

California's New Legislation On A Landlord's Duty To Repair

I. INTRODUCTION

California has long been faced with a serious substandard housing problem.¹ By and large, the incidence of such substandard housing can be ascribed to one very elementary fact: The current market cost of living in what constitutes standard or essentially decent housing today is beyond the economic means of a significant portion of the population.² And it follows that the problem pertains chiefly to the cost of living in properly habitable rental housing;³ the substantial investment, credit standing and additional expense necessary to acquire home ownership are likely to be prohibitive to those who can

¹Data from the 1960 Census revealed that at least 736,000, or 13.5 per cent, of California's housing units at that time were either "deteriorating with all plumbing," "deficient plumbing, not dilapidated" or "dilapidated." GOVERNOR'S ADVISORY COMMISSION ON HOUSING PROBLEMS, APPENDIX TO THE REPORT ON HOUSING IN CALIFORNIA 43 (1963). This assessment of the problem may well have been quite conservative. One authority has pointed out that in Washington D.C., for instance, the 1960 Census data indicated that only about 20 per cent of the District's housing units were substandard; five years later, assuming that the total number of housing units then was still comparable with the total recorded in 1960, inspections pursuant to the local housing code found that almost 50 per cent were substandard. O. SUTERMEISTER, INADEQUACIES AND INCONSISTENCIES IN THE DEFINITION OF SUBSTANDARD HOUSING 100-101 (National Commission on Urban Problems Research Report No. 19, 1969).

²See THE PRESIDENT'S COMMITTEE ON URBAN HOUSING—A DECENT HOME 7-11 (1968).

scarcely afford costs attributable to the basic physical amenities of their dwelling.

One of the most commonly suggested public policies for alleviating the incidence of substandard housing—by helping to bring standard or essentially decent rental housing within the purchasing power of all citizens—is to make residential landlords to some extent legally responsible and accountable to their tenants for maintaining the habitability of the premises. This article will be concerned with California's most recent legislative development toward implementing that public policy, the enactment of Assembly Bill (A.B.) 2033 of the 1970 session,⁴ amending and supplementing §§ 1941 and 1942 of the Civil Code.⁵ First, the historical context of the new law will be discussed. Then its actual impact will be examined and evaluated. Finally, with the benefit of hindsight, some legislative proposals designed to strike a better balance between the interests of landlord and tenant at stake will be made.

II. THE HISTORICAL CONTEXT OF THE NEW LEGISLATION

A. AT COMMON LAW

Prior to 1873, California followed the traditional common law rule on repairs: In the absence of fraud, including the failure to disclose dangerous conditions known to himself but otherwise latent, a residential landlord owed his tenant no duty whatsoever with respect to the habitability of the demised premises, unless he contracted to assume such a duty.⁶ If the dwelling was not properly fit for occupation at the commencement of the lease, or subsequently became unfit in some way, it was up to the tenant to make the needed repairs.

³Data from the 1960 Census showed that well over two-thirds of the total "unsound" housing units in California's ten Standard Metropolitan Statistical Areas (SMSA's) were renter-occupied as opposed to owner-occupied. GOVERNOR'S ADVISORY COMMISSION ON HOUSING PROBLEMS, APPENDIX TO THE REPORT ON HOUSING IN CALIFORNIA 144 (1963).

⁴Ch. 1280, [1970] Cal. Stats. 2314; CAL. SUMMARY DIGEST OF STATS. ENACTED, 1970 Reg. Sess., 177.

⁵CAL. CIV. CODE §§ 1941 and 1942 (West 1954).

⁶*Brewster v. De Fremery*, 33 Cal. 341, 345-347 (1867).

This rule emerged as part of the English common law during the Middle Ages.⁷ It is usually conceded to have been fairly well suited for the feudal and agrarian society of that era.⁸ Leases of real property at that time were normally long-term affairs made primarily with reference to land and the agricultural living to be had from it. The shelter afforded by a dwelling that happened to come along with the land was frequently of only incidental concern. Nonetheless, in an arrangement of this sort, the tenant acquired a possessory interest in the dwelling that was spatially exclusive and temporally substantial. Having such a right to enjoy its use, it was only natural that he and not the landlord should bear the burden of maintaining it. Practically speaking, it was no more difficult for the tenant to take care of the premises than it would be for the landlord. And the ultimate cost of habitability was going to be roughly the same for the tenant whether he himself secured and paid for repairs or whether the landlord handled this function for him and then factored the expense into the rent charged. In short, given the nature of the typical fifteenth century lease, there was simply no real need for a general public policy of requiring the landlord of a residence to maintain its habitability.

With the advent of the industrial revolution, however, the nature of the typical lease involving housing changed radically. As the result of two basic trends, tenants came to be faced with severe economic and practical problems in directly performing the repair function themselves as opposed to having it handled for them by their landlords.

1. THE RISE OF MULTIPLE FAMILY DWELLINGS

Industrialization necessarily entailed much greater urbanization. And the need to house denser geographic concentrations of people in economic fashion, in turn led to the widespread use of multiple family rental dwellings. In this situation, the tenant is no longer actually leasing land and thereby obtaining exclusive possession of all dwelling facilities standing thereon. Rather, the focus of the transaction is merely upon one unit of living space which shares many of its facilities with a number of other living units, occupied by different

⁷*Javins v. First National Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir. 1970). "The rule was 'settled' by 1485. 3 W. Holdsworth, *A History of English Law* 122-123 (6th ed. 1934). The common law rule . . . originated in the even older rule prohibiting the tenant from committing waste." *Id.* at 1077, n. 30.

⁸*See, e.g.*, F. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS* 110-111 (National Commission on Urban Problems Research Report No. 14, 1968); *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir. 1970).

tenants within the same building. Relative to his counterpart in a single family dwelling, the individual tenant of a multiple family dwelling is confronted with some very difficult obstacles in maintaining habitability on his own.

First of all, he is at a serious economic disadvantage in repairing those facilities which his dwelling unit shares with other dwelling units in the building. In a single family dwelling, all of the benefits flowing from repairs to, say, the weatherproofing of the roof, will accrue to just the one tenant. But in a multiple family dwelling, the benefits resulting from such repairs will be spread over and divided among the whole group of tenants sharing the facility. As an individual then, the tenant of a multiple family dwelling is economically less able than his counterpart in a single family dwelling to make certain repairs on his own. In order to place the two types of tenants on an economic parity the cost of maintaining a watertight roof for the multiple family dwelling must be borne proportionately by all of the tenants using the facility. And, of course, the best if not the only feasible way to bring about such an arrangement is to have the landlord perform this kind of maintenance for all and recover his expenses in the form of increased rent to all.

Second, even if an individual tenant were willing to pay more than his fair share for repairs affecting other living units besides his own in a multiple family dwelling, those who are in possession of the rest of the premises are under no obligation to permit him entry where that may be necessary for the repairs to be properly carried out.⁹ If, however, the landlord handles repairs of common facilities, he is not subject to this practical disability.¹⁰

2. *THE PREVALENCE OF SHORT-TERM TENANCIES*

Industrialization also brought with it increased personal and social mobility. Accordingly, leases involving a residence typically came to be made for much shorter terms than in the past. The very lengthy possessory interest which characterized feudal tenancies now became the exception rather than the rule.

The economic handicaps to direct tenant repair during a short-term tenancy are manifest. In the case of a tenancy as short as one month, for example, the benefits of just about any repairs to the dwelling will endure well beyond the tenant's own term of occupation. Thus,

⁹J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE, *General Introduction* at 7 (1969) [hereinafter cited as LEVI]. See also, *Rathbun Co. v. Simmons*, 90 Cal. App. 692, 696-697, 266 P. 369, 371-372 (1928).

