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Rent Withholding: A New Approach to Landlord-Tenant Problems

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RENT WITHHOLDING: A NEW APPROACH TO LANDLORD-TENANT PROBLEMS

I. INTRODUCTION TO THE PROBLEM

Substandard housing is one of today's most pervasive and serious social problems. Large segments of our population, the so-called slum dwellers, are living in overcrowded, dilapidated, unsanitary, rodent infested buildings.[1] Still bound by medieval legal concepts, modern real property law is generally an inadequate weapon against the prime cause of this substandard housing—the landlord who fails to maintain the property and make needed repairs.[2]

Most cities have housing laws requiring residential units to be kept in at least a minimal state of repair.[3] Vigorous enforcement is the exception, however, and the usual punishment for violations consists of fines so low that many landlords accept them as nothing more than a minor cost of doing business. Thus, the standards set by these laws rarely reflect the true condition of urban housing.[4]

With regard to the landlord's rental property, the tenant is his sole source of income. Nevertheless the tenant is usually unable to exert any pressure upon the landlord to improve the condition of his housing. Although the covenants in an ordinary bilateral contract are considered dependent,[5] this basic principle of modern contract law is not applicable to leases.[6] While the modern lease is primarily a conveyance of living space, the laws surrounding it developed in an agrarian society where land was valued chiefly for its agricultural utility. Any buildings or other improvements on the land were of secondary importance. The tenant paid rent for the use of the land, and this obligation continued so long as the landlord did not interfere with his possession. If the landlord breached any covenant con-

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1 There were over 58 million housing units in the United States in 1960. Almost one half were located in metropolitan areas; of this one half, almost twenty per cent were in deteriorating or dilapidated condition. Tenants occupied twice as many of these substandard dwellings as owners. In Los Angeles, out of 936,202 total units, 77,841 were substandard; 52,100 of these were tenant occupied. In San Francisco, out of 310,552 total units, 27,785 were substandard; 19,993 of these were tenant occupied. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1960 CENSUS OF HOUSING, STATES AND SMALL AREAS 40 (1960).

2 *Tenant Rent Strikes*, 3 COLUM. J. OF LAW AND SOCIAL PROBLEMS 1 (1967).

3 *See, e.g.*, LOS ANGELES, CAL., MUN. CODE ch. IX.

4 Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 316-19 (1965).

5 RESTATEMENT OF CONTRACTS § 266 (1932).

6 Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915); *see also* RESTATEMENT OF CONTRACTS § 290 (1932).

cerning repair of the buildings, the tenant could sue for damages, but his duty to pay rent was not abated.[7]

The medieval concept of independency of covenants is still very much a part of today's real property law. It has been modified in only one respect. If the landlord allows the premises to become so dilapidated that they are no longer fit for human occupation, he is deemed to have interfered with the tenant's possession, and the latter is under no further duty to pay rent. This is the doctrine of "constructive eviction."[8] The doctrine, however, is conditional. Most courts will not permit the tenant to assert constructive eviction as a defense to an action for nonpayment of rent unless he has vacated within a reasonable time after ceasing his rental payments.[9] This requirement imposes no great burden on the financially secure tenant, who has a wide choice of accommodations at his disposal, but for the slum tenant, for whom low cost housing is scarce, it makes the doctrine of constructive eviction meaningless.

Frustrated by the limited traditional sources of relief available to them and encouraged and organized by the civil rights movement,[10] slum tenants are looking more and more to the rent strike to force landlords to make needed repairs.[11] The logic is simple. The tenant provides the landlord with income by paying rent. Therefore, rent withholding is the one way in which the tenant can make his protest meaningful. Nevertheless, in the absence of either statutory support or a sudden judicial modification of the doctrine of constructive eviction, the tenant who withholds rent from a landlord maintaining uninhabitable premises will be subject to summary eviction.[12]

The courts have almost universally held that the tenant must vacate before he can avail himself of the defense of constructive eviction.[13] This wall of judicial uniformity has been breached in only two New York Municipal Court cases which arose during the severe housing shortage following World War II. In *Majen Realty Corp. v. Glotzer*[14] the landlord attempted to recover rent from a tenant whose premises had been badly

[7] Comment, *Rent Withholding—A Proposal for Legislation in Ohio*, 18 W. RES. L. REV. 1705, 1707 (1967); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 534-35 (1966).

[8] Veysey v. Moriyama, 184 Cal. 802, 195 P. 662 (1921).

[9] *See, e.g.*, Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Palumbo v. Olympia Theatre, 276 Mass. 84, 176 N.E. 815 (1931).

[10] *Rent Withholding—Public and Private*, 48 CHICAGO BAR RECORD 14 (No. 3, 1967).

[11] *Id.* at 18-19. Tenant rent strikes first occurred in New York and Chicago during the housing shortage after World War I. There was a three year rent strike in Vera Cruz, Mexico, from 1932-1935. More recently there have been rent strikes in Harlem and the Old Town Gardens area of Chicago.

[12] CAL. CODE CIV. PROC. § 1161 (West Supp. 1968).

