The Residential Lease: Some Innovations for Improving The Landlord-Tenant Relationship

I. INTRODUCTION

In the area of landlord-tenant problems, the typical urban lease for residential dwellings has not proven to be a vehicle for improving housing conditions or the relationship existing between landlord and tenant. However, it is submitted that innovative lease agreements, created by attorneys cognizant of legal and non-legal stresses affecting the participants in the urban rental housing market, can lessen the mounting housing crisis—a crisis manifested by poor quality housing and poor quality landlord-tenant relations.[1]

In terms of the low-income tenant, much of the urban housing is substandard, old, and overcrowded.[2] Although numerous efforts have been made by statutory enactments and judicial rulings to improve dwelling conditions, the "root cause of slums is economic" and not legal.[3] Completely rehabilitating substandard dwellings can require a plan more expensive and more time consuming than even new construction.[4] In some instances, merely bringing old housing up to the

[1]Although the proposals discussed in this article can be applied to tenants of each income level, the major thrust of this article is directed towards the problems arising between the urban landlord and the low-income tenant.

[2]*See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257-58 (1968) [hereinafter cited as CIVIL DISORDERS].

[3]J. LEVI, P. HABLUTZEL, L. ROSENBERG, J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 10 (1969) [hereinafter cited as LEVI].

[4]THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING—A DECENT HOME 108 (1968) [hereinafter cited as A DECENT HOME].

applicable housing code standards has resulted in rent increases beyond the low-income tenant's ability to pay,[5] and perhaps even more injurious, the landlord has abandoned the housing complex entirely.[6]

Typically, the urban landlord has utilized form leases as a matter of convenience and to protect his economic interests. But these same form leases have had the collateral effects of permitting further housing deterioration and increasing tensions between the landlord and the tenant.[7] For the low-income tenant, involvement in developing these lease agreements is minimal if not entirely absent.[8] The tenant in search of housing is confronted with the alternatives of accepting the proffered lease or "contract of adhesion,"[9] going without the security of any written agreement, or remaining homeless.

Lacking some outside force, it would seem improbable that the landlord would acquiesce to alterations in the present lease procedure that now preserves his unilateral dictation of the landlord-tenant relationship.

However, a potentially disruptive force is emerging in the form of organized tenants. Despite the desire for improved housing conditions, the individual tenant has not succeeded in upgrading his leased dwelling or improving the relationship existing between himself and the landlord. As a result of this individual weakness, tenants representing all income levels have begun to unite into tenant unions.[10]

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[5]CIVIL DISORDERS, *supra* note 2, at 259.

[6]*Id.*

[7]For examples of major tenant grievances as well as examples of inequitable form lease provisions, *see* T. FLAUM & E. SALZMAN, URBAN RESEARCH CORPORATION REPORT: THE TENANT'S RIGHTS MOVEMENT 12-15 (grievances), 35-40 (lease provisions) (1969) [hereinafter cited as FLAUM & SALZMAN].

[8]"Among low-income tenants, the impetus to execute a lease usually comes from the landlord. Where local law is ambiguous or extends a tenant's common law rights as to significant terms and conditions of occupancy, it is clearly to the landlord's advantage to propose to the prospective tenant a lease favoring the landlord's interests and usually on a "take it or leave it basis." It is conjectural whether in fact *any* bargaining takes place at the original execution of a lease for low-income premises." (Emphasis added). Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society,* 46 J. URBAN L. 695, 715 (1969) [hereinafter cited as Garrity]. "Because of their lack of bargaining power, the poor are made to accept onerous lease terms." Williams et al. v. Shaffer, 385 U.S. 1037, 1040 (Douglas, J., dissenting) (1967), *denying cert. to* 222 Ga. 334, 149 S.E. 2d 668 (1966).

[9]Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change,* 54 GEO. L. J. 519, 554 (1966) [hereinafter cited as Schoshinski].

[10]*See* Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant,* 77 YALE L. J. 1368 (1968) [hereinafter cited as *Tenant Unions*]. Moreover, the tenant union movement is no longer simply a manifestation of low-income tenant dissatisfaction but has emerged among tenants in the upper income brackets as well. *See, e.g.,* Urban Research Corp., *Luxury Tenants on Strike,* THE TENANT MOVEMENT 1 (August-September, 1970) [hereinafter cited as THE TENANT MOVEMENT].

The increasingly prevalent activities of these organizations have included rent withholding and street protests that have resulted in financial loss and inconvenience for the particular landlord as well as a worsening of the already tenuous landlord and tenant relationship.[11] Whatever the ultimate impact of this new influence on the urban housing market may be, the landlord can no longer be oblivious to the feelings of his tenants who are finding strength in numbers.

To mitigate the increasingly rigid lines between landlord and tenant, effective lease counseling by attorneys for both sides must go beyond the legal minimums of the typical form leases. Yet, proposals must remain within the realm of attainable goals if there is to be an effective compromise between the pressures bearing on the landlord and the needs of the tenant. Consideration should be given to factors that, if provided for in the lease, can decrease the intensity of existing controversies and thereby benefit both landlord and tenant. An awareness of areas of tenant dissatisfaction during lease preparation may succeed in stemming the current pressure for tenant organization without forcing the landlord to withdraw his assets from the housing market because of excessive burdens.

The following discussion concentrates on selected lease provisions and their relationship to matters of particular tenant dissatisfaction. The proposals are intended to present the tenant with alternatives to tenant unionization and confrontation tactics. The suggestions are likewise designed to present the landlord with alternatives to the *status quo* and the potential of rent strikes and fiscally impractical demands. Most important, the various proposals are intended to stimulate thought and renew creativity in the field of dwelling leases, an area beset by readily available but often antiquated and unresponsive form leases.

II. LEASE PROPOSALS

A. LANDLORD-TENANT COMMUNICATION

To insure the much needed dialogue between the landlord and tenant, it becomes essential that the residential lease establish a framework for landlord-tenant encounters designed to air grievances and provide clarification of management action.

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[11] *Tenant Unions, supra* note 10, at 1393-1394.

The problem of maintaining open and regular lines of communication between the landlord and his tenants exists in apartment complexes of every size. At least partially because of the lack of meaningful communication, the usual relationship existing between the urban landlord and the tenant is "one of the uneasiest in human experience" with neither side viewing the other as truly understanding, helpful, or exemplary.[12] "Yet, when they can be caused to sit down together and discuss mutual problems, each is likely to be surprised at how reasonable the other becomes."[13] Absent free and continuous interchange, each side is provided with opportunities to build up misunderstandings. These misunderstandings often result in increased rigidity in barriers already existing between landlord and tenant. Because of the growing unrest with the absence of landlord-tenant communication, one of the goals of tenant organizations has been the express provision for grievance meetings and procedures in lease agreements.[14]

1. "TOWN-MEETINGS"

As the rise of the tenant union indicates, a mere lack of discussion between the landlord and the tenant does not stifle tenant dissatisfaction nor eliminate the misunderstandings created in purely tenant grievance discussions where the landlord is not in attendance. The creation of a system of organized, periodic encounters between the landlord and interested tenants[15] can furnish the urban landlord with a rare opportunity to explain the financial and social strains bearing heavily on his managerial actions.