¹⁰30 CAL. JUR. 2d *Landlord and Tenant* § 135 (1956).

if a month-to-month tenant is left to make repairs on his own, he will have to bear their entire cost even though as to most if not all of them, he may never substantially enjoy their full benefits. On the other hand, if such repairs are handled through the landlord, their cost can be allocated proportionately in the form of rent over the full series of successive tenants who will benefit from them.

Moreover, even if a short-term tenant were prepared to bear the whole cost of repairs the benefits of which he may never fully enjoy, he might well encounter practical difficulties in obtaining the financing that might be necessary to effect some of these repairs because of the very slight interest which he has in the property.¹¹ The landlord, of course, would not be hampered with this difficulty.

* * *

To summarize, within the bounds of the trends toward multiple family dwellings and short-term tenancies, it has become economically and practically unrealistic for tenants to maintain habitability themselves. If needed repairs are to be made cheaply and efficiently, or perhaps even at all, this function must be handled through the landlord.

Ironically, however, only the higher income renters, those relatively best able to overcome the economic barriers to direct tenant maintenance under these circumstances, have ordinarily had sufficient bargaining power to compel the landlord to take responsibility for repairs by contract where the latter would not otherwise willingly assume it.¹² The supply of rental housing for persons of lower or more moderate incomes, the vast majority of renters, has generally lagged well behind the demand.¹³ Hence, as to those tenants least able to afford the consequences, property owners have usually been in a position to avoid the inconveniences of maintaining habitability at will.

B. PRIOR STATUTORY DEVELOPMENTS

¹¹Javins v. First National Realty Corp., 428 F.2d 1071, 1078-1079 (D.C. Cir. 1970).

¹²Statement by Philip Hablutzel, co-author of the MODEL RESIDENTIAL LANDLORD-TENANT CODE (LEVI, *supra* note 9) submitted to the Cal. Assembly Urban Affairs and Housing Comm. during Interim Hearings on Landlord-Tenant Relations, Dec. 1 and 2, 1969, at 3.

¹³For an indication of the shortage of low-income housing which existed in American cities of the 1850's and 1860's, see C. GLAAB & A. BROWN, A HISTORY OF URBAN AMERICA 160-161 (1967). For a discussion of the shortage which exists today, see T. FLAUM & E. SALZMAN, URBAN RESEARCH CORP. REPORT: THE TENANT'S RIGHTS MOVEMENT 3-4 (1969).

The obsolescence of the common law rule on repairs, and the general inability of tenants to rectify the situation by contract with their landlords, were already becoming issues of significant concern during the second half of the nineteenth century. One of the first American jurisdictions to take legislative action on the problem was California.

In 1870, the state legislature established a three-man commission to revise and compile the law of California into a systematic statutory scheme.¹⁴ This, of course, was part of the nationwide movement toward codification then taking place. And inevitably, the members of the commission looked to the work done for New York by the leading exponent of that movement, David Dudley Field, as the foundation for their own labors in California.¹⁵

The original and primary function of the Field codes was simply to restate the common law in an orderly and readily ascertainable form.¹⁶ Field and his associates, however, also felt impelled to incorporate within their codes a number of reforms of the common law.¹⁷ Among the reforms picked up by the Code Commissioners in California was that contained in sections 990 and 991 of the proposed Civil Code for New York,¹⁸ renumbered as §§1941 and 1942 in the California Civil Code draft of 1871.¹⁹ In plain and sweeping terms, these provisions completely reversed the common law rule with respect to the burden of maintaining the habitability of a leased dwelling:

Sec. 1941. The lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and must repair all subsequent dilapidations thereof, except such as are mentioned in Sec. 1929.²⁰

¹⁴Ch. DXVI, [1870] Cal. Stats. 774.

¹⁵Van Alstyne, *The California Civil Code*, in 6 WEST'S ANNOTATED CALIFORNIA CODES 1, 4-7 (1954).

¹⁶D. D. FIELD, *Correspondence between the California Bar and Mr. Field*, November 28, 1870, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 349, 349-350 (A. Sprague ed. 1884).

¹⁷D. D. FIELD, *Address to the Law Department of the British Social Science Association*, November 12, 1866, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 338, 345 (A. Sprague ed. 1884).

¹⁸COMMISSIONERS OF THE CODE, *THE CIVIL CODE OF THE STATE OF NEW YORK, REPORTED COMPLETE* (1865).

¹⁹OFFICE REVISION COMMISSION, *REVISED LAWS OF THE STATE OF CALIFORNIA; IN FOUR CODES: CIVIL CODE* (1871).

²⁰*Id.*, § 1941.

The Commissioners' comment accompanying § 1941 in the draft code signifies the strong feeling in favor of reform in this area which existed even a century ago: "This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally

[Sec. 1929. The hirer of a thing must repair all deteriorations or injuries thereto, occasioned by his ordinary negligence.]²¹

Sec. 1942. 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, and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor.²²

Along with the rest of the proposed California Civil Code, as ultimately submitted to the legislature, these provisions were enacted in the spring of 1872²³ and took effect on the first day of the following year, 1873.²⁴

As originally constituted though, there was no small amount of dissatisfaction with the California codes; in response to this, another commission was created in 1873 to suggest appropriate changes.²⁵ In a report to the governor, the Code Examiners, as the later commissioners were called, found that

many legislative provisions would change our settled law of twenty-two years' standing, and not for the better. We have proposed to change many of these provisions so as to bring them into harmony with the law as heretofore existing and construed by our Courts for nearly a quarter of a century.²⁶

Among the statutes referred to were Civil Code §§1941 and 1942. And in accordance with the recommendations of the Code Examiners, these provisions were amended in 1874 to read as they were to continue to read for over ninety-six years:

Sec. 1941. The lessor of a building intended for the occupation of human beings must, *in the absence of an agreement to the contrary*, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable,

believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary . . . shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication, were it not that the community at large revolt at every application of the rule." *Id.*, § 1941, Comment.

²¹*Id.*, § 1929.

²²*Id.*, § 1942.

²³Van Alstyne, *The California Civil Code*, in 6 WEST'S ANNOTATED CALIFORNIA CODES 1, 8 (1954).

²⁴CAL. CIV. CODE § 2 (West 1954).

²⁵Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 187-188 (1922).

²⁶4 CAL. APP'X TO THE JOURNALS OF THE SENATE AND THE ASSEMBLY OF THE TWENTIETH SESS. 3 (1873). This quotation also appears in Parma, *The History of the Adoption of the Codes of California*, 22 LAW LIB. J. 8, 17 (1929).

except such as are mentioned in section nineteen hundred and twenty-nine.²⁷

Sec. 1942. If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, *where the cost of such repairs do [sic] 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.*²⁸

The amendments of 1874 practically eviscerated §§1941 and 1942. The tenant's recourse under § 1942 for a violation of his right under § 1941 was somewhat circumscribed to self-repair and deduction of expenses to the extent of only one month's rent at a time or, in the alternative, mere termination of the lease.²⁹ But the really important debility was imposed by the additional phrase in § 1941 which made that statute applicable in the first place only in the absence of a contrary agreement between the parties. Now the same relative inequality in bargaining strengths that had previously made it almost impossible for the tenant to compel his landlord to assume the burden of maintaining habitability by contract could be used offensively by the landlord to force the tenant to waive his statutory right to such an arrangement. The dearth of subsequent appellate decisions on §§1941 and 1942—despite such inviting constructional problems as the meaning of “untenantable” or “reasonable” notice—indicates the extent to which these statutes were thus rendered little more than dead letters in the law of California.

As the trends toward multiple family rental dwellings and short-term tenancies continued in ensuing years, the legislature did not remain completely oblivious to the problems arising where tenants were left to maintain habitability on their own under such circumstances. Beginning with the Tenement House Act of 1909,³⁰ and ultimately evolving into today's State Housing Law,³¹ a number of public health and safety regulations have been enacted in California, requiring the owners of leased dwellings to maintain their properties according to

²⁷Ch. 612, § 205, [1874] Cal. Acts Amend. of Codes 245 (emphasis added).