[13] Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915); *see also* RESTATEMENT OF CONTRACTS § 290 (1932).

[14] 61 N.Y.S.2d 195 (Mun. Ct. 1946).

damaged by fire. The court recognized that the tenant must ordinarily abandon the premises to sustain the defense of constructive eviction, but noted that this rule rested upon the reasoning that if the premises were in fact uninhabitable, the tenant would have moved elsewhere. Since the scarcity of housing had destroyed the reason for the rule, the court declined to apply it in this case.[15] In *Johnson v. Pemberton*[16] the New York Municipal Court said that implicit in the doctrine of constructive eviction

> . . . was the presumption that there was [*sic*] always available other premises to which the tenant could move. The grim realities of the acute housing shortage reduce this time-worn presumption to sheer naivete; a postulate exploded by the facts.[17]

These cases are particularly relevant to the slum tenant for whom there is a substantial shortage of housing within his income bracket. While logic and reason clearly support this position, the weight of authority still adheres to the traditional doctrine of constructive eviction, and the appellate courts of New York have refused to adopt this line of reasoning.[18]

Thus it appears that slum tenants can look only to the legislature for effective rent withholding relief. In order to propose legislation for California, it is necessary to analyze the effectiveness of existing rent withholding legislation. A model statute will be proposed based upon the best provisions of existing legislation, incorporating new concepts where analysis shows they are needed.

II. Analysis of Existing Legislation

Ten states, including California, currently have rent withholding statutes of one form or another.[19] California's purported rent withholding statutes are Civil Code sections 1941 and 1942. These statutes are of little value to the slum tenant. Section 1941 requires the landlord to deliver the premises in a condition fit for human occupancy and to repair all subsequent dilapidations which render them untenantable. The statute, however, permits the parties in both a leasehold and a month-to-month tenancy to agree between themselves that the tenant shall have the burden of making re-

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15 *Id.* at 196-97.

16 97 N.Y.S.2d 153 (Mun. Ct. 1950).

17 *Id.* at 157.

18 *See* Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964), *reversing* 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct. 1964).

19 CAL. CIV. CODE §§ 1941-42 (West 1954); ILL. PUB. AID CODE § 11-23 (1967); MASS. GEN. LAWS ch. 111, § 127F (Supp. 1968); MICH. STATS. ANN. §§ 5.2772(1)-5.2891(17) (Supp. 1968); MONT. REV. CODES ANN. § 42-201 (1947); N.Y. CODE SOCIAL WELFARE § 143-b (McKinney 1966); N.Y. CODE REAL PROPERTY ACTION AND PROC. §§ 755, 769-82 (McKinney Supp. 1968-69); N.Y. CODE MULTIPLE DWELLING § 302-a (McKinney Supp. 1968-69); N.D. CENT. CODE §§ 47-16-12, 47-16-13 (1960); OKLA. STAT. title 41, §§ 31-32 (1954); PA. STAT. ANN. title 35, § 1700-1 (Supp. 1968); S.D. CODE §§ 38.0409-.0410 (1939).

pairs.[20] In practice the slum landlord, due to his disproportionate bargaining power vis-à-vis the tenant, can shift his burden at will. The slum tenant must either accept his terms or remain homeless.

A standardized lease shifting the duty of repair to the tenant contains all the elements of a contract of adhesion; that is, a contract consisting of many provisions highly beneficial to the only party with any real bargaining power.[21] The courts look unfavorably upon such contracts and often limit their effect.[22] California courts have strictly construed lease clauses which waive the protection of section 1941, giving them no more effect than is absolutely required by their language.[23] For example, the courts have held that a landlord may not contract away a duty to repair imposed by housing regulations adopted to preserve the health and safety of the community.[24]

Nevertheless, under present California law, lease clauses waiving section 1941 will normally be given effect.[25] This result appears to be legally correct. At common law the duty to make repairs was on the tenant, absent an agreement to the contrary.[26] In addition, section 1941 by its terms allows the parties to shift the duty of repair, and an agreement will not be declared void as against public policy when it is expressly authorized by a statute.[27]

Under section 1942, if the landlord fails to make needed repairs after notice by the tenant and has not already contracted away his duty to repair, the tenant may either vacate the premises or withhold up to one month's rent to repair them. These are the tenant's only remedies.[28] The statute imposes no contractual obligations upon the landlord.[29] If the tenant withholds more than one month's rent, he will have no defense to an action for eviction.[30]

These remedies are wholly inadequate for the slum dweller. One

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[20] *See* Bakersfield Laundry Ass'n v. Rubin, 131 Cal. App. 2d Supp. 862, 280 P.2d 921 (1955).

[21] Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204-05 (2d Cir. 1955) (disenting opinion); Bekken v. Equitable Life Assur. Soc'y, 70 N.D. 122, 143, 293 N.W. 200, 212 (1940).

[22] Schoshinski *supra* note 7, at 555.

[23] Butt v. Bertola, 110 Cal. App. 2d 128, 242 P.2d 32 (1952); Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967).

[24] Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (1967).