A provision in the lease agreement for weekly, bi-weekly, or monthly "town-meetings" necessarily results in greater pressure on the landlord. He, or his agent, must be willing to devote the additional time required for attendance at these meetings. The landlord must be disposed to listen to numerous complaints and verbal attacks and be prepared to defend and explain actions affecting the tenant and the apartment complex. This added responsibility, however, can be promotive of greater benefits and relieve mounting pressures by giving each side an opportunity to discuss differences and by providing each

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[12]Sembower, *Landlord-Tenant Arbitration: An Award and Comments*, 24 ARB. J. (n.s.) 35, 43 (1969) [hereinafter cited as Sembower].

[13]*Id.*

[14]*See, e.g.*, Nat'l Ass'n of Community Counsel, *Tenant Rights*, COMMUNITY LEGAL COUNSEL REP. 1, 2 (August, 1968).

[15]Many tenants will probably not actively or regularly participate in these periodic gatherings. However, the mere *availability* of these meetings to discuss grievances as a factor in reducing hostility provides justification for a plan of "town-meetings."

side with the occasion to explain its position and to better understand the other side.

In an effort to give tenants a voice in the management of the apartment building, statutes have been enacted in some states to provide tenants in public housing projects with an opportunity for expression in determining rules, rents, and services;[16] tenant participation in management has also been one of the expressed goals of the emerging tenant unions.[17] For the landlord willing to acknowledge in some way the tenant's desire for a voice in management, the "town-meetings" provide an excellent opportunity for group management or at least advice and discussion concerning such matters as excessive noise, vandalism, safety and even rent increases and maintenance.

As an alternative to a system of regularly scheduled meetings, a plan can be set out in the lease whereby any party desiring a grievance session can post notice and the meeting can be held on the next prearranged date. Depending on the facilities of the particular residential complex, the designated meeting place can be a room in the apartment building, a local church hall, or some other easily accessible site.[18]

2. *"CONCILIATION"*

In the event that some grievances cannot be settled by using the system of "town-meetings" established in the lease, an opportunity can be made available for the engagement of a third party to aid in settling disputes. Where the applicable state statutes will enforce arbitration agreements relating to future controversies,[19] the lease can provide for a binding arbitration procedure.[20] However, it seems unlikely that the landlord would agree to such a binding procedure in a lease agreement without considerable pressure by organized tenants.[21] Therefore, efforts should be made to incorporate a form of conciliation procedure in the lease. Under this procedure the conclusions reached by the third party would not be binding on either

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[16]*See, e.g.*, P.A. 344 (1968), MICH. C.L.A. § § 125.699-125.705, discussed in Note, *The Michigan Tenant's Rights Statute*, 6 HARV. J. LEG. 563 (1969).

[17]*Now It's "Rent Strikes,"* U.S. NEWS&WORLD REP., Oct. 20, 1969, at 31.

[18]For a possible guide to drafting a grievance procedure, see the suggested provisions in 2 THE NAT'L HOUSING L. PROJECT, HANDBOOK ON HOUSING LAW: LANDLORD TENANT MATERIALS L-T Ch. I, 73 (1969)[hereinafter cited as NAT'L HOUSING L. PROJECT].

[19]For a list of state statutes making arbitration agreements binding, see Cushman, *Arbitration and State Law*, 23 ARB. J. (n.s.) 162, 167 n. 18 (1968).

[20]Sembower, *supra* note 12, at 35.

[21]Murphy, *A Proposal For Reshaping The Urban Rental Agreement*, 57 GEO. L. J. 464, 478 (1969) [hereinafter cited as Murphy].

side, and the landlord would not need to fear loss of control over his investment. Yet, the introduction of a third party into grievance discussions, even in an advisory capacity only, can lead to a clarification of the issues and settlement of a controversy that the landlord and tenant meeting alone are incapable of resolving.[22]

The lease provision should indicate the party to whom the grievance is to be submitted as well as any pertinent notice requirements to guarantee that both the landlord and the tenant are aware of their respective rights and obligations. Where there is some local figure generally respected by the landlord and the tenants, his name might be inserted in the agreement as a possible conciliator. Selection of a genuinely disinterested third party and creation of a lasting conciliation process, however, can create difficulties where there is no participation by a tenant union and its spokesman to provide continuity of interest. Therefore, the lease can specify some alternative means for the selection of a third party to hear the grievance if there is opposition to the named conciliator or where no conciliator has been named in the lease. One possible method of selection would be to permit each party to designate a third party, and these individuals would then select another to act as conciliator for the particular controversy.

Regardless of the selection process, the individual or individuals chosen to act as conciliators in landlord-tenant disputes must be willing to participate voluntarily or with only nominal compensation because of the financial capabilities of the low-income tenant. To maintain impartiality, where the conciliator is to be paid, each side should share the costs equally.

3. "HOST-TYPE" MANAGEMENT

A recent experiment in the area of landlord-tenant communication has been the initiation of "host-type" management.[23] This procedure requires the resident manager to enage in a continual process of seeking out tenant complaints on a person-to-person basis and then remedying the problems as quickly as possible.[24] A clause can be inserted in the lease whereby the landlord, or the building manager, periodically discusses tenant problems on an individual basis. This method of apartment management has apparently been effective where the practice of energetically seeking out complaints is basic management

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[22]*See generally* Johnson, *Contrasts in the Role of the Arbitrator and of the Mediator*, 9 LAB. L. J. 769 (1958).

[23]THE TENANT MOVEMENT, *supra* note 10, at 2.

[24]*Id.*

policy.[25] Although this individual interchange on a personal level directed towards discovering and remedying complaints may be viewed as the zenith in the drive for improved landlord-tenant dialogue, the effectiveness of the plan in practice where it is a lease duty and not a voluntary responsibility by the landlord would seem to depend on some degree of sophistication of the parties and a preexisting cordiality in their relations. Moreover, the added costs of adequately implementing such a program might preclude its utility with respect to low-income housing.[26] As should be the case with any lease alternative, the particular characteristics of the landlord and the tenants of the building will determine the viability of this means of promoting dialogue.

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The potential advantages to be derived from improved communication, such as curbing tenant dissatisfaction and keeping the landlord informed of housing conditions, should not be disregarded because of the possibilities of added efforts needed to maintain the communication procedure or the inability of the particular procedure to solve all grievances. Admittedly, the decisions reached in litigation or through compulsory arbitration are decisive and binding determinations of existing differences, but they are also time consuming and expensive.[27] It is suggested that the more informal and less cumbersome methods of settlement, such as periodic meetings or local conciliators, are a preferable method of resolving the day-to-day problems of the urban apartment complex.[28] However, it cannot be forgotten that the effectiveness of various provisions for improving dialogue between the landlord and the tenant is dependent upon their willingness to exercise good faith efforts in utilizing the available procedures.

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[25]*See id.*

[26]In the case of an apartment complex that utilized "host-type" management, the added costs necessitated a 3 to 5 percent increase in monthly rents. *Id.*

[27]Regarding the prohibitive expense involved in resorting to litigation to resolve landlord-tenant differences, see COMM. ON THE CONTINUING EDCUATION OF THE BAR, STATE BAR OF CALIFORNIA, LEGAL ASPECTS OF REAL ESTATE TRANSACTIONS § 26, at 540-541 (1956) [hereinafter cited as LEGAL ASPECTS OF REAL ESTATE TRANSACTIONS].

[28]"[The utilization of informal, periodic grievance meetings] is fundamental, because plainly no practical arbitration machinery can operate to handle on an original jurisdictional basis all the complaints which are bound to arise day to day concerning such matters as leaking faucets, plugged toilets, and the like." Sembower, *supra* note 12, at 42.