²⁸*Id.*, § 206 at 246 (emphasis added).

²⁹The apparent intent of the legislature that the two remedies specified in the amended § 1942 were to be the tenant's *exclusive* means of redress for the landlord's failure to comply with § 1941 was confirmed in *Van Every v. Ogg*, 59 Cal. 563, 566 (1881).

³⁰Ch. 625, [1909] Cal. Stats. 948.

³¹CAL. HEALTH & SAFETY CODE §§ 17910 *et seq.* (West 1964), *as amended*, (West Supp. 1971) and Dep't of Housing and Community Development Regs., CAL. ADMIN. CODE tit. 8, §§17000 *et seq.* (1967).

various minimum standards of habitability. But the landlord obligations created by these housing codes are matters of public law. Only certain public agencies are authorized by the terms of the statutes to seek criminal or civil enforcement of such duties.³² It is true that the judiciary has, in light of the general policy considerations embodied in the housing codes, expanded to some extent the common law actions in tort and contract which a tenant may maintain against his landlord in connection with substandard housing conditions. But no California court has yet gone so far as to fully develop both an effective right coupled with a meaningful remedy on the part of the tenant for housing code violations by his landlord.³³

Considerable support has arisen in recent years for reforming Civil Code §§ 1941 and 1942 so as to make landlords truly independently answerable to their tenants on the question of habitability. There are two basic reasons for such support.

First, as the substandard housing problem persists or worsens, so-

³²CAL. HEALTH & SAFETY CODE §§ 17960-17995 (West 1964), *as amended*, (West Supp. 1971).

³³The California cases which draw upon the enactment of the housing codes to widen the scope of the landlord's common law liability to his tenant appear to break down as follows:

Tort: It is well established in California that where a tenant suffers physical injury to either person or property as the result of some specific housing code violation, the landlord may be held to respond in damages according to the principles of negligence per se. *McNally v. Ward*, 192 Cal. App. 2d 871, 876-877, 14 Cal. Rptr. 260, 263-264 (1961); *Morris v. Oney*, 217 Cal. App. 2d 864, 869-870, 32 Cal. Rptr. 88, 90-91 (1963); *Gustin v. Williams*, 255 Cal. App. 2d Supp. 929, 932, 62 Cal. Rptr. 838, 839-840 (Super. Ct. App. Dep't 1967). However, the significance of this right of action is sharply restricted by the requirement that the tenant incur some sort of physical loss. As is the case with negligence generally, emotional discomfort or distress short of any physical harm is by itself insufficient to sustain a recovery. *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 795, 56 Cal. Rptr. 115, 116 (1967).

Contract: There is some authority in California for the proposition that by reason of the adoption of governmental housing regulations, a covenant or warranty in favor of the tenant to the effect that the landlord will comply with all such regulations is to be implied in every residential lease or rental agreement. *Buckner v. Azulai*, 251 Cal. App. 2d Supp. 1013, 1015, 59 Cal. Rptr. 806, 807-808 (Super. Ct. App. Dep't 1967). This theory has the advantage of entitling the tenant to relief upon the mere existence of code violations without more. But in the cited case, the only remedy afforded the tenant was cancellation of the contract and abandonment of the premises. In view of the shortage of decent housing, such a remedy is almost certain to be ineffectual. For an example of what is still probably the predominant view nationally—refusing to establish any implied covenant to meet housing code requirements—see the leading case of *Davar Holdings, Inc. v. Cohen*, 255 App. Div. 445, 7 N.Y.S.2d 911 (1938), *aff'd mem.*, 280 N.Y. 828, 21 N.E.2d 882 (1939). For an example of what may well now be the trend—recognizing an implied warranty of compliance with housing code requirements, backed up with an effective remedy for damages—see the landmark case of *Javins v. First National Realty Corp.*, 428 F.2d 1070 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

ciety's need to avail itself of every reasonable measure to combat it has become more apparent than ever. In this regard, private tenant action can work as a useful supplement to housing code enforcement by public agencies in assuring to the extent proper that the landlord and not the tenant shall handle the maintenance of habitability. A federally sponsored conference on tenant's rights has said:

The history of public enforcement of housing codes in the United States offers no basis for confidence that it will always be sufficient, even in places where it is sufficient now. Other areas of the law have benefitted from concurrent public and private enforcement (*e.g.*, antitrust law, securities laws, laws against fraud and deception). Substandard housing constitutes a large enough problem to warrant attack by every means that can be brought to bear.³⁴

Second, the tenants of substandard housing have themselves become increasingly conscious of their condition and have grown more resolved to play an active role in bettering it.³⁵ Private tenant action can help serve this important need for self-determination as well as help meet material wants.

In April of the 1969 legislative session, a bill was introduced in the Assembly that was intended to eliminate some of the shortcomings of Civil Code §§ 1941 and 1942, including the primary stumbling block of waivability.³⁶ The bill ultimately died in committee.³⁷ But the deliberation it sparked on the basic need to revise §§ 1941 and 1942—which went so far as to involve published hearings on the issue³⁸—finally culminated in the enactment of a successor during the 1970 session. This was A.B. 2033.

III. THE IMPACT OF THE NEW LEGISLATION

Civil Code §§ 1941 and 1942 have been amended and supplemented in a number of significant respects by the enactment of A.B. 2033.

³⁴NATIONAL CONFERENCE ON LEGAL RIGHTS OF TENANTS, *TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING* 7-8 (1967).

³⁵*See generally*, T. FLAUM & E. SALZMAN, URBAN RESEARCH CORP. REPORT: *THE TENANT'S RIGHTS MOVEMENT* (1969).

³⁶CAL. A.B. 2069, 1969 Reg. Sess.

³⁷CAL. FINAL CALENDAR OF LEGIS. BUS., 1969 Reg. Sess. 613.

³⁸*Summary of Interim Hearings on Landlord-Tenant Relations before the Cal. Assembly Urban Affairs and Housing Comm.*, Dec. 1 and 2, 1969.

A. CONTRARY AGREEMENTS BETWEEN THE PARTIES

One of the most critical aspects of any reform of §§1941 and 1942 would concern the effect to be given an agreement between the parties that purports to reduce or eliminate what would otherwise be the landlord's duty and the tenant's right under these statutes. It has already been pointed out that the landlord's hitherto unrestricted ability to cause his tenant to waive §§1941 and 1942 has largely precluded them from ever really working to counteract the modern problems posed by the common law rule on repairs.

The new legislation leaves intact the phrase in §1941 which expressly recognizes the supremacy of private contrary agreements.³⁹ However, the initial paragraph of Civil Code §1942.1, created under §4 of A.B. 2033,⁴⁰ somewhat limits the types of contrary agreements which will prevail over the basic statutory arrangement. It is now provided:

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 untenable, 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.⁴¹

This provision requires an affirmative undertaking of repairs by the tenant if the landlord is to still effectively avoid the responsibility for them himself. A mere waiver or cutting back of the tenant's statutory right to demand that the landlord make the repairs is no longer sufficient.

At first glance, one may leap to infer from the concluding phrase of §1942.1, *i.e.*, "as part of the consideration for rental," that the landlord is required to give his tenant some kind of adequate reduction in rent for the latter's affirmative assumption of a duty to repair. Upon a closer examination, however, the language of the new statute simply does not seem to admit of such a far-reaching construction. Only "a" consideration is called for, not necessarily an "adequate" one. And, of course, the landlord's letting of the premises may in

³⁹Section 1941 itself remained wholly unchanged by A.B. 2033. It continues to read: "The lessor of a building intended for the occupation of human beings must, *in the absence of an agreement to the contrary*, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine." CAL. CIV. CODE §1941 (West 1954) (emphasis added).

⁴⁰Ch. 1280, §4, [1970] Cal. Stats. 2316.