[25] Bakersfield Laundry Ass'n v. Rubin, 131 Cal. App. 2d Supp. 862, 280 P.2d 921 (1955); Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963); Lee v. Giosso, 237 Cal. App. 2d 246, 46 Cal. Rptr. 803 (1965).

[26] Brewster v. De Fremery, 33 Cal. 341 (1867).

[27] 17 C.J.S. *Contracts* § 211 (1963).

[28] Nelson v. Myers, 94 Cal. App. 66, 75, 270 P. 719, 723 (1928).

[29] Metcalf v. Chiprin, 217 Cal. App. 2d 305, 31 Cal. Rptr. 571 (1963).

[30] Moroney v. Hellings, 110 Cal. 219, 42 P. 560 (1895).

month's rent will not suffice to repair most slum apartments, and in most instances the entire building is in need of repair. If the tenant repairs the premises, he subjects himself to the possibility of a suit for damages by his landlord for making the repairs improperly.[31]

Montana's rent withholding statutes[32] are identical to California's. The rent withholding statutes of North Dakota, South Dakota, and Oklahoma are almost identical to California legislation, but permit the tenant to withhold as much rent as needed to repair the premises.[33] In Illinois, public welfare departments are entitled by statute to withhold welfare payments in the form of rent when the landlord is not keeping the premises in an adequate state of repair.[34]

Massachusetts, Michigan, Pennsylvania, and New York have the most progressive rent withholding statutes.[35] Each state allows the tenant to withhold his rent from the landlord and to pay it into court whenever the premises are not maintained in a habitable condition. Since New York has the most comprehensive legislation in this area, an in depth analysis of its provisions and effectiveness is appropriate before a model statute for California can be recommended.

In 1962 the New York Legislature, recognizing that up to twenty-five million dollars in welfare funds were being paid as rent to landlords of substandard housing,[36] enacted Social Welfare Law section 143-b, commonly known as the Spiegel Law. Under this law, if a person is entitled to public aid or assistance in the form of payments toward the rental of housing, the public welfare department may pay the rent money directly to the landlord. If the welfare department knows of conditions on the premises which are dangerous, hazardous, or detrimental to life or health, it can withhold payment of rent from the landlord on its own initiative until such conditions are removed. During this period of withholding, the landlord cannot evict his tenants for nonpayment of rent.

Since the Spiegel Law has been in effect, New York welfare departments report that the housing of welfare recipients has improved.[37] But while

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31 Simen v. Sam Aftergut Co., 26 Cal. App. 361, 146 P. 1058 (1915); Connell v. Browstein-Louis Co., 86 Cal. App. 610, 261 P. 331 (1927).

32 MONT. REV. CODES ANN. § 42-201 (1947).

33 N.D. CENT. CODE §§ 47-16-12, 47-16-13 (1960); S.D. CODE §§ 38.0409-.0410 (1939); OKLA. STAT. title 41, §§ 31-32 (1954).

34 ILL. PUB. AID CODE § 11-23 (1968).

35 MASS. GEN. LAWS ch. 111, § 127F (Supp. 1968); MICH. STATS. ANN. §§ 5.2772(1) -5.2891(17) (Supp. 1968); PA. STATS. ANN. title 35, § 1700-1 (Supp. 1967); N.Y. CODE SOCIAL WELFARE § 143-b (McKinney 1966); N.Y. CODE REAL PROPERTY ACTIONS AND PROC. §§ 755, 769-82 (McKinney Supp. 1968-69); N.Y. CODE MULTIPLE DWELLING § 302-a (McKinney Supp. 1968-69).

36 Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 581 (1966).

37 *Id.* at 592.

the short run effects of the Spiegal Law may be beneficial, welfare recipients may ultimately be driven into the worst available housing. There are already indications that this law has caused landlords to prefer non-welfare recipients as tenants whenever possible,[38] and it is the landlords with the better housing who have the widest choice in this regard. Moreover, the Spiegel Law denies the welfare tenant any initiative in improving the condition of his housing. If he relies upon this law, he must acquiesce in his plight until the welfare department decides to act.

Those not on welfare are given rent withholding rights under section 755 of the New York Real Property Actions and Proceedings Law. This section empowers the appropriate city department to give notice to the landlord to make necessary repairs or to cease conduct constituting a violation of the housing code. After such notice, eviction proceedings against the tenant for nonpayment of rent will be stayed if the court determines that the condition of the premises constitutes a constructive eviction. Thereafter the tenant will be free from eviction so long as he deposits his rent with the court. If the landlord makes the necessary repairs, the withheld rent will be paid to him by the court. If the necessary repairs are not made within a reasonable time, the court may hire contractors to make needed repairs and pay them from the fund of withheld rent.

Thus under section 755, once the landlord has been notified by the proper city department of a housing code violation, the tenant may withhold payment of rent, and when eviction proceedings are brought for nonpayment of rent, he must hope that the court will agree with him that the condition of the premises constitutes a constructive eviction.