B. SECURITY DEPOSITS

All too frequently the residential tenant experiences the erratic nature of security deposit[29] refunding procedures.[30] Although many tenants often tacitly accept the inequitable results, a new trend of dissatisfaction in these procedures is emerging.[31] Landlords have already been confronted actively by dissatisfied tenants in the form of tenant unions and coalitions of tenant organizations intent on altering the current uncertain status of security deposits.[32]

Theoretically, the security deposits are created to insure against the contingencies of unpaid rents, tenant-inflicted damages, and unclean premises at the termination of the lease.[33] Any claim as to the retention of these funds by the landlord arises only at such time as there has been a breach of the tenant's obligation and an assessment of damage.[34] However, the security deposit in actuality has evolved into a bonus to be kept by the landlord upon termination of the lease agreement regardless of the damages actually sustained by the landlord. Landlords will retain security deposits after the departure of a

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[29]"Security deposit" refers to monies paid to secure performance of the terms of the lease. "[M]onies paid upon the execution of a lease . . . fall into four classes: (1) advance payment of rent; (2) as a bonus or consideration for the execution of the lease; (3) as liquidated damages; *and* (4) as a deposit to secure faithful performance of the terms of the lease." (Emphasis added). Thompson v. Swiryn, 95 Cal. App. 2d 619, 625, 213 P.2d 740, 744 (1950).

[30]For a discussion of "the disappearing security deposit," *see* Murphy, *supra* note 21, at 475-476.

[31]The *Handbook on Housing Law*, prepared primarily as a guide for Legal Services attorneys representing low-income tenants, suggests procedures for better protecting tenants' security deposits. NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T ch. I, 70.

[32]Instances of excess deductions of as much as twenty dollars to repair a nick in a refrigerator as well as a complete absence of refunds in other cases, prompted the formation of a statewide group of tenant unions in New Jersey to alter the methods landlords use in handling security deposits. FLAUM & SALZMAN, *supra* note 7, at 22.

[33]Garrity, *supra* note 8, at 718.

[34]"If [the money paid at the execution of a lease] is a deposit for security, it may be retained by the lessor only to the extent of the damages actually suffered." Boral v. Caldwell, 224 Cal. App 2d 157, 164, 35 Cal. Rptr. 689, 692 (1963). "Ordinarily, the title to money deposited with the landlord as security for the performance of the covenants of the tenant remains in the tenant, subject to the terms and conditions of the lease, and the landlord has a lien on the deposit for the amounts which become due under the covenants of the lease." 52 C.J.S. *Landlord & Tenant* § 472(2) (1968). California Civil § 1951 reads in pertinent part:

> (c) The landlord may claim of such payment or deposit only such amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean such premises upon termination of the tenancy, if the payment or deposit made for any or all of those specific purposes. Any remaining portion of

tenant secure in the knowledge that a former tenant is severely inhibited from initiating legal action. This restraint is a product of a combination of factors including problems of proof,[35] the relatively small sum of money at issue, the time factor, and the distance now separating the tenant from his former landlord.[36] Where the reimbursement is forthcoming, usually the payments are delayed, the application of the retained amounts unitemized, and the interim retention and use of the funds having been without cost to the landlord.

A recent study indicates that of the form leases prevalent in ten major cities "not a single lease . . . contain[ed] an adequate definition of the status of a tenant's security deposit."[37] The lease clause suggested by the California Real Estate Association merely provides that:

> Tenant also agrees to pay upon execution of this lease, in addition to rent, a security deposit of $. Said deposit will be returned to Tenant by Landlord or his successors upon full performance of the terms of this lease.[38]

Thus the tenant "deposits" a relatively large sum of money with his newly acquired landlord under terms that are frequently vague or otherwise inadequate.

Not anticipating the return of their posted deposits because of prior experience or rumor, tenants can be expected to maintain the

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such payment or deposit shall be returned to the tenant no later than two weeks after termination of his tenancy. CAL. CIV. CODE §1951 (West Supp. 1971) (operative July 1, 1971).

[35]"[I]t may be somewhat unrealistic to expect the low-income tenant to bring suit for an unreturned security deposit and then overcome the defense of unexplained injury to the premises when this tenant neglected to obtain a list of defects at the commencement of his tenancy." Garrity, *supra* note 8, at 719.

See Subsection E. *Inspections, infra,* for a discussion of methods designed to remedy this problem of proof.

[36]*See,* NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 70. California Civil Code § 1951 provides a penalty where the landlord improperly retains the tenant's security deposit. The effectiveness of this new remedy will depend on an awareness of its availability on the part of the tenants. However, this statutory remedy may become a valuable tool for the more legally sophisticated tenant unions—if they can succeed in proving the requisite "bad faith." Section 1951 reads in pertinent part:

> (f) The *bad faith* retention by a landlord or transferee of a payment or deposit or any portion thereof, in violation of this section, may subject the landlord or his transferee to damages not to exceed two hundred dollars ($200), in addition to any actual damages. (Emphasis added). CAL. CIV. CODE § 1951 (West Supp. 1971) (operative July 1, 1971).

[37]FLAUM & SALZMAN, *supra* note 7, at 36, 38.

[38]CAL. REAL ESTATE ASS'N, LEASE (RESIDENTIAL), §4, (Revised, Nov. 1969).

premises in a less than diligent fashion especially during the latter part of the lease term.

1. ACCOUNTABILITY

The usual security deposit provision now provides merely for the amount, receipt thereof, a "refund" should certain conditions be fulfilled, and possibly a description of the deposit's intended use.[39] To augment these characteristic provisions, the landlord should accept the responsibility of returning the deposit to the former tenant within a specified time.[40] Where the deposit is to be used to remedy the tenant's defaults under the lease agreement, the landlord should agree to give the tenant written notice within the time specified for return of the deposit that all or part of the deposit will be withheld. A provision should also be inserted requiring an itemization of any deductions from the deposit. This accounting should include repairs, their costs, and conceivably the identity of persons employed by the landlord to make the necessary repairs. The landlord would forward this information to the tenant along with or immediately subsequent to the notice indicating that funds are to be deducted.[41]

These provisions clarify the status of the deposit and aid in a prompt and complete termination of the relationship. The tenant is immediately aware if funds will be deducted. He is provided with information that combats misunderstandings and suspicions. Also,

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[39] *Id.*; MODERN LEGAL FORMS *Leases* § 5095 (Supp. 1969).

[40]California Civil Code Section 1951 requires return of unused portions of the deposit within a specified time and reads in pertinent part:

> Any remaining portion of such payment or deposit shall be returned to the tenant no later than *two weeks* after termination of his tenancy. (Emphasis added). CAL. CIV. CODE § 1951 (West Supp. 1971) (operative July 1, 1971).

[41]The following is an example of a lease paragraph implementing the reforms suggested:

> The landlord agrees without demand to refund to the tenant within fifteen days of the expiration of this tenancy the security deposit and any additional deposits, and any accumulated interest thereon, paid by the tenant as a condition of his tenancy and in addition to the stipulated rent, or within such fifteen-day period to notify the tenant, by personal service or certified mailing to the tenant's last known address, of his intention to withhold and apply such monies toward defraying the cost of repair which under the terms of this agreement should have been made by the tenant. Failure to give the tenant such timely notice shall be a bar to the landlord's right to withhold and apply these funds in whole or in part. Within 30 days after the landlord has properly notified the tenant of his intention to withhold such monies he shall give the tenant an itemized and signed statement of the use to which such monies were applied, including names, addresses and fees of the persons making repairs, and he shall refund the balance. . . . Murphy, *supra* note 21, at 481.

he is furnished with sources from which additional information can be gathered to clarify any remaining questions.