⁴¹CAL. CIV. CODE §1942.1 (West Supp. 1971).

itself serve as a legally sufficient consideration for both a given level of rent to be paid and the affirmative assumption of a duty to repair by the tenant.

The manner in which § 1942.1 is apparently supposed to prevent a landlord from shifting back to his tenant the burden of any repairs which cannot be economically performed by the latter, seems to be founded on two rather questionable assumptions. First, it is assumed that a prospective tenant will always readily perceive where and to what extent he could not economically maintain habitability on his own. There is obviously room for doubt as to the validity of this premise. Nonetheless, if the tenant does in fact realize that he could not economically make certain repairs, it will naturally take greater bargaining strength on the part of the landlord to compel the former to indeed become contractually liable for the performance of such repairs as opposed to what would be needed to merely force him to relinquish his rights under §§ 1941 and 1942. The second assumption implicit in the new statute is that this extra margin of bargaining strength that is now required of the landlord will be more than he can actually muster. It is interesting to note, however, that even the California Real Estate Association appears to have confessed a lack of faith in this proposition.⁴²

Of course, § 1942.1 does have the virtue of not preventing or inhibiting the parties from contracting that the tenant and not the landlord shall be responsible for some or even all repairs under those circumstances where the tenant *can* economically handle the repairs on his own. Here a tenant will have no cause to balk at assuming an affirmative duty to effect such repairs as opposed to just giving up his right to call upon the landlord to make them. That there still are cases where the tenant is at no economic disadvantage in taking care of a particular repair by himself is a fact almost as universally sensed as the existence of the reverse condition in the great majority of modern repair situations. Unfortunately, however, the precise circumstances which determine whether or not it will be more economical for a tenant if a given type of repair is performed through his landlord are not so widely understood. It was perhaps the failure to articulate these circumstances which led to a provision like § 1942.1 which, while it al-

⁴²Referring to the clause in § 1942.1 which states 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," the CREA has warned its members that "[t]he Legislature does not contemplate that this 'exception' shall, in effect, become a new near-universal waiver. The point was specifically discussed. We hope there will be no abuses of the exception because this will lead immediately to legal and legislative attempts to repeal the exception." Calif. Real Estate Assoc., New 1970 California Landlord-Tenant Laws, Oct., 1970, at 3.

most completely preserves freedom of contract for the sometimes legitimate benefit of landlords, does not provide fully effective protection against many repair agreements which are unfair to tenants.

It was previously noted that the need to change the original common law rule on repairs arose as a result of the modern trends toward multiple family dwellings and short-term tenancies.⁴³ If, however, particular facilities of a given dwelling are under the exclusive dominion of the tenant (as virtually all facilities are in the case of a single family dwelling) and if the particular repairs which the tenant must make to these facilities will be substantially consumed during his own term of possession (as perhaps all foreseeable repairs might be in the case of a very long-term lease) there is no real need for a public policy of requiring the landlord to perform such maintenance. These were the circumstances that prevailed in the typical lease involving housing when the common law rule first emerged long ago. And to the extent that these circumstances still occur in leases today, the common law rule remains as apt now as it was then. Where the benefits of a specified repair to be performed by the tenant will largely accrue only to himself both in space and through time and, perhaps, where the landlord is an absentee, it may be substantially less expensive and easier for the tenant to handle such tasks on his own rather than pay the higher level of rent that would be required if the landlord took care of these matters for him. A statute drawn with the above distinctions in mind can absolutely protect the tenant from the landlord's excessive bargaining power where necessary, and yet leave the parties free to contract as they wish where reasonable.

B. THE CRITERIA OF HABITABILITY

Prior to the enactment of A.B. 2033, the practical scope of the landlord's repair obligation to his tenant under § 1941 was left almost wholly for judicial determination. It was simply required that a building leased as a residence be put into a condition "fit" for such occupation and that all subsequent dilapidations rendering the premises "untenantable" be repaired.⁴⁴ Now, however, Civil Code § 1941.1, created under § 1 of A.B. 2033,⁴⁵ supplies a legislative definition of habitability for purposes of §§ 1941 and 1942. Under this provision, a dwelling is deemed untenable if it fails *substantially*⁴⁶ to meet any

⁴³Text accompanying notes 9-11 *supra*.

⁴⁴CAL. CIV. CODE § 1941 (West 1954).

⁴⁵Ch. 1280, § 1, [1970] Cal. Stats. 2314.

⁴⁶CAL. CIV. CODE § 1941.1 (West Supp. 1971).

of the following relatively specific criteria:

1. Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.⁴⁷
2. Plumbing facilities which conformed to applicable law in effect at the time of installation, maintained in good working order.⁴⁸

The “applicable law” referred to above is apparently the state or local building and housing code requirements or any other governmental health and safety regulations pertinent to a given dwelling. Maintenance in “good working order” may or may not mean, it seems, maintenance in continued accord with those particular code requirements in effect at the time of installation.

3. Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.⁴⁹
4. Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.⁵⁰
5. 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.⁵¹

The latter criterion, unlike those relating to plumbing, heating and electrical facilities, does not limit its incorporation of the requirements of “applicable law” to those state or local housing codes in effect at the time of installation. Thus it seems that current code standards would control for water facilities. Another noteworthy aspect of this criterion is the question of whether or not its final two phrases “furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law” refer to a water supply “under the control of the tenant” as well as to a system “under the control of the landlord.” With a number of conflicting rules of statutory construction relevant to the issue, it could well be decided either way.⁵²

⁴⁷*Id.*, § 1941.1(a).

⁴⁸*Id.*, § 1941.1(b).

⁴⁹*Id.*, § 1941.1(d).

⁵⁰*Id.*, § 1941.1(e).

⁵¹*Id.*, § 1941.1 (c).

⁵²There appears to be no reason why the legislature would want to hold the landlord responsible for providing and maintaining a water supply capable of producing hot and cold running water, *even though* it is to be under the control of the tenant, and yet at the same time absolve the landlord of any responsibility to provide and main-

6. 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.⁵³

This criterion makes the landlord responsible for putting "[b]uilding, grounds and appurtenances . . . in every part" in sanitary condition at the commencement of a new tenant's lease. Thereafter, the landlord is charged with keeping in sanitary condition only that portion of the premises which he retains under his own control. If taken literally, the rather absolute language of "[b]uilding, grounds and appurtenances . . . in every part" would seem to entitle a tenant at the commencement of a lease for one of the living units in a multiple family dwelling, to a clean-up by the landlord of the *entire* premises, including not only that portion to be under the control of the new tenant and that portion to remain under the control of the landlord but also those portions already under the control of established tenants. It is difficult to believe, however, that the legislature actually intended such an unusual result by the language quoted. Any provision that would create a landlord obligation to renew the sanitary condition of areas under the control of established tenants, solely upon the unrelated arrival of a new tenant, should provide as such in much clear-

tain such necessary adjuncts to the water supply as outlet fixtures and sewage disposal facilities simply *because* the former is to be under the control of the tenant. It is an established rule of statutory interpretation in California that, "[s]tatutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity." 45 CAL. JUR. 2d *Statutes* § 116 (1958). It would seem far more reasonable to read the final two phrases of this criterion as applying to every water supply system, regardless of whose control it may be under.

On the other hand, it is also an established rule of statutory interpretation that, "[i]t will be presumed that every word, phrase, and provision was intended to have some meaning and perform some useful office, and a construction implying that words were used in vain, or that they are surplusage, will be avoided." *Id.*, § 117. It is difficult to imagine why the legislature would specifically distinguish water supply systems under the control of the tenant from those under the control of the landlord if it did not intend that the final two phrases of this criterion would apply only to the latter.