There are two basic problems with section 755. First, as with the Spiegel Law, the tenant must wait until the proper city department acts to inform the landlord of a housing code violation. Considering the slow pace of action which often characterizes municipal governments, the tenant might have to live with an unhealthy and dangerous condition for a long period of time before officials declare the condition to be a violation of the law. Second, the concept of constructive eviction is nebulous, and the rent withholding tenant must run the risk that the court will not agree with him that the condition of his premises falls within this concept. If he is wrong, he will have no defense to the landlord's action for eviction.

In 1965 the New York Legislature added article 7-A, sections 769-782, to the Real Property Actions and Proceedings Law in an attempt to eliminate the problems presented by section 755. Under this article, if at least one-third of the tenants of a multiple dwelling combine, they may petition to have their rent paid into court. If the court finds that a condition exists which is dangerous to life, health, or safety and was not caused by the petitioning tenants, it may enter judgment that the rent be paid into

[38] *Id.* at 592-93.

court as it falls due. Once judgment has been entered, the landlord no longer has the right to collect rent from any of his tenants, petitioners or non-petitioners. The landlord will not reacquire the right to collect rent until the dangerous condition has been removed. If the landlord does not begin repair of the premises within a reasonable time, the court may appoint an administrator to collect the rent monies and to use them to make necessary repairs.

Article 7-A eliminates many of the problems of section 755 and the Spiegel Law. The tenants may initiate action on their own behalf without awaiting action by the appropriate city department. Tenants are also able to obtain a judicial determination of their right to withhold rent before beginning the rent strike. They need not run the risk of eviction. However, since one-third of the tenants must join in the original petition, independent action by individual tenants is circumscribed. Unfortunately it may often prove difficult to persuade one-third of the tenants to join in instituting legal proceedings.[39] Furthermore, in practice it is difficult to find qualified parties willing to serve as administrators of slum property. A person accepting such a position must be willing to sacrifice ten to twelve hours of his time per week. His compensation will be low, usually not in excess of ten per cent of the cost of repairs.[40]

When a qualified administrator is appointed, he often has trouble collecting rent from the tenants. They frequently believe that the administrator is their friend and will not require strict compliance with their rent obligations.[41] Administrators appointed under article 7-A have also encountered difficulties in finding contractors willing to repair the slum building. Since contractors must be paid from the withheld rent money, they frequently must accept payment on a monthly basis, an arrangement few contractors are willing to accept.[42] Some administrators have tried to procure loans from commercial banks to finance the cost of repairs, but they have had difficulty finding lenders willing to make such an investment.[43] Nevertheless, since the adoption of article 7-A, there has been a significant improvement in the condition of New York slum housing.[44]

Another section of New York's rent withholding legislation, adopted in 1965, frees the tenant from the need to depend upon his neighbors before action against his landlord may be taken. New York Multiple Dwelling

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39 Michael Harrington points out that the poor, with their distrust of others, are far less likely than other members of society to join in groups. HARRINGTON, THE OTHER AMERICA 133 (1962).

40 *Tenant Rent Strikes*, 3 COLUM. J. OF LAW AND SOCIAL PROBLEMS 1, 12 (1967).

41 *Id.*

42 *Id.* at 14.

43 *Id.*

44 After the adoption of article 7-A in 1965, one county experienced an eighty per cent rate of corrections in a one month's period. Comment, *Renting Withholding—A Proposal for Legislation in Ohio*, 18 W. RES. L. REV. 1705, 1714 (1967).

Law section 302-a provides that if the records of the proper city department show that a "rent impairing" violation has existed on the premises for six months and that the landlord has been properly notified of the violation, the tenant may withhold his rent without any legal proceedings until the violation has been cured. While the violation continues, the tenant cannot be evicted for nonpayment of rent, but like the Spiegel Law and section 755 of the New York Real Property Actions and Proceedings Law, section 302-a requires that the tenant wait for action by the appropriate city department before he may take the initiative. Even then the tenant must live with a dangerous condition for an unreasonable period of time, six months, before he can begin withholding rent.

Based upon this survey of current New York legislation,[45] the following Model Statute for California is proposed. It is structured upon the best provisions of the existing New York statutes, but contains many new provisions where analysis has shown they are needed.

III. MODEL STATUTE

PREAMBLE

Having found that there exist in this state residential buildings which are

[45] Brief notice should be made of the provisions of the Massachusetts, Michigan, and Pennsylvania rent withholding statutes. In Massachusetts, once the Board of Health has found that the condition of the premises is in violation of the state Sanitary Code, the tenant may petition to pay his rent into court. If the court finds that the facts alleged in the petition are true, it shall so order. The court can either disburse the rental payments to the owner to make the necessary repairs, or appoint a receiver to collect the rent and make repairs. If the rental payments are not sufficient to repair the premises, the receiver may apply for funds from the Department of Public Health. The state is given a lien on the property for all sums not repaid. MASS. GEN. LAWS ch. 111, §§ 127C-J (Supp. 1968).