2. *INTEREST*

Another subject of dispute is the problem of interest accruing on the security deposit during the period of the landlord's retention of the money. Where specific provision for an interest credit on the tenant's security deposit has been inserted in the lease, it has permitted the tenant recovery of interest attributable to that portion of the deposit actually returned, and the landlord is permitted to retain the remainder for indemnification purposes.[42]

Some writers have taken the position that payment of interest on security deposits in the case of the urban landlord entails more work and expense for the lessor than the generated funds would cover.[43] As a rationale for refusing interest payments on security deposits, this view is especially subject to question in view of the tenant's ownership of the funds, and others have urged adoption of interest provisions.[44] It is submitted that this latter position is preferable and should be considered.[45]

Depending on the size of the deposit and the length of time held, the accrued interest can aid the tenant in meeting his lease obligations in the event of a breach, and, of greater significance in terms of landlord-tenant relations, the interest clause can provide the tenant with an added incentive to exercise greater care of the premises. To facilitate the computation of this accumulating interest, an interest rate schedule can be established and a copy presented to the tenant upon execution of the lease. This form would enable immediate determination of accrued interest at any time throughout the lease term. In addition, the specific rate of interest established in the lease should reflect the added costs incurred by the landlord from increased book-

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[42]Pasadena Hudson, Inc. v. Maggiora, 157 Cal. App. 2d 724, 728-729, 321 P.2d 852, 855 (1958). "In the absence of a special agreement to pay interest on the deposit, none is chargeable." 52 C.J.S. *Landlord & Tenant* § 472 (2) (1968).

[43]LEVI, *supra* note 3, at 63.

[44]Murphy, *supra* note 21, 475-476.

[45]The following can be used as a guide for drafting a provision permitting the crediting of interest to the tenant's security deposit:

> In the event the landlord requires a security deposit or any additional monies to be paid by the tenant as a condition to the completing of this agreement the landlord agrees to . . . pay any accumulated interest for the period for which the monies are held as security and not used for the purpose of defraying unpaid rent or paying for repairs which were the duty of the tenant to make in accordance with this agreement. *Id.* at 481.

keeping expenses caused by accounting for the interest on security deposits. However, this expense should decline proportionately where the sum of the deposits is large and thereby a higher interest rate is feasible.

Assuming that it has been determined that interest will be computed on the security deposit for the benefit of the tenant, consideration can be given to the nature of the account for these funds.[46] Although it may be emotionally preferable for the tenants to have their security deposits placed in a bank account separate from the landlord's business account, this plan may run contrary to more practical considerations. Added bookkeeping duties can be avoided by permitting the landlord to commingle these funds with his own.[47] This commingling also serves as a compromise. The landlord is paying interest to the tenant on money that was previously "interest free" in the hands of the landlord. But the landlord will be paying a lesser rate of interest for the use of the funds than would be the case had he borrowed the same amount from commercial sources, assuming the lease stipulates an interest rate on par with rates applicable to savings accounts. Moreover, where the rate of interest and the express procedures relating to security deposits have been stipulated in the lease, the necessity for separate accounts would seem to be diminished.

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Lease provisions designed to protect the tenant's funds can alleviate some of the increasing tenant unrest. Regardless of the specific security deposit procedure envisioned or the amount of interest actually generated by the security deposit, the result of the above proposals can be an awareness by the tenant that his security deposit is protected by the lease agreement. The tenant is also made aware that his deposit is earning interest that is his if the premises are returned in satisfacory condition at the end of the term. Such security

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[46]*See, e.g.*, NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 70; Murphy, *supra* note 21, 475-476, 481.

[47]In the absence of an express provision permitting him to do so, the landlord is not entitled "to use the [security deposit] or retain the earnings therefrom, until [the tenant has] forfeited his ownership thereto by failing to comply with the terms of said lease. . . ." Ingram v. Pantages, 86 Cal. App. 41, 44, 260 P. 395, 396 (1927). The dearth of lease provisions relating to the payment of interest on security deposits (*see* Murphy, *supra* note 21, at 475-476) would thus indicate that most landlords are merely ***holding*** the deposited monies without utilizing the deposits or obtaining any earnings from the deposits until such time as there is a default—a result that appears inconsistent with economic reality. Therefore, it seems more realistic as well as more equitable to allow the tenant an interest credit on his security deposit and to permit the landlord to utilize the funds for the duration of the lease.

deposit procedures can be implemented without imposing an undue burden on the landlord if the pertinent provisions are developed with a view in mind of the time and expense involved to the landlord in utilizing the new procedure.

C. NOTICE

In many jurisdictions, form leases for rental dwellings contain a waiver of notice clause.[48] Such a clause will usually provide that "if, in the landlord's opinion, the tenant has failed to live up to any provision of the lease, the landlord may terminate the lease without notice."[49] The clause is inserted without benefit of negotiation[50] and effectively waives the tenant's existing statutory right to notice calling for the performance of the particular lease duty or for the vacating of the premises.

In contrast, California's statutory provisions relating to notice apparently have not been the object of waiver clauses.[51] Before an unlawful detainer action can be commenced to evict a defaulting tenant, California requires three days' notice be given to the tenant who has defaulted in rent payments or who has breached some other provision of the lease.[52] In the absence of a noncurable breach of the lease,[53] this notice must contain a request for the tenant to pay or perform or, in the alternative, to quit the premises.[54] However, California would appear to permit parties to a lease to stipulate notice provisions other than those called for by statute so long as such provisions are not contrary to public policy.[55]

The increasing awareness of the financial problems of the low-income tenant have prompted suggestions to prohibit waiver of notice

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[48]Schoshinski, *supra* note 9, at 552. *See, e.g.*, 8 AM. JUR. LEGAL FORMS *Landlord and Tenant* Nos. 8:293, 8:294 (1954).

[49]FLAUM & SALZMAN, *supra* note 7, at 36.

[50]Schoshinski, *supra* note 9, at 552.

[51]Telephone conversation with Myron Moskovitz, Chief Attorney, National Housing Law Project, Berkeley, California, October 21, 1970.

[52]CAL. CODE OF CIV. PROC. § 1161(2), (3) (West 1967).

[53]CAL. CODE OF CIV. PROC. § 1161(2), (3) (West 1967).

[54]CAL. CODE OF CIV. PROC. § 1161(2), (3) (West 1967).

[55]"There is nothing in the contractual provision for the termination of the lease [requiring a thirty-day notice to vacate after the lessees have been in default sixty days] that violates any rule of public policy, and that parties may, in their lease, provide for the termination thereof upon notice different from and superseding that prescribed by the code is well established. [Citations omitted]." Devonshire v. Langstaff, 10 Cal. App. 2d 369, 372, 51 P.2d 902, 904 (1935); LEGAL ASPECTS OF REAL ESTATE TRANSACTIONS, *supra* note 27, § 56, at 553, citing to *Devonshire* v. *Langstaff*.

clauses as well as to insert provisions for longer notice periods.[56] These longer notice periods permit the tenant, lacking financial reserves, greater time to fulfill his overdue obligations, and there appears no reason to expect that California landlords will be immune from pressure designed to benefit the tenant by extending notice periods. It is submitted that efforts can be made to stem possible unrest by accommodating notice provisions to the problems of tenants in a particular complex without disregarding the landlord's interests.