Still another general rule of statutory interpretation that seems relevant here is that which provides that modifying words or phrases apply only to the words or phrases immediately preceding them and are not to be construed as extending to more remote language. *Id.*, § 137. The usefulness of this rule may be somewhat limited, however, by an exception sometimes made to it, to the effect that "where several words are followed by a phrase that is as applicable to the first and other words as to the last, the phrase will be read as applicable to all." *Id.*

⁵³CAL. CIV. CODE § 1941.1(f) (West Supp. 1971).

er terms than are present here. It is likely then that the phrase “[b]uilding, grounds and appurtenances . . . in every part” will be restrictively interpreted to exclude portions of the premises already under the control of other tenants.

7. 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.⁵⁴
8. Floors, stairways, and railings maintained in good repair.⁵⁵

* * *

One of the obvious advantages of the housing codes adopted in California after §§ 1941 and 1942 is that they set out in some detail just what requirements the property owner must comply with. This, of course, helps curtail uncertainty, confusion and costly litigation over the potentially complex issue of what constitutes habitability by modern standards. It was to be expected then that the advocates for both landlord and tenant would seek to include a more specific statutory definition of untenability in the recent revision of §§ 1941 and 1942. It is difficult to rationalize, however, the rather narrow definition which ultimately prevailed in the new § 1941.1. “Untenability” under this statute is a much more restrictive concept than “substandard buildings” as defined under the State Housing Law.⁵⁶ Many basic aspects of habitability which are part of the latter are entirely omitted from the former. These include such items as ventilation,⁵⁷ room and space dimensions,⁵⁸ structural hazards,⁵⁹ hazardous mechanical equipment,⁶⁰ fire hazards,⁶¹ exits,⁶² and fire protection and fire fighting equipment.⁶³ Furthermore, even as to those fundamental elements of habitability which both provisions make mention of, § 1941.1 appears to impose some undue limitations not found

⁵⁴*Id.*, § 1941.1(g).

⁵⁵*Id.*, § 1941.1(h).

⁵⁶CAL. ADMIN. CODE tit. 8, § 17925 (1967).

⁵⁷*Id.*, § 17925(a)(7).

⁵⁸*Id.*, § 17925(a)(9).

⁵⁹*Id.*, § 17925(b)(1)-(10).

⁶⁰*Id.*, § 17925(f).

⁶¹*Id.*, § 17925(h).

⁶²*Id.*, § 17925(l).

⁶³*Id.*, § 17925(m).

in the State Housing Law. For example, under weather protection, the State Housing Law proscribes deteriorated, crumbling, or loose plaster on interior walls⁶⁴ while § 1941.1(a) does not. Worse yet, under sanitation, the State Housing Law requires the landlord to keep his building completely free of rodent or vermin infestation at all times,⁶⁵ while § 1941.1(f) charges him only with keeping that portion of the premises which remains under his control continually free and that portion under the control of the tenant free merely at the commencement of the lease. There appears to be no intrinsic justification for using such substantially less stringent criteria of habitability solely because the context is one of private tenant action as opposed to public code enforcement.

C. ARBITRATION OF DISPUTES REGARDING HABITABILITY

The second paragraph of Civil Code § 1942.1, created under § 4 of A.B. 2033,⁶⁶ now formally authorizes a landlord and tenant to agree to arbitrate disputes on whether or not the premises may be untenable. The new provision reads:

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 untenable 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.⁶⁷

There was apparently nothing in the law prior to the enactment of A.B. 2033 which would have prevented a landlord and tenant from effectively agreeing to arbitrate questions of habitability. Now, however, under the maxim of *expressio unius est exclusio alterius*,⁶⁸ it might be argued that the parties may agree to arbitration of such matters only in accordance with the qualifications set out in the new provision above. The qualifications (agreement in writing, recital of

⁶⁴*Id.*, § 17925(g)(1).

⁶⁵*Id.*, § 17925(a)(12).

⁶⁶Ch. 1280, § 4, [1970] Cal. Stats. 2316.

⁶⁷CAL. CIV. CODE § 1942.1 (West Supp. 1971).

⁶⁸45 CAL. JUR. 2d *Statutes* § 133 (1958).

§§ 1941 through 1942.1 and apportionment of costs) seem fair enough for both tenant and landlord.

D. PERFORMANCE OF TENANT OBLIGATIONS AS CONDITIONS TO THE EXERCISE OF TENANT RIGHTS

Under Civil Code § 1929, every tenant has a duty to exercise reasonable care in his use of the premises and to correct any damage proximately caused by his failure to exercise such care.⁶⁹ Section 1941 has always incorporated § 1929 by reference and provided that a tenant may not demand that his landlord make a particular repair, the need for which has arisen because of his own negligence.⁷⁰ So much is obviously essential if § 1929 is to have genuine vitality.

Civil Code § 1941.2, however, created under § 2 of A.B. 2033,⁷¹ goes substantially further in conditioning the tenant's exercise of his rights under §§ 1941 and 1942 upon the performance of certain of his own obligations with respect to the condition of the premises. It is now provided:

(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 wilfully 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.⁷²

None of the tenant responsibilities set out in the new provision is

⁶⁹CAL. CIV. CODE § 1929 (West 1954).

⁷⁰*Id.*, § 1941.

⁷¹Ch. 1280, § 2, [1970] Cal. Stats. 2315.

⁷²CAL. CIV. CODE § 1941.2 (West Supp. 1971).

very remarkable in itself. Although the statute labels them "affirmative obligations," they might all be regarded as nothing more than specific elements of the reasonable care already required of the tenant in his use of the premises. The significant change, of course, lies in the fact that the tenant may not demand *any* repairs by the landlord under §§1941 and 1942 if he himself is in violation of *any* of the obligations listed above. There need be no correlation between the particular defect which the tenant complains of and the duty which he has failed to perform. If, for example, the tenant damages the garbage disposal in his apartment through improper use, he has no right to look to the landlord for the maintenance of the roof, toilet or heating facilities, which may become inoperative through no fault of his, until he himself fixes the garbage disposal.

Section 1941.2 is apparently designed as a more powerful negative incentive for tenants to carry out their own minimal responsibilities in helping to keep the premises habitable. In practice, however, the new statute seems at least as likely to delay or discourage vigorous tenant action for purposes of seeing to it that the landlord properly performs *his* duties. Certainly there are other ways to induce the requisite tenant cooperation which do not have the unfortunate side effect of permitting short-sighted wholesale cessations of maintenance on the part of the landlord. The landlord, for example, might be allowed to treat his expenses for repairs necessitated by the tenant's failure to comply with the various requirements of §1941.2 as "rent due and payable."⁷³ The landlord would then be able to demand reimbursement from the tenant under the compulsion of summary proceedings for unpaid rent and/or eviction.

E. LIMITATIONS UPON THE TENANT'S REMEDY

As was previously noted, the remedies available to a tenant for a violation of his rights under §1941 have long been somewhat circumscribed by §1942.⁷⁴ Section 1942 has now been amended, under §3 of A.B. 2033,⁷⁵ to include an important new limitation upon the tenant's ability to redress substandard housing conditions:

- (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

⁷³LEVI, *supra* note 9, § 2-304(1)(a). See text accompanying notes 100 and 101 *infra*.

⁷⁴Note 29 and accompanying text *supra*.

⁷⁵Ch. 1280, § 3, [1970] Cal. Stats. 2315.

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.*⁷⁶

The effect of the new limitation is self-evident. The problem toward which it is apparently directed is surely the most troublesome of all involved in the reform of §§ 1941 and 1942. That problem arises where a given building already needs so many repairs that the landlord cannot hope to fund the cost of rehabilitation out of the rents which the current tenants pay or are reasonably capable of paying.

In what is probably the majority of rental housing situations in California, the building is already in properly livable condition and the landlord properly maintains it as such. Making the landlord strictly accountable to his tenant for habitability here might well have no economic impact whatever.