In Michigan, owners of multiple dwellings are required to register with an enforcing agency. The enforcing agency is empowered to periodically inspect all multiple dwellings and issue a certificate of compliance. This certificate shall only be issued if the premises are free from all hazards to the health or safety of the occupants. If the certificate is withheld, the tenants' duty to pay rent shall be suspended and the rent paid into an escrow account established by the enforcing agency. The enforcing agency can release the withheld rent to the landlord if he is willing to make the needed repairs, or the court may appoint a receiver to repair the building. If the withheld rent does not cover the receiver's expenses, the court may impose a lien on the property for the amount owed. MICH. STAT. ANN. §§ 5.2772(1)-5.2891(17) (Supp. 1968).

In Pennsylvania, once the proper department has certified a building as unfit for human habitation, the duty of the tenants to pay rent is suspended until the necessary repairs are made. The tenants are to deposit this withheld rent in an escrow account. If the landlord makes the necessary repairs within six months of the certification of unfitness, the withheld rent money shall be paid to him. If the needed repairs are not made within six months, the withheld rent monies are returned to the tenants, except that funds may be used for the repair of the premises. No tenant may be evicted for any reason while he is depositing his rent in the escrow account. PA. STATS. ANN. title 35, § 1700-1 (Supp. 1968).

unsafe, unsanitary, inadequate, or overcrowded, that the condition of these buildings has a demoralizing effect upon the residents therein and a deleterious effect on the social and economic well-being of the entire community in which they exist, that the majority of these buildings are occupied by renters, and that present statutory and common law remedies are inadequate to cope with this problem, the California State Legislature does hereby adopt this Model Statute.

SECTION I

a. The scope of this statute shall be limited to the leasing or renting of multiple dwellings.

b. Any attempted waiver by a tenant of any of the provisions of this statute shall be deemed contrary to public policy and void.

SECTION II

a. Upon the leasing or renting of a building, the landlord must put it into a condition fit for human occupation and repair all subsequent dilapidations thereof which render it untenantable.

b. The proper city department in charge of the enforcement of the housing and sanitation laws, hereinafter called the department, shall promulgate a list of housing law violations which shall be designated rent impairing violations. Rent impairing violations shall consist of all conditions in a building which the department determines either constitute or, if not promptly corrected, will constitute a fire hazard or a serious threat to the life, health, or safety of the occupants thereof.

c. Whenever the department determines that a rent impairing violation exists in a building, it shall so indicate in its records and mail notice of the determination to the owner and all lienholders of record of the building. A copy of the determination shall be published every other day for four weeks in a newspaper of general circulation in the county in which the building is situated, such publication to commence within five days after the mailing of notice of the determination to the owner and all lienholders of record.

d. The owner and all lienholders of record of any building in which it is determined that a rent impairing violation exists shall be entitled to a hearing before the department to review the correctness of the determination. The owner and all lienholders shall be entitled to appeal any adverse decision to the superior court of the county wherein the building is situated.

e. If the records of the department show that a violation described as a rent impairing violation has existed in a building for a period of two months without correction, any individual tenant upon making payments corresponding to his rental obligations to the clerk of the superior court

shall be relieved of his duty to pay rent to the landlord and shall not be subject to eviction for nonpayment of rent. The tenant's obligation to pay rent to the landlord will not resume until the rent impairing violation has been removed.

f. If the department has not declared that a rent impairing violation exists in a building, any individual tenant may petition the superior court of the county wherein the building is situated, complaining of the existence of a rent impairing violation. The petition shall state the condition which it is alleged constitutes a rent impairing violation and the rental obligation of each petitioning tenant.

g. Upon the filing of such petition, the superior court shall issue an order requiring the owner and all lienholders of record to appear at a time not later than fifteen days after the issuance of the order and to show cause why the court should not declare that a rent impairing violation exists.

h. It shall be a valid defense to such a petition for the owner or lienholder to show that the rent impairing violation alleged in the petition either does not exist, has been removed, or has been caused by the negligent or intentional conduct of the petitioning tenant.

i. If the court determines that a rent impairing violation exists in the building and was not caused by the negligent or intentional conduct of the petitioning tenant, it shall so declare and shall order all tenants to make payments into court corresponding to their rental obligations.

j. The tenants shall continue to make the payments into court for as long as the rent impairing violation continues to exist. As long as the tenants continue to make such payments, they shall not be subject to eviction for nonpayment of rent. The tenants' obligation to pay rent to the landlord will not resume until the rent impairing violation has been removed.

k. Whenever the tenants of a building are paying rent into court pursuant to any part of this section, the court, upon either its own or a tenant's motion, may appoint a receiver to manage the property and collect the rent from the tenants.

l. The court shall provide a reasonable compensation for the receiver. The receiver shall apply the withheld rent money both to pay himself compensation and to engage contractors and materialmen to make the repairs needed to cure the rent impairing violation. The receiver shall be empowered to evict tenants for nonpayment of rent.

m. If the rent monies paid into court are insufficient to provide the payments specified in paragraph *l* above, the court may order the receiver to borrow the funds necessary for his own compensation and payment in full of such contractors and materialmen. As rent payments are collected by the receiver, they shall be applied to the repayment of this debt.

n. The court may order the receiver to evidence his debt to the lender by the issuance of receiver's certificates. Such receiver's certificates shall con-

stitute a first lien on the property superior to all other mortgages, trust deeds, liens, and encumbrances, whether recorded or unrecorded.

o. Upon correction of the rent impairing violation, the landlord shall be entitled to all rent monies withheld pursuant to any part of this section which were not expended by the receiver or needed to satisfy any outstanding obligations incurred by the receiver.