1. LONGER PERIODS

Where rental units are comprised mainly of welfare recipients or low-income wage earners hit first by economic fluctuations, lease provisions with longer, non-waivable notice periods can be suggested by counsel. These longer periods might be expected to meet with landlord opposition where rent defaults are involved. To the landlord, an increased period before eviction proceedings can be commenced may signify only a longer free rent period.[57] Longer notice periods, however, do provide the tardy or financially troubled tenant with an added opportunity to obtain the necessary funds and could bypass the inconvenience to the landlord of an eviction proceeding as well as the tenant's discomfort arising from such a proceeding.[58]

Another variation of the notice procedure is the insertion of a "grace period."[59] The tenant is thus granted a short period after rent falls due in which to make payment or, where there has been some other breach of a lease duty, to fulfill that duty. Although this concept has been suggested in situations where waiver of notice clauses prevail,[60] the "grace period" can be implemented in conjunction with statutory or extended notice provisions. After the "grace period" has passed and the default or breach remains, the appropriate notice procedure can be commenced.

2. EMERGENCY DELAYS

As an alternative to longer notice periods for all tenants, provisions have been suggested acknowledging particular financial crises

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[56]*See, e.g.*, Murphy, *supra* note 23, at 477; NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 68.

[57]Murphy, *supra* note 21, at 477.

[58]LEGAL ASPECTS OF REAL ESTATE TRANSACTIONS, *supra* note 27.

[59]Murphy, *supra* note 21, at 477.

[60]*Id.*

that beset the low-income tenant. These procedures permit an extended period before eviction action can be commenced upon the occurance of specific emergency situations.[61] These may include interruptions in welfare payments or a halt in wages because of a labor strike or lay-off.[62] These and other similar occurrences can mean disaster for a tenant unable to temporarily defer rent payments or other lease obligations. However, in consideration for this extension, the tenant can be required to pay a specified rate of interest for the period of the delay.

Where this emergency procedure is utilized, a method of verifying the validity of the tenant's financial incapacity can be devised and stipulated to as a prerequisite to any emergency delay. The lease can require verification by a letter to the landlord from a local welfare or labor official explaining the nature and probable duration of the tenant's difficulty. The tenant should be given the responsibility of requesting these informational letters to avoid further burdening the landlord, who may already be reluctant to accept alternations in current lease formats.

This verification procedure establishes a formal method of presenting the tenant's special predicament to the landlord. The information obtained may be persuasive in determining the necessity for legal action at the termination of the emergency period. The landlord may discover that the delay, while longer than the applicable notice period would have been, will only be temporary and not require eviction nor the initiation of cumbersome eviction proceedings. Moreover, this formalized method of acquainting the landlord with the tenant's problems can expand the often circumscribed nature of landlord-tenant communication.

* * *

The financial incapacity of the low-income tenant has lead to inquiry into the propriety of landlords evicting such tenants for non-payment of rent resulting from work lay-offs or slow welfare checks.[63] It has been argued that the intervention of these factors temporarily precluding payment ought to be judged a valid defense in eviction proceedings.[64] These arguments could likewise be applied to other breaches that arise because of temporary financial incapacity. The alternatives proposed in the form of emergency deferrals or

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[61] *See generally* NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. 1, 69.

[62] *Id.*

[63] *See* Garrity, *supra* note 8, at 720.

[64] *Id.*

extended notice periods are also intended as a recognition, albeit more limited, of this dependence by low-income tenants on periodic income allotments and their nearly total lack of financial reserves. These alternatives are intended to serve as a compromise. More liberal notice procedures serve to blunt arguments seeking to limit or preclude some eviction proceedings; yet, the suggested notice procedures can also improve the often uncertain status of the tenant—a result that may have a positive impact on the entire dwelling complex.[65]

D. THE DUTY TO REPAIR

The nature and the extent of the duty to repair rental dwellings is becoming one of the major crises issues in the realm of landlord-tenant relations. Archaic and ineffective legal remedies,[66] the shortage of adequate housing,[67] and the economic realities of the rental housing market[68] have combined with inadequate lease agreements[69] to furnish many tenants with housing falling below minimum standards. To further complicate this problem, tenants are no longer acquiescing to these deteriorated housing conditions. While a number of factors have resulted in tenant dissatisfaction, poor maintenance, including dilapidated housing and specific housing code violations, has provided the major grievance for low-income tenants of private housing.[70] Complaints by low-income tenants relating to maintenance far

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[65]*See generally* LEVI, *supra* note 4, at 9-10.

[66]*See* Van Every v. Ogg, 59 Cal. 563, 565 (1881) (landlord under no duty to repair at common law); testimony of Myron Moskovitz before the California Legislature, Assembly Committee on Urban Affairs and Housing (Dec. 2, 1969), on file with the U.C.D. LAW REVIEW (the ineffectiveness of California statutory protection); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, at 278 (1966) (the ineffectiveness of sanctions for housing code violations); Garrity, *supra* note 8, at 705 (the ineffectiveness of various new proposals to meet the problem of disrepair).

[67]*See* A DECENT HOME, *supra* note 4, at 8, 20-21 (inadequate housing nation-wide); 3 *California's Housing Needs*, HOUSING AND COMMUNITY DEVELOPMENT NEWS 4 (Oct.-Dec., 1968), cited in E. SCOTT & E. RABIN, REPORT OF THE LOW INCOME HOUSING PROJECT—HOUSING CODE ENFORCEMENT IN THE CITY OF SACRAMENTO: PROPOSALS FOR CHANGE Ch. II, 6-8 (1969) (inadequate housing in California).

[68]*See* statement of Charles Davenport, *Hearings on H.R. 13270 Before Senate Comm. on Finance*, 91st Cong., 1st Sess. 4903 (1969); CIVIL DISORDERS, *supra* note 2, at 259; A DECENT HOME, *supra* note 4, at 7-8.

[69]*See* Schoshinski, *supra* note 9, at 521. *See, e.g.*, CAL. REAL ESTATE ASS'N, LEASE (RESIDENTIAL) ¶ 10 (Revised, Nov. 1969) (inadequate guidelines relating to landlord's duty to repair).

[70]FLAUM & SALZMAN, *supra* note 7, at 12-13. Poor maintenance is also the major grievance of tenants in public housing, and for upper and middle income tenants,

outnumber those concerning rent increases and inadequate safety or security features; criticisms of apartment maintenance also outnumber complaints relating to the lack of tenant control over the dwelling complex.[71] Moreover, it is the low-income tenants that have indicated the greatest propensity of all income levels for rent withholding and the various forms of mass protest as methods for displaying their dissatisfaction with housing conditions.[72]

It is submitted, however, that innovative lease provisions, designed with an awareness of the various pressures bearing on the rental housing area, can serve to blunt growing tenant dissatisfaction by upgrading rental dwellings without unduly burdening the landlord.