In those cases where the building is still in relatively good shape and the landlord would otherwise be only slightly remiss in maintaining it, there will be just a moderate addition to the landlord's operating expenses. It may be assumed that the latter will seek to pass this extra cost on to his tenants; but the increased rent to them will still normally lie within the reach of their budget. (*Any* increase in a tenant's rent may outwardly appear inconsistent with the goal of lowering the cost of living in properly habitable rental housing. But, again, the basic idea behind fixing responsibility with the landlord for those repairs the benefits of which will accrue to a number of tenants either in space or through time, is that it ultimately costs each tenant less to pay the landlord to handle these repairs than it would if he were left to make them on his own).

The economic picture is quite different, however, where a building is already so far below the prescribed standards of habitability that it is doubtful that it can at once, if indeed ever, be fully refurbished out of the rents which the current predominantly lower income tenants of such buildings are at all able to pay.⁷⁷ The ultimate consequences of nonetheless affording the tenants in this situation an unrestricted remedy for immediately securing all needed repairs at the expense of the landlord seem either unfavorable to the tenants or unfair to the landlord, or both.

First of all, the landlord will naturally be forced to attempt to draw higher income tenants for his building, that is, tenants who can pay

⁷⁶CAL. CIV. CODE §1942(a) (West Supp. 1971) (emphasis added).

⁷⁷See NATIONAL CONFERENCE ON LEGAL RIGHTS OF TENANTS, TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING 26-29 (1967).

the substantially higher rents which will help cover the cost of the required rehabilitation. To the extent that the landlord is successful in this regard, however, some or all of the current tenants will be forced out and into an accordingly diminished market for rental housing which yet remains within their relatively limited purchasing power. Instead of a properly habitable dwelling, or even the status quo, the current tenants could conceivably wind up with no real housing at all.

At any rate it is likely that the landlord of a significantly substandard building cannot reasonably plan on acquiring higher income tenants who will *fully* absorb the expenses of a required rehabilitation. Otherwise he would probably be undertaking such rehabilitation already. To the extent that this is so, the costs will simply have to come out of the property owner's own pocket. Depending upon the potential for higher income tenants, the availability of financing for repairs, the degree of rehabilitation required, the value of the property, and any number of other factors, the landlord will, of course, attempt to minimize his loss by either continuing to hold the property and paying for the repairs himself, selling the property at a price which reflects the liability for repairs, or even abandoning the property altogether—in which case, the current tenants are again forced out and into a worsened housing situation.⁷⁸ Whichever course may be taken, however, it should be clear that an absolute policy of requiring the landlord to repair here becomes more than just a business regulation designed to spread the cost of repairs bearing on habitability proportionately over all the tenants in space and through time who will benefit from them. It takes on the effect of redistributing wealth from landlord to tenant.

It has been argued that the owners of presently substandard rental housing ought to be considered culpable enough by reason of such ownership in itself that their prospective losses would be quite justified. Sax and Hiestand, in their now famous article advocating the judicial recognition of a new tort of slumlordism,⁷⁹ concede that

[f]here is, to be sure, a sense in which the slum landord is the product, rather than the creator, of the problem in which he is involved. That there is poverty, which creates the demand for very low-cost housing, is not his fault; that it is difficult, if not impossible, to maintain such housing in acceptable condition and still

⁷⁸In 1968 it was reported that rigorous housing code enforcement in New York City had resulted in the boarding up and abandonment of over 2,500 buildings. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT, 259 (1968).

⁷⁹Sax & Heistand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

make an adequate profit is likewise not a matter of his making.⁸⁰

The authors claim, however, that

[n]o one seeks to impose liability upon the landlord for the mere presence of these conditions. He becomes culpable, and thus responsible as an individual, only when he capitalizes upon these social ills as the means to earn his livelihood. In this sense he stands in the same position as one who employs children in a factory or mine [or a] seller of narcotics⁸¹

In a second analogy, the authors go on to assert that society would not

permit a doctor to give inadequate treatment, or a lawyer inadequate representation, to the poor simply because their fees could not economically justify more ample services. Our universal answer to such people is that they may stand aside and do nothing if they wish, but if they undertake to provide services for their own economic benefit, they must serve adequately or be deemed wrongdoers in law.⁸²

Sax and Hiestand conclude that

[w]e do not characterize the slum landlord as a conscious or willing evildoer; we agree that he is probably doing precisely what a rational profit-seeking businessman in his circumstances would feel required to do. We simply say that if it is true that slum ownership is a business which requires the maintenance of such indecent conditions, then this is a business which needs to be eliminated [L]et us recognize that what we are condemning him [the landlord] for is going into (or staying in) such a business.⁸³

The first analogy drawn by Sax and Hiestand, that is, a comparison of the landlords of substandard dwellings with narcotics peddlers and child labor exploiters, would, if valid, form quite a strong argument for the property owners' moral blameworthiness. But the appeal of this analogy seems superficial at best. Both the narcotics traffic and, at least today, the hiring of child labor are activities which society may fairly and effectively condemn with little or no concern about any economic consequences to would-be victims. They are pursuits which people may do entirely without in any case. A redistribution of wealth between those who engage in such businesses and those who are led to patronize them, might be completely fitting as a matter of corrective justice between such individuals, in the same basic vein as the tort of deceit or the principles of restitution. On the other hand,

⁸⁰*Id.* at 890.

⁸¹*Id.*

⁸²*Id.* at 891.

⁸³*Id.* at 892.

society cannot truthfully condemn the operation of substandard rental housing per se until, perhaps, it eliminates the poverty which now prevents the tenants thereof from finding or affording any better. Shelter is, of course, an utterly essential commodity for everyone. As long as society tolerates economic disparities between its members such that not all can rent shelter that meets common standards of adequacy—even though, where proper, maintenance is handled through the landlord instead of directly by the tenant—then society must implicitly sanction the unhappy business of those property owners who actually provide what is next possible under the circumstances.

As for the second analogy drawn by Sax and Hiestand—asserting that society does not permit lawyers and doctors to give “inadequate” services to the poor and that therefore landlords should never be permitted to rent substandard housing to them—it must again be noted that people in general can get along relatively much more easily without legal or even medical services than they can without shelter from day to day. Without also eliminating the poverty which prevents some persons from affording proper professional services or adequate rental housing, society can with a much clearer conscience insist that lawyers and doctors shall render only proper services or else none at all than flatly decry and drive out of the market the owners of all rental housing except that which is fully adequate.

The dilemma of presently substandard housing then, insofar as it cannot feasibly be repaired by the landlord out of the rents which the current tenants can be expected to pay, is really a question of distributive justice between society as a whole and its more disadvantaged members. It is not properly a matter of corrective justice between individuals as landlord and tenant. Perhaps the redistribution of wealth and/or income by government is indeed the only way to ever completely eradicate the incidence of substandard rental housing. But if so, it is a burden to be borne by all of us as taxpayers, and not disproportionately by some as the present owners of such housing.

The above considerations clearly call for some limitations upon the tenant's remedy to secure repairs which the landlord should ordinarily be handling for him. However, it should by now be apparent that the new restriction created by the enactment of A.B. 2033 is excessively broad. Although the tenant's remedy cannot properly operate to compel full and immediate *rehabilitation* of buildings that are already below prescribed standards of habitability—because of the likelihood that such repairs cannot be funded out of the rents which the current tenants are at all able to pay—there is no reason

why the tenant's remedy cannot work fairly and effectively to assure the rigorous *conservation* of all buildings, and at least prevent those which are now substandard from becoming any worse. The new amendment to § 1942, which now disallows exercise of the tenant's repair-and-deduct remedy more than once within any twelve-month period as to *future* as well as *existing* dilapidations, unnecessarily restrains the tenant from efficiently seeing to it that the landlord conserves the building in its present state—a relatively small-scale job which almost certainly can be funded out of the rents which the current tenants pay or are reasonably capable of paying.