SECTION III

a. In any eviction proceeding, the landlord must plead and prove that his motive is not retaliatory. If a rent impairing violation exists or comes into existence at or after the time a tenant takes possession of space in a building, the landlord may neither evict him nor unreasonably raise his rent for two years from that time.

b. The tenant may vacate such space and terminate his liability at any time within said two year period upon the giving of thirty days' notice to the landlord of his intention to so vacate.

c. Nothing in this section shall prevent the landlord from evicting the tenant for the commission of waste, disorderly conduct, nonpayment of rent when not withheld pursuant to any provision of Section II of this Statute, or for any other reason equitably requiring such eviction.

IV. Analysis of the Model Statute

Since the commercial tenant generally has a degree of bargaining power not enjoyed by the tenant who rents living space, the proposed Model Statute deals with only multiple family dwellings.[46] While serious problems exist with respect to the condition of single family dwellings, these problems are to some extent peculiar to this type of housing and are therefore beyond the scope of this comment.

The Model Statute eliminates the troublesome provision of California law which allows the landlord to contract away his duty of repair.[47] It also gives the tenant more freedom of action than is provided by New York law. Current New York legislation prohibits the tenant who complains of unsanitary or unsafe conditions in his building from withholding rent until either the appropriate city agency has taken action or one-third of his fellow tenants are willing to join him in signing a petition.[48] By eliminating the one-third requirement,[49] the Model Statute greatly enhances the opportunity for the individual tenant to improve his housing. The unreasonable

[46] Model Statute § Ia.

[47] Model Statute § Ib.

[48] N.Y. Code Multiple Dwelling § 302-a (McKinney Supp. 1968-69); N.Y. Code Real Property Actions and Proc. art. 7-A, §§ 769-82 (McKinney Supp. 1968-69).

[49] Model Statute § IIf.

six month waiting period required by New York Multiple Dwelling Law section 302-a is also eliminated. Under the Model Statute the tenant need wait only two months after action by the appropriate city agency before withholding rent.[50] No tenant should be forced to live with a dangerous condition for more than this length of time.

The provision in the Model Statute allowing the receiver to borrow the funds necessary to provide himself with reasonable compensation and to pay in full the contractors hired to cure the rent impairing violation[51] is designed to remove the problems encountered under article 7-A of the New York Real Property Actions and Proceedings Law. The receiver's position is made financially attractive, and it should be easier to find contractors willing to make needed repairs when immediate payment in full is assured.

By allowing the receiver to evidence his debt through the issuance of receiver's certificates constituting a first lien on the property, the Model Statute enables the receiver to borrow the needed funds.[52] The device of receiver's certificates constituting a first lien on the property is already used in California. In *Title Ins. and Trust Co. v. California Development Co.*[53] the superior court made an order authorizing the receiver to issue receiver's certificates in the sum of eighty thousand dollars and to spend the proceeds for the repair of the property under his management. By the terms of the order the certificates were declared a first lien on the property in his possession. In response to the argument that the court had no power to make the receiver's certificates a first lien on the property, Justice Sloss stated that there was no doubt as to the court's power to give priority to certificates issued to enable the receiver to care for and preserve the property in his charge.[54] While the *California Development* case provides authority for making receiver's certificates a prior lien on the property, it is best to spell out the priority in a statute in order to assure their marketability.

Giving the lien securing the loan priority over all other liens would also bring another ally into the struggle to improve slum housing. Almost all

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50 Model Statute § IIe.

51 Model Statute § IIm.

52 Model Statute § IIn. This provision is similar to New York Multiple Dwelling Law section 309. This statute provides that the proper city department may seek a court order appointing a receiver to manage and repair a multiple dwelling if a condition exists in that dwelling which constitutes a serious fire hazard or is a serious threat to life, health, or safety. The receiver is given a lien on the property for all expenses necessarily incurred in the execution of the court order. This receiver's lien is superior to all other mortgages, liens, and encumbrances of record.

53 171 Cal. 227, 152 P. 564 (1915).

54 *Id.* at 231, 152 P. at 566.

slum apartments are heavily mortgaged,[55] and the mortgagees are concerned lest the landlord-mortgagor do anything which might impair the formers' security interest.[56] For instance, in jurisdictions where liens for unpaid property taxes are superior to prior liens, the mortgagee requires the landlord to pay his property taxes. Once the mortgagee realizes that the landlord's failure to keep the premises in a habitable condition also can endanger his security interest, he will insist that the landlord make all necessary repairs.

