tenant activity ranging from a request to the landlord for repairs to contacting the enforcement agencies.150 To avoid factual problems and questions of intent, an eviction or rent increase within a given time period—e.g., within six months following the exercise by the tenant of any protected activity—should be prima facie retaliatory. This would require the landlord to show affirmatively that his action was not for purposes of retaliation.151

V. **Change in Judicial Attitudes**

It may be peculiar in an article of this nature to say simply that it is necessary to have a change in judicial attitudes; yet this is the primary


reason for the ineffectiveness of existing law and the disillusioned feelings of tenants. Too often in the author's experience, and that of other attorneys representing indigent tenants, the judge simply assumes that any tenant not paying rent is a "deadbeat" not entitled to any consideration from the court. Too often the court simply repeats those repugnant shibboleths: "A landlord can terminate a tenancy for any reason he wishes" and "if you don't like it there, you can always move."

The time has certainly come for reappraisal of ancient dogma and attitudes in light of statutory and social changes. Adequate response of the law to the needs of society depends on the willingness of judges to reevaluate old answers to new problems and to be receptive to social realities. Only through judicial willingness to reexamine established rhetoric in light of harsh realities, and judicial amenability to necessary improvements, can really significant changes occur.