F. "REASONABLE" NOTICE TO THE LANDLORD BEFORE TENANT REMEDIAL ACTION

The tenant has always been required by the terms of § 1942 to give his landlord "reasonable" notice and opportunity to correct substandard housing conditions before taking remedial action under that statute.⁸⁴ The vague standard of "reasonableness" (like "untenantability") makes it somewhat difficult for the parties to readily understand their respective rights and obligations in this area and tends to invite excessive litigation. It was perhaps in response to this potential problem that the "reasonable" notice requirement of § 1942 was amended, under § 3 of A.B. 2033,⁸⁵ as follows:

(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.⁸⁶

Considering the great variety of repairs which may have to be made to maintain the habitability of a modern dwelling, and the attendant variety of times that may be required to carry them out, thirty days appears to be a satisfactory presumptive standard of reasonable notice.

The presumption established by the new amendment, however, is only one affecting the burden of producing evidence as to "reasonableness." It is not a presumption affecting the burden of proof on the issue. This seems inappropriate.

Section 603 of the California Evidence Code defines a presumption affecting the burden of producing evidence as one "established to

⁸⁴CAL. CIV. CODE § 1942 (West 1954).

⁸⁵Ch. 1280, § 3, [1970] Cal. Stats. 2315.

⁸⁶CAL. CIV. CODE § 1942(b) (West Supp. 1971).

implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.”⁸⁷ The Law Revision Commission comment accompanying this statute states that the purpose of such a presumption is merely “to dispense with unnecessary proof of facts that are likely to be true if not disputed.”⁸⁸ On the other hand, a presumption affecting the burden of proof is defined by § 605 of the Evidence Code as one

established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.⁸⁹

The Law Revision Commission comment clarifies that a presumption affecting the burden of proof may in part be designed to facilitate the determination of the particular action in which it is applied;⁹⁰ yet what essentially characterizes it as a presumption affecting the burden of proof is that “there is always some further reason of policy”⁹¹ for its establishment.

Given these fundamental distinctions, it would seem that a presumption as to the reasonableness of thirty days notice to the landlord ought to be one affecting the burden of proof. It should not be one that merely deals with the burden of producing evidence. The thirty day specification is intended to do more than just simplify an action by eliminating one element of the tenant’s case which is usually true if not contested. It is essentially designed to give the landlord a meaningful deadline within which he should normally act on tenant complaints as to habitability. Or, stated more broadly, the presumption is ultimately intended to encourage the conscientious maintenance of California’s stock of rental housing.

G. RETALIATORY ACTION BY THE LANDLORD

A serious problem confronting the effectiveness of the tenant’s repair-and-deduct remedy under § 1942 is the possibility of retaliatory

⁸⁷CAL. EVIDENCE CODE § 603 (West 1966).

⁸⁸*Id.*, § 603, Comment.

⁸⁹*Id.*, § 605.

⁹⁰*Id.*, § 605, Comment.

⁹¹*Id.*

⁹²See Note, *Retaliatory Eviction—Is California Lagging Behind?*, 18 HAST. L. J. 700 (1967).

action by the landlord.⁹² This may take the form of a refusal to renew the tenant's rental agreement at expiration or the imposition of unfair and onerous conditions upon renewal such as exorbitant rent increases or unwarranted cuts in services. Civil Code §1942.5, created under §5 of A.B. 2033,⁹³ constitutes the first definitive statement of law in California regarding retaliatory action by the landlord not only for the tenant's exercise of rights under §§ 1941 and 1942 but also for complaints to governmental enforcement agencies about housing code violations. The new statute provides:

(a) If the lessor has as his dominant purpose retaliation against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate governmental agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services, within 60 days:

(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942; or

(2) After the date upon which the lessee, in good faith, has filed a written complaint, with an appropriate governmental agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

(3) After the date of an inspection or issuance of a citation, resulting from a written complaint described in paragraph (2) of which the lessor did not have notice; or

(4) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

In each instance, the 60-day period shall run from the latest applicable date referred to in paragraphs (1) to (4), inclusive.

(b) A lessee may not invoke the provisions of this section more than once in any 12-month period.

(c) Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his rights under any lease or agreement or any law pertaining to the hiring of property or his right to do any of the acts described in subdivision (a) for any lawful cause. Any waiver by a lessee of his rights under this section shall be void as contrary to public policy.

(d) Notwithstanding the provisions of subdivisions (a) to (c), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an

⁹³Ch. 1280, § 5, [1960] Cal. Stats. 2316.

arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a). If such statement be controverted, the lessor shall establish its truth at the trial or other hearing.⁹⁴

Although at the time § 1942.5 was enacted, there was no other significant California law on the question of retaliatory action, the state's supreme court has subsequently held that §§ 1941 and 1942 in their form *prior* to A.B. 2033 impliedly forbade any such action whatever. In *Schweiger v. Superior Court*,⁹⁵ the petitioner was a month-to-month tenant in a multiple family dwelling owned by the real party in interest. In June of 1969, the tenant wrote his landlord asking that certain long-needed repairs be made to his apartment, pursuant to §§ 1941 and 1942. The landlord responded by raising the rent for the coming month of August by fifty dollars. When the tenant defaulted as to payment of this amount, the landlord brought an action for unlawful detainer in small claims court and obtained judgment for, among other things, repossession of the premises. The tenant appealed and had the case tried *de novo* in superior court. It was argued by the tenant that the rent increase from which the unlawful detainer action had developed was intended as retaliation for his exercise of rights under §§ 1941 and 1942 and that to allow an eviction by the landlord under such circumstances would contravene public policy. This defense was rejected; but the issue was certified to the court of appeals. In spite of the certification, the court of appeals declined to transfer the case. The tenant then sought a writ of mandate from the supreme court to compel the trial court to entertain his defense. The supreme court, per Mosk, J., noted that

[i]f we fail to recognize a reasonable limitation on the punitive power of landlords to increase rents and evict tenants, the salutary purposes sought to be achieved by the Legislature in enacting Civil Code sections 1941 and 1942 will be frustrated.⁹⁶

The writ was thus granted, establishing "a defense in unlawful detainer actions when the landlord's motive is retaliation for the exercise of statutory rights under section 1942."⁹⁷

In two major respects the new § 1942.5 actually narrows the scope of protection against retaliatory action which the tenant would now otherwise have in the exercise of his rights under §§ 1941 and 1942.

⁹⁴CAL. CIV. CODE § 1942.5 (West Supp. 1971).

⁹⁵3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

⁹⁶*Id.* at 513, 476 P.2d at 100, 90 Cal. Rptr. at 732.

⁹⁷*Id.*

Subdivision (a) of the statute forbids retaliation only within 60 days of the latest of four listed events and subdivision (b) allows the tenant to invoke the statute only once in any 12-month period. The Court in *Schweiger* laid down no such restrictions. Nor does there seem to be any sound reason for these restrictions.

On the other hand, § 1942.5 does in at least one sense seem to properly enhance the tenant's protection against retaliation over what it would have been otherwise. Subdivisions (c) and (d) of the new statute apparently require the landlord to show "lawful cause" before doing any of the prescribed acts within any of the prescribed annual periods of 60 days and bear the burden of proof as to the validity of such justification, if contested. This, in effect, creates a presumption of retaliation in favor of the tenant during a period when such acts of the landlord are most likely to be retaliatory in fact. Under *Schweiger*, on the other hand, it would always be the tenant's responsibility to plead and prove as part of an affirmative action or defense the difficult matter of a retaliatory intent on the part of the landlord.

IV. PROPOSED LEGISLATION

From what has been said above, it seems clear that the enactment of A.B. 2033 left a good deal to be desired toward properly reforming Civil Code §§ 1941 and 1942. In view of the new legislation's inadequacies the following modifications are proposed:

The people of the State of California do enact as follows:

Section 1. Section 1941 of the Civil Code is amended to read:

1941. The lessor of a building intended for the occupation of human beings must, except as otherwise provided in this chapter, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable.