Rent withholding legislation or any other remedy for the slum tenant is meaningless unless protection is afforded the tenant against retaliatory eviction by the landlord. Since most slum tenants are in possession under a month-to-month tenancy rather than a lease,[57] they are at the mercy of the landlord. In most jurisdictions he may evict them on thirty days' notice without even an explanation.[58] It would be very easy for a landlord whose tenants have begun withholding rent pursuant to statute to announce that he is terminating the tenancy and that they must vacate within thirty days. Indeed, it is this sort of threat which in the past has made many slum tenants reluctant to report housing code violations.[59]

In recent years the courts have whittled away at the landlord's right to be totally capricious in evicting tenants. In *Abstract Investment Co. v. Hutchinson*[60] the California District Court of Appeal held that the special defense of discrimination was proper in a possessory action under the unlawful detainer statute. If the tenant can establish that the landlord is attempting to evict him because of race alone, a court judgment ordering eviction would violate the Fourteenth Amendment prohibition against state action denying equal protection of the law.[61]

In *Edwards v. Habib*[62] the tenant had complained to the proper authorities of housing code violations. In the resulting eviction proceeding, the United States Court of Appeals for the District of Columbia held in a per curiam decision that the defense of retaliatory eviction was admissible. Judge Wright, concurring, stated that a court would not aid a landlord in depriving a tenant of his constitutional right to inform authorities of violations of the law.[63]

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55 Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 280 (1966).

56 *Id.*

57 Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 588 (1966).

58 CAL. CIV. CODE § 1946 (West 1954); Housing Authority v. Cordova, 130 Cal. App. 2d Supp. 883, 885, 279 P.2d 215, 216 (1955).

59 Comment, *Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia*, 36 GEO. WASH. L. REV. 190, 194 (1967).

60 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

61 *Id.*

62 366 F.2d 628 (D.C. Cir. 1965).

63 *Id.* at 629.

It is not too great an extension of the *Habib* rationale to prohibit a landlord from evicting a tenant for exercising his rights under a rent withholding statute. However, experience with an Illinois statute expressly prohibiting retaliatory eviction[64] indicates that a retaliatory motive has been difficult to prove in practice.[65]

It is evident that some form of legislative protection for the tenant against retaliatory eviction is required. This legislation could consist of a tolling of the landlord's right to evict once the tenant has exercised his rights under a rent withholding statute. In this area of legislation, as in rent withholding, California lags far behind the more progressive states. In New York the Spiegel Law suspends the landlord's right to evict for any reason while the welfare department is withholding rent.[66] Proposed H.R. 257 section 1250(a) indicates how non-welfare tenants can be protected from retaliatory eviction following a rent strike.

> Whenever a tenant . . . shall . . . [file] a complaint . . . alleging violation of the . . . Housing Regulations or Code, or whenever such Department shall serve a notice of deficiencies, or whenever such tenant shall . . . request that [the landlord] undertake . . . repairs . . . no action, or proceeding to recover possession of such premises shall be maintainable by the landlord against such tenant, nor shall the landlord otherwise cause such tenant involuntarily to quit such premises, for a period of nine months . . . notwithstanding that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the landlord . . . or a court pursuant to a court order, the rent to which the landlord is entitled.[67]

Massachusetts, Connecticut, and Pennsylvania have already adopted legislation similar to H.R. 257.[68] The Massachusetts statute provides that where a tenancy has been terminated without fault of the tenant who after diligent search is unable to find similar housing, the court may stay eviction proceedings for a period of three months or less.[69]

The Model Statute protects the tenant from eviction without cause for two years once a rent impairing violation exists.[70] This provision will give the tenant greater protection than legislation which does not suspend the landlord's right to evict until the tenant has complained or exercised his statutory right to withhold rent. Under the latter type of statute, the landlord who allows his building to fall into disrepair might anticipate troublesome tenants and evict them before they begin to complain. Since there is no purpose to be served in compelling a slum tenant to remain in the premises for two years if he wants to move out, the Model Statute allows him to

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64 ILL. REV. STATS. ch. 80, § 71 (1966).

65 Comment, *Retaliatory Eviction—Is California Lagging Behind?* 18 HASTINGS L. J. 700, 705 (1967).

66 N.Y. CODE SOCIAL WELFARE § 143-b (5) (McKinney 1966).

67 H.R. 257, 90th Cong., 2d Sess. § 1250(a) (1967).

68 MASS. GEN. LAWS ANN. ch. 239, §§ 9-13 (1959); CONN. GEN. LAWS §§ 52-546 (1960); PA. STAT. ANN. title 35, § 1700-1 (Supp. 1968).