1. CONFORMITY WITH HOUSING CODE REQUIREMENTS

One option available would be to require the landlord to bring the premises into conformity with local health and housing code requirements at the time of letting. The landlord would also undertake the burden of maintaining those standards during the tenancy with the stipulation that the tenant be responsible for damages and maintenance needs arising from a want of ordinary care by the tenant or his invitees.[73] This proposal for repair and maintenance under the lease provides an appealing simplicity and efficiency with regards to a determination of what actions are needed; this plan would probably result in little, if any, tenant unrest if fulfilled without corresponding rent increases.

In dwelling complexes where existing conditions vary only slightly from code requirements, this type of provision should be considered. However, where existing housing conditions are in substantial violation of housing code requirements, a provision requiring the landlord to put his building into conformity with code requirements might not be feasible. In some situations where tenants have sought strict enforcement of housing codes through court action, there has emerged an "implied judicial appreciation" that excessively punitive sanctions to compel landlord compliance with housing codes will only force the landlord to abandon his properties which "as deficient as they are,

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inadequate maintenance is ranked second only to criticisms of high rents as a cause for tenant dissatisfaction. *Id.* at 12-14.

[71] *Id.* at 12-13.

[72] *Id.* at 16. The term "mass protest" includes protest marches and demonstrations, rallies, sit-ins, and picketing. *Id.*

[73] "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care." CAL. CIV. CODE § 1929 (West 1968).

For an example of a lease proposal requiring maintenance of the rental premises in conformance with applicable housing code regulations, *see* Murphy, *supra* note 21, at 480.

provide a semblance of shelter to the very poor."[74] In other instances where strict enforcement has actually been tried, bringing many "old structures up to code requirements and maintaining them at that level often would [have required] owners to raise rents far above the ability of local residents to pay;" therefore, the landlords facing this economic squeeze were forced to abandon their buildings rather than bear the cost of repairing them.[75]

2. *NEGOTIATED REPAIR DUTIES*

Instead of a potentially extensive rehabilitation plan, it might be economically more beneficial and more practical for the landlord and the tenant if the lease provides a negotiable provision relating to repair duties. Under this proposal, after an initial inspection by the landlord and the prospective tenant and prior to entering into the rental agreement, the parties determine what specific repairs are to be undertaken, who will be responsible for the repairs, and when they will be accomplished.[76] This plan can serve as a compromise by meeting the tenant's immediate concerns relating to repairs within established time limits without burdening the landlord with rectifying all code violations or otherwise making significant, immediate financial outlays.

In California, for those maintenance and repair duties within the purview of the statutory protection of Civil Code§§1941, *et seq.*,[77] the landlord and tenant still retain considerable flexibility in developing negotiated repair provisions in the lease agreement. The parties

[74]Garrity, *supra* note 8, at 702.

[75]"There are economic reasons why these codes are not rigorously enforced. Bringing many old structures up to code standards and maintaining them at that level often would require owners to raise rents far above the ability of local residents to pay. In New York City, rigorous code enforcement has already caused owners to board up and abandon over 2,500 buildings rather than incur the expense of repairing them." CIVIL DISORDERS, *supra* note 2, at 259.

[76]*See generally* NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 50, 62; LEVI, *supra* note 3, at 10-11.

[77]*See* CAL. CIV. CODE § 1941 (West 1968), and §§ 1941.1, 1941.2, 1942, 1942.1 (West Supp. 1971).

In 1970, the California legislature amended and expanded the statutory duties relating to the duty to repair rental housing. *See* Ch. 1280 [1970] Cal. Stats. The former practice whereby tenants waived their rights to repair and deduct or vacate where conditions had rendered the premises untenantable is now precluded by voiding such agreements as contrary to public policy. CAL. CIV. CODE § 1942.1 (West Supp. 1971). The legislature also gave substance to the heretofore undefined term "untenantable" by so classifying premises that "substantially" lack any of the newly established statutory standards. CAL. CIV. CODE § 1941.1 (West Supp. 1971). When the premises are deemed "untenantable" by the new statutory criteria, the tenant is now permitted to repair and deduct up to one month's rent once in any 12-month period or vacate the premises. CAL. CIV. CODE § 1942 (West Supp. 1971).

can agree that the landlord will assume some or all of the repair or maintenance duties otherwise required of the landlord by the statutory provisions.[78] Depending on the extent of the duties assumed by the landlord, the parties can then agree that the tenant will assume any remaining maintenance and repair duties relating to tenantability for "all or stipulated portions of the dwelling as part of the consideration for rental."[79] Moreover, where the delapidations concern items not within the new statutory standards defining "untenantable," or

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[78]"The lessor of a building intended for 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...." CAL. CIV. CODE § 1941 (West 1968).

California Civil Code 1941.1 reads as follows:

> A dwelling shall be deemed *untenantable* for purposes of Section 1941 if it *substantially* lacks any of the following affirmative standard characteristics:
>
> (a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
>
> (b) Plumbing facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.
>
> (c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
>
> (d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.
>
> (e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.
>
> (f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.
>
> (g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.
>
> (h) Floors, stairways, and railings maintained in good repair. (Emphasis added). CAL. CIV. CODE § 1941.1 (West Supp. 1971).

[79]California Civil Code § 1942.1 (West Supp. 1971) reads in pertinent part:

> Any agreement by a lessee of a dwelling waiving or modifying his rights under Section 1941 or 1942 shall be void as contrary to public policy with respect to any condition which renders the premises untenantable, *except* that the lessor and the lessee may agree that the lessee shall undertake to improve, repair or maintain all or stipulated portions of the dwelling as part of the consideration for rental. (Emphasis added).

the deficiencies in those standards are less than "substantial,"[80] an agreement by the parties regarding the making of specific repairs would be controlling. In addition, an agreement by the parties relating to specified repairs would be effective where the needed repairs exceed in value the equivalent of one month's rent in a twelve month period—the cost limitation placed on expenditures under the statute regardless of existing deficiencies.[81]

In terms of low-income housing in advanced stages of disrepair, a provision permitting initial agreement between the landlord and the tenant regarding repair duties would seem preferrale to the suggested *Code Requirements* provision, *supra.* More particularly for California, the utilization of a *Negotiated Repair Duties* provision would appear to have a decidedly more beneficial influence on landlord-tenant relations than would mere reliance by the tenant on his statutory right to repair and deduct, and in view of the housing shortage, it would be more practical than utilizing the statutory "right" to vacate.[82] Moreover, the suggested provision can accommodate those repair problems not covered by the California statutory provisions either because of their nature or degree. These latter repair problems would seem to be likely subjects for future tenant unrest or tenant union action.

3. *CONTINUED MAINTENANCE*

A provision relating to the continued maintenance of the premises

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Although the tenant may no longer waive his rights to repair and deduct or vacate, California Civil Code § 1942.1 appears to permit the parties to the lease to agree that the tenant will make repairs that were formally the object of waiver clauses. The only limitation on this shifting of the burden of repair is that it be "part of the consideration for rental." Should this rather vague limitation on the landlord and the tenant's right to "agree" become the object of abuse by landlords, it might be expected that this aspect of § 1942.1 will become the subject of tenant dissatisfaction.

[80]*See* CAL. CIV. CODE § 1941.1 (West Supp. 1971), quoted, *supra* note 78.

[81]California Civil Code § 1942 reads:

> (a) 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 does 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. This remedy shall not be available to the lessee more than once in any 12 month period.
>
> (b) For the purposes of this section, if a lessee acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a presumption affecting the burden of producing evidence. CAL. CIV. CODE § 1942 (West Supp. 1971).