Section 2. Section 1941.1 of the Civil Code is amended to read:

1941.1. A building shall be deemed untenable for purposes of Section 1941 if it is in substantial violation of any of the state-wide criteria of fitness for human habitation established under Chapter 2 (commencing with Section 17920), Part 1.5, Division 13 of the Health and Safety Code.

[*Comment:* The above provision makes the practical scope of the landlord's duty to maintain habitability vis-a-vis his tenant the same

as it is vis-a-vis the statewide public at large.⁹⁸ Language substantially similar to that of the proposed statute appeared in A.B. 2033 as originally introduced, but was subsequently amended out of the bill in favor of the more restrictive scheme that was ultimately enacted.⁹⁹]

Section 3. Section 1941.2 of the Civil Code is amended to read:

1941.2. (a) The lessor shall not be responsible to a lessee under Section 1941 for repairing any dilapidation which such lessee is bound to repair under Section 1929 including, but not limited to, any dilapidation which results from or continues to exist by reason of such lessee's

(1) failure to keep that part of the premises under his control as clean and sanitary as reasonably possible; or

(2) failure to dispose from his dwelling unit of all rubbish, garbage and other waste in a reasonably clean and sanitary manner; or

(3) failure to properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as reasonably possible; or

(4) permitting any of his licensees or invitees 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, or himself doing any such thing; or

(5) misoccupying of the premises, utilizing portions thereof for purposes other than living, sleeping, cooking, dining etc., as such portions were respectively designed for or intended to be used.

(b) If within 15 days after notice from the lessor, a lessee neglects to repair a dilapidation which he is responsible for under subdivision (a), any actual and reasonable expense which the lessor incurs in repairing the said dilapidation himself shall be considered rent due and payable by such lessee on the next regular rent collection date or, if the tenancy has terminated, upon demand.

[*Comment:* Subdivision (a) of the above provision essentially changes the law in this area back to what it was prior to A.B. 2033. The landlord is absolved of his responsibility to repair under § 1941 only to the extent that the tenant is himself obliged to repair under § 1929 or the more specific duties set out above.

Subdivision (b) provides a substitute for the "incentive" to tenant care of the premises which the present § 1941.2 embodies. Instead of enforcing the tenant's responsibilities with respect to preserving the condition of the building by threatening to withhold performance of some or all of the various other repairs to which he would normally be entitled, the landlord may demand reimbursement for any repair

⁹⁸The statewide criteria of habitability referred to in the proposed statute are currently summarized in CAL. ADMIN. CODE tit. 8, § 17925 (1967).

⁹⁹CAL. A. B. 2033, § 1, 1970 Reg Sess., *as amended*, June 11, 1970.

expenses traceable to the tenant's carelessness under the compulsion of summary proceedings for unpaid rent and/or eviction. This concept is taken from the Model Residential Landlord-Tenant Code,¹⁰⁰ whose authors characterize it as "unprecedented in the United States."¹⁰¹]

Section 4. Section 1941.3 is added to the Civil Code to read:

1941.3. Any agreement by a lessee waiving or modifying his rights under Sections 1941 to 1942, inclusive, or by which he affirmatively assumes a duty to improve, repair or maintain any condition of the building bearing upon its tenantability, shall be void as contrary to public policy, except as follows:

(a) The lessee may, by written agreement, affirmatively undertake to perform any specified improvements, repairs or maintenance which will benefit only his own dwelling unit and which will be substantially consumed during his own term of occupancy, as part of the consideration for rental.

(b) The lessee may, by written agreement independent of the rental agreement, affirmatively undertake to perform any improvements, repairs or maintenance whatever, if, taking into account the consideration given and received by the lessee under the rental agreement, the consideration exchanged for such services is adequate.

[*Comment:* These provisions are patterned closely after the suggestions of the Model Residential Landlord-Tenant Code.¹⁰²

Exception (a) above allows the parties to shift the burden of some or even all repairs relating to tenantability back from the landlord to the tenant *if* the circumstances are such as to make the arrangement economically and practically reasonable for the tenant. If specified repairs will benefit only the tenant's own dwelling unit and they will be substantially consumed during the tenant's own term of occupation, it will cost the tenant roughly the same, if not less, to perform such specified repairs on his own as it would if he were to pay the landlord to perform them. The original cause for concern about the tenant being responsible for maintaining habitability is wholly absent under such conditions. The parties may and ought to be left free to agree as they will on these types of repairs, subject only to market considerations and the general law of contracts.

It is anticipated that in the case of a month-to-month tenancy in an apartment complex, there will be few, if any, tasks which will meet the qualifications of exception (a).

¹⁰⁰LEVI, *supra* note 9, § 2-304(1)(a).

¹⁰¹*Id.*, § 2-304, Comment.

¹⁰²*Id.*, § 2-203(2) and (3).

Exception (b) is intended to permit a landlord to hire one who happens to be his tenant to carry out repairs which he (the landlord) is charged with securing under § 1941. The fact that two persons stand in the relationship of landlord and tenant toward one another should not necessarily prevent them from also dealing between themselves as property owner and repairs contractor. However, in order to prevent the landlord from taking advantage of any bargaining leverage which he may have over the tenant with respect to their rental agreement, and thus defeating via their service contract the protection which the tenant is supposed to have against such bargaining superiority with respect to the performance of repairs that do not meet the qualifications of exception (a), the landlord must be prepared to show under exception (b) that he is exchanging a truly adequate consideration for the tenant's repair services.]

Section 5. Section 1941.4 is added to the Civil Code to read:

1941.4. The lessor and lessee may, if an agreement is in writing, set forth the provisions of Sections 1941 to 1942, inclusive, and provide that any controversy relating to a condition of the premises claimed to make them untenable 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.

[*Comment:* The above provision is designed only to relocate, intact, what is currently the second paragraph of Civil Code §1942.1.]

Section 6. Section 1942 of the Civil Code is amended to read:

1942. (a) If within a reasonable time after notice to the lessor of dilapidations which he ought to repair under Section 1941, he neglects to do so, the lessee may

(1) vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions; or

(2) repair the same himself, where the reasonable cost of such repairs does not exceed one month's rent of the premises, and deduct the expense from the rent, except that this remedy shall not be available to the lessee more than once within any 12-month period as to any dilapidations occurring on or before the 180th day following the effective date of this act.

(b) In any action or proceeding in which the lessor claims that the lessee is not entitled to repair and deduct under this section because the dilapidation which the lessee complains of occurred on or before the 180th day following the effective date of this act, the lessor shall bear the burden of proof as to such fact. However, an affidavit of the lessor, his agent, his predecessor in title or his pre-

decessor's agent, sworn or affirmed before a notary public or other appropriate officer on or before the 180th day following the effective date of this act, and recording, on the basis the affiant's own observation, the existence of the dilapidation which the lessee complains of, shall be admissible as prima facie evidence of such fact.

(c) For purposes of this section if a lessee acts to repair and deduct after the 30th day following notice to the lessor, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a presumption affecting the burden of proof.

(d) Prior to correcting any condition under this section which affects facilities which are shared by the lessees of other dwelling units, the lessee shall notify all such other lessees and so arrange the work as to create the least practicable inconvenience to them.

[*Comment:* Subdivision (a) of this proposed statute fully restores the tenant to the remedies which he had under § 1942 prior to the enactment of A.B. 2033, for purposes of seeing to it that the landlord at least conserves the premises in their condition as of the 181st day following the effective date of the act. The general restriction added by A.B. 2033 is here retained only in the form of an exception, permitting the tenant to exercise his repair-and-deduct remedy just once within any twelve-month period as to any dilapidations occurring on or before the 180th day following the effective date of the act. As discussed earlier, this limitation on the tenant's remedy, where applied for purposes of having a presently substandard building rehabilitated, is necessary because of the probability that complete and immediate rehabilitation, as