69 MASS. GEN. LAWS ANN. ch. 239, §§ 9-13 (Supp. 1959).

70 Model Statute § IIIa .

terminate whenever he desires upon the giving of proper notice.[71] Nothing in the statute prohibits the landlord from evicting the tenant for waste, disorderly conduct, nonpayment of rent when not withheld pursuant to statute, or for any other reasonable cause.[72] The landlord's right to raise rents is restricted in order to prevent him from doing indirectly what he may not do directly.[73]

It may seem harsh to force the landlord to plead and prove that his motive is not retaliatory in order to evict once a rent impairing violation exists. But when one considers that modern apartment houses are no more than income producing property and that tenants are totally subservient to the landlord under a month-to-month tenancy, the statute does not seem quite so inequitable. The landlord is providing an essential service because he wants to make money, and as long as the tenant pays a fair rent and conducts himself in a reasonably civilized manner, the landlord has no more justification to refuse his patronage than does the supplier of any other essential service.[74]

Passing mention should be made of the constitutional issues raised by the Model Statute. Its various provisions are likely to be challenged on the grounds of violation of due process and impairment of contracts.[75] Nevertheless, litigation involving similar statutory provisions in other jurisdictions indicates that the Model Statute will survive these attacks. The following does not purport to be an exhaustive treatment of the myriad issues presented, since such a discussion would be far beyond the scope of this comment.

In *Milchman v. Rivera*[76] the basic provision of the Model Statute, the right of the State to allow the tenant to withhold rent, was questioned when the constitutionality of New York's Spiegel Law was challenged. The court held that the Spiegel Law was a valid exercise of the State's police power.[77] Since it did not permanently deprive the landlord of his

[71] Model Statute § IIIb.

[72] Model Statute § IIIc.

[73] Some form of legislation establishing rent control districts might be appropriate to protect the tenant from indirect eviction but this topic is beyond the scope of this comment.

[74] It might be appropriate to enact legislation granting all tenants a certain minimum estate whenever they enter into possession of rental property. Only legislation of this nature would fully protect the tenant from retaliatory eviction. Such a proposal, however, would warrant a more extensive discussion than is permitted by the scope of this comment.

[75] *See* Central Savings Bank v. City of New York, 279 N.Y. 266, 18 N.E.2d 151 (1939), *cert. denied*, 306 U.S. 661 (1939), where a lien subordination statute was held an illegal impairment of the obligation of contracts.

[76] 39 Misc. 2d 347, 240 N.Y.S.2d 859 (1963).

[77] For a discussion on the broad interpretation given the concept of the State's police power, see Miller v. Board of Public Works, 195 Cal. 477, 485, 234 P. 381, 383 (1925); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 82-83 (1958).

right to rent, the statute did not constitute a taking of property without due process of law.

Section 309 of the New York Multiple Dwelling Law, containing receivership and lien subordination provisions similar to those in the Model Statute, was challenged in *In Re 1531 Brook Ave.*[78] The New York court held that since the statute contained specific provisions for notice to interested parties, a hearing, and an opportunity for the landlord to make repairs, it was a valid exercise of the police power and did not violate due process or impair the obligation of contracts.

The United States Supreme Court has already passed upon statutes similar to the provision of the Model Statute which tolls the landlord's right to evict. In *Block v. Hirsh*[79] the United States Supreme Court upheld the constitutionality of a District of Columbia statute which provided that the right of a tenant to occupy any hotel, apartment, or other rental property was to continue notwithstanding the expiration of his term so long as he paid his rent. The statute was to remain in effect for only two years. The Supreme Court held that the statute was a valid exercise of Congress's police power over the District and did not deprive landlords of their property without due process of law. Emergencies growing out of World War I had resulted in dangerous and burdensome housing conditions. The Court stated that a public exigency would justify the legislature in restricting property rights to a certain extent without compensation.

In *Marcus Brown Holding Co. v. Feldman*[80] the United States Supreme Court upheld the constitutionality of a New York statute similar to that involved in the *Block* case. The Court rejected the argument that to the extent the statute affected leases made before it was enacted, it constituted an illegal impairment of the obligation of contracts. The legislation was justified, as in the *Block* case, under the State's police power, and as Justice Holmes pointed out, all contracts are made subject to the right of the State to exercise this power properly. Therefore, there should be no constitutional complications arising from the application of the Model Statute to tenancies already in existence at the time of its enactment.

V. CONCLUSION

The adoption of the proposed Model Statute would divest modern real property law of its medieval shackles and make it relevant to contemporary society. It would be a major step toward equalizing the position of the tenant vis-à-vis his landlord. While it is not the definitive answer to the problem of substandard housing, it is one answer in an area of the law where there are no definitive answers.

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78 38 Misc. 2d 589, 236 N.Y.S.2d 833 (1962).
79 256 U.S. 135 (1921).
80 256 U.S. 170 (1921).

It could be argued that rent withholding is an imperfect weapon in the war against slum housing, striking at some guilty landlords harder than at others. The sanctions provided in the Model Statute, especially the lien subordination provisions, may discourage investment by lending institutions in construction of low cost housing, thereby reducing the accommodations available to the slum tenant.. Some may urge that effective enforcement of existing housing laws would be a better means of eliminating slum housing. Mere enforcement of housing code regulations, however, denies the individual tenant any control over his destiny. All vital decisions are made by the enforcement officials.

What is sorely needed today is a remedy which will not only give the slum tenant improved housing, but will also replace his psychology of despair with a psychology of hope. It is submitted that the Model Statute, giving the slum tenant the initiative to control his own future, is such a remedy.

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