[82]*See* CAL. CIV. CODE § 1942 (West Supp. 1971), quoted, *supra* note 81.

can also be inserted in the lease. The landlord can agree to maintain those areas under his control in the same condition as at the time of letting or, where an agreement to make specific repairs exists, in the same condition as at the time such repairs are completed. The tenant should then be given the corresponding duty to care for his own residence. The tenant should also accept responsibility for the damage caused by himself or any person on the premises with his permission. Although these provisions will generally follow statutorily imposed duties,[83] it would seem that an elaboration of these duties in the lease agreement would serve to better inform the parties of their respective obligations and to reduce the possibilities of later confusion relating to lease duties.

4. LEASE REMEDIES

To better insure the landlord's good faith efforts in meeting his lease obligations as well as providing the tenant with some recourse short of reliance on statutory or other legal remedies, clauses can be inserted in the lease for a reduction or elimination of rental pay-

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[83]In the absence of an express covenant relating to the tenant's duty to repair, California imposes the following statutory duty on the tenant:

> The hirer of a thing must use ordinary care for its preservation in safety and in good condition. CAL. CIV. CODE § 1928 (West 1968).
>
> The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care. CAL. CIV. CODE § 1929 (West 1968).

In addition, no duty arises on the part of the landlord under § 1941, *et seq.*, where the tenant fails to exercise proper care of the leased premises. The applicable code provision reads:

> (a) No duty on the part of the lessor shall arise under Section 1941 or 1942 if the lessee is in substantial violation of any of the following affirmative obligations:
>
> (1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.
>
> (2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.
>
> (3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.
>
> (4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.
>
> (5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.
>
> (b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the lessor has expressly agreed in writing to perform the act or acts mentioned therein. CAL. CIV. CODE § 1941.2 (West Supp. 1971).

ments until such time as the landlord fulfills his duties.[84] As an adjunct or as an alternative to rent reduction, problems arising from disrepair can be discussed at landlord-tenant meetings or referred to third parties *via* arbitration or conciliation provisions.[85] In either case, the tenant is provided with some leverage in obtaining compliance where the landlord has been remiss in his duties. For the landlord who is bona fide in his intention to carry out the lease requirements relating to repair, these provisions should cause little resentment. In addition, furnishing the tenant with remedies short of court action can be important in convincing him that the lease is not a unilateral, landlord's document.

E. INSPECTION

The insertion of specific procedures relating to the initial condition of the rental dwelling, the making of periodic inspections, and the rendering of an end-of-term inspection is another part of the lease agreement that can perform the vital function of relieving tensions and misunderstandings existing between the landlord and the tenant.

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[84]*See* Murphy, *supra* note 21, 473-475. The following can be used as a guide for drafting a provision permitting a reduction in rental payments:

> It is further agreed that if the landlord breaches any of the covenants or warranties herein regarding the condition and maintenance of these premises after the tenancy has commenced, and the tenant gives notice of the need for repairs or restoration of said premises or replacement of certain parts thereon, and a reasonable time passes without the repair, restoration, or replacement having been made by the landlord, the stipulated rent payable by the tenant for these premises shall be reduced by 50% until said repairs, restoration, or replacement have been made. . . . Full rent shall begin to be due on the day the repairs, restoration, or replacements are completed; and only 50% of the stipulated rent shall be due for the interval between the expiration of time for the repairs to have been completed and the time when they are actually completed. At the option of the tenant, the landlord shall either credit the amount of the reduction under this paragraph toward the succeeding month's rent, or shall refund said amount in cash to the tenant within two weeks of the date of completion of repairs, restoration, or replacement. *Id.* at 480.

[85]*See* Subsection A. *Landlord-Tenant Communication, supra.* California Civil Code § 1942.1 (West Supp. 1971) expressly permits referral to arbitration of maintenance controversies arising under § § 1941 and 1942. Section 1942.1 reads in pertinent part:

> The lessor and lessee may, if an agreement is in writing, set forth the provisions of Sections 1941 to 1942.1, inclusive, and provide that any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, pursuant to the provisions of Title 9 (commencing with Section 1280), Part 3 of the Code of Civil Procedure, and that the costs of such arbitration shall be apportioned by the arbitrator between the parties. CAL. CIV. CODE § 1942.1 (West Supp. 1971).

Such provisions lead to better communication and ease the operational burdens associated with the residential complex. By delineating mutual rights and responsibilities relating to inspection procedures, each party can be assured of a bilateral recognition of the condition of the premises throughout the tenancy.[86] Differences arising as to responsibility for damage are diminished.[87] The tenant's privacy is expressly protected, and wasted efforts on the part of the landlord are averted.

1. INITIAL INSPECTION

At the commencement of the lease term and after a thorough inspection of the premises, the tenant and the landlord should sign a statement listing the condition of the premises and fixtures therein.[88] The form can be attached to the lease or a signed copy can be given to the landlord and the tenant and incorporated by reference into their copies of the lease. Each is then in possession of signed proof of the condition of the dwelling upon letting; as a result the typical phrase that "the premises will be returned in the same condition as when received, reasonable wear and tear excepted," will be more meaningful.[89]

2. MID-TERM INSPECTION

Subject to certain qualifications, if the tenant does not consent to inspection and there is no reservation in the lease of such a right, the landlord has no right of inspection during the lease term.[90] Such inspections, however, are beneficial to the landlord as a means of re-

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[86]*See* Murphy, *supra* note 21, at 475.

[87]*Id.*

[88]The following is an example of a lease provision requiring this beginning inventory:

> BEGINNING INVENTORY LIST: At the time of taking possession of the premises by the TENANT, the LANDLORD will provide the TENANT with an inventory statement listing all of the items of furniture and decoration within the premises. The TENANT will indicate on the statement whether the furniture and decorations, as well as the premises, are in good and sanitary condition. Both LANDLORD and TENANT will sign an original copy of the inventory statement within three (3) days of the date of taking possession. When the [TENANT returns] possession of the premises to the LANDLORD, [he] shall return the premises and its furnishings and decorations in the same condition as when received, reasonable use and wear thereof excepted. ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, MODEL LEASE ¶ 8 (1969), on file with the U.C.D. LAW REVIEW [hereinafter cited as MODEL LEASE].

[89]*See, e.g.*, 7 AM. JUR. LEGAL FORMS *Landlord and Tenant* Number 7:1135.1 (Supp. 1965).

[90]*See* 51C C.J.S. *Landlord & Tenant* §318 (1968).

maining informed as to the condition of his investment. They are likewise important to the tenant hoping to impress upon the usually absent landlord the conditions under which the tenant lives. Unless there is an emergency, the tenant wants and deserves privacy in his home. The landlord also has a special interest in not wasting inspection excursions by missing the tenant at his home. The usual form lease gives the landlord, his employees, and his contractors the right to enter all portions of the demised premises at any and all reasonable times for inspection or repair purposes.[91] A variation of this form permits inspection or repair any time "with Lessee's permission, which shall not unreasonably be withheld . . . ."[92] However, it appears that neither form provides the necessary "reasonableness," and each must be prepared for the distinct possibility of the other seriously questioning his view on that subject.

Periodic, general inspections should, therefore, be established in the lease. Subject to certain exceptions, such as a tenant's consent[93] on a particular occasion or the existence of an emergency, specific times can be inserted[94] in the lease during which inspections or repairs may be conducted after notice is given to the tenant by the landlord. Retaining the notice requirement prevents unnecessary surprise for the tenant who has temporarily forgotten the lease provisions relating to times and dates for the periodic inspections.

3. END-OF-TERM INSPECTION

Equally important is the end-of-term inspection. This inspection is closely related to the problem of security deposits and deserves agreement as to times and procedure. The tenant in the process of moving may prefer the landlord's final inspection at a time he considers the premises ready for surrender. Therefore, the tenant should have the responsibility for notifying the landlord of the preferred time or times for a joint inspection.[95] Using the account of the premises'

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[91]*See, e.g.*, 7 AM. JUR. LEGAL FORMS *Landlord and Tenant* Nos. 7:1089, 7:1246 (1954).

[92]CAL. REAL ESTATE ASS'N, LEASE (RESIDENTIAL) (Revised, Nov. 1969).

[93]This exception is beneficial where a feeling of mutual respect exists between the landlord and the tenant. It enables greater informality and can lead to friendlier relations. There still remains the problem of the "consent" resulting from the fear or ignorance of the tenant and not from the cordial landlord-tenant relations.

[94]*See* Subsection F. *Negotiable Provisions, infra.*

[95]The following is an example of a lease provision relating to the end-of-term inspection:

> END OF TERM INSPECTION: (a) When possession of the premises is returned to the LANDLORD at the termination of this lease, the LANDLORD and . . . [the TENANT] shall conduct a joint inspection of the

condition made at the outset of the lease, the landlord and tenant can mutually assess tenant caused damage. Should any damage be discovered after the tenant has vacated, this can be included in a statement to be mailed to the tenant. This statement should contain an itemization of all damages as well as the total security deposit deductions.[96]

F. NEGOTIABLE PROVISIONS

Short of actually taking over complete control of a particular residential complex,[97] one of the basic and most far-reaching aims of tenant organizations has been the strengthening of their customarily powerless[98] negotiating position *vis-a-vis* the landlord and the exercise of that freshly acquired power to the fullest.[99] Tenant conduct may be directed toward remedying particular problems such as unclean conditions or inadequate safety precautions. In the alternative, the tenant's efforts may be channeled directly toward a role in determining policies related to landlord-tenant relations.[100] Whatever the immediate goal, the end result will probably mean an increase of the tenant's negotiating power and surely will be signified by heightened tensions between the landlord and the tenant. The landlord is necessarily placed in a position of reacting to demands made by tenant groups rather than formulating and guiding apartment building policy. Preferable results would seem achievable where efforts are made *via* the lease to provide the tenant with the opportunity to aid in determining the particular form of the landlord-tenant relationship. Steps can be taken to relieve the growing pressure for a stronger tenant negotiating role by guiding the form of tenant involvement towards the mutual benefit of the landlord and the tenant by utilizing negotiable lease provisions.

Although use of negotiable clauses is inconsistent with the motive

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premises and its furnishings and decorations.

(b) The [TENANT], . . . must within one week prior to vacating the premises, arrange a mutually convenient time during the LANDLORD'S normal business hours for the inspection; failure to do so or to attend at the arranged time will relieve the LANDLORD of any obligation to make an inspection in the TENANT'S presence. MODEL LEASE, *supra* note 88, ¶ 9.

[96]*Id. See* Subsection B. *Security Deposits, supra.*

[97]*See* Maynard, *Tenant Rights Movement Is Gaining as Urban Housing Shortage Grows,* The Washington Post, Dec. 14, 1969, § A at 24, col. 1. *See also* NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 82-126.

[98]See, *supra* notes 8 & 9.

[99]*See generally* NAT'L HOUSING L. PROJECT, *supra* note 18, at L-T Ch. I, 1-81.

[100]*See* FLAUM & SALZMAN, *supra* note 7, 12-14.

of efficiency behind the deference to form agreements,[101] negotiable provisions are not incompatible with form leases. Allowance can be made for them in form leases by merely leaving specific details to be filled in or specific clauses to be inserted by the tenant and the landlord during joint discussions prior to the tenant entering into possession.[102]

Many specific grievances or inconvenient practices that create tenant dissatisfaction can be remedied by specialized lease provisions directed at the individual tenant's problems or characteristics. As an example the particular hour or date for periodic inspections of the premises by the landlord can be subject to mutual agreement and might involve such considerations as the tenant's work schedule. Where mutually desirable, the day of the month selected for rent payment can be made to coincide more closely with the tenant's payday through landlord-tenant discussion in lease preparation. For the tenant who is unable to read English but is literate in a foreign language, the use of a bilingual lease may be crucial and the exercise of an option in this regard should be reserved for initial landlord-tenant negotiations. Another area for mutual agreement might involve provisions for emergency termination of the lease without penalty in instances where there exists anticipated, yet unscheduled job transfers or possibly the indefinite prospect of military service.[103]

These few examples do not exhaust the items that can be accommodated by negotiable provisions and it is suggested that thought be given to this relatively undeveloped area in lease preparation. In addition to meeting the particular needs of individual tenants, negotiable provisions can serve other functions as well. Tenants imbued with the feelings of an active participant rather than those of a passive recipient in the living arrangement can be expected to exercise greater care and interest in the rental unit. Moreover, a tenant already active in formulating his living arrangements through nego-

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[101]"[Standard form contracts] save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit. . . ." Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939).

[102]This is currently being practiced to a limited extent with regard to such items as rent and termination date. *See, e.g.*, CAL. REAL ESTATE ASS'N, LEASE (RESIDENTIAL) (Revised, Nov. 1969).

[103]The following is an example of a lease provision that could be utilized relating to termination in the event of military service:

> This lease shall automatically terminate [when the TENANT] . . . is involuntarily inducted into the military service. The term "involuntary induction" shall include voluntary enlistment when involuntary induction is imminent. . . . MODEL LEASE, *supra* note 88, ¶ 14.

tiable provisions would seem to be under less compulsion to resort to more disruptive tactics designed to achieve a similar goal.

III. CONCLUSION

Perhaps "more than the good will of men" will be required.[104] Perhaps the "interrelated factors of a severe shortage of low-income housing, the deterioration of many inner-city dwellings and the inordinately disparate bargaining position between the urban landlord and his tenant fostered by protectionist legal principles compel governmental regulation and intervention in urban housing problems."[105] Perhaps it rests with legal assistance programs or tenant organizations to advise tenants as to the various forms of self-help available to improve housing conditions.

However, it is the premise of this discussion that it is not too late for compromise within the framework of the landlord-tenant relationship and that such compromise can enhance that relationship as well as improve rental housing conditions generally. In developing alternative provisions relating to current lease procedures, it becomes apparent that the significance of different lease provisions as a source of landlord-tenant discord varies with the changes in the economic and jurisdictional settings. Therefore, to reach constructive compromise lease agreements, it is suggested that the attorney drafting the lease consider the applicability of the proposals discussed herein to the particular housing conditions involved. The attorney must also scrutinize local economic, legal, and social conditions for other aspects of the residential lease that are susceptible to innovative lease development. Armed with alternative provisions, the attorney can then seek to alter existing form leases or lease practices to better accommodate the changing needs and demands arising within the rental housing market.

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[104]"One concludes ultimately that more than the good will of men will be required to transform an incredibly ugly contemporary housing experience into a sanitary new or renewed system of shelter for the masses." Murphy, *supra* note 21, at 478-79.

[105]Garrity, *supra* note 8, at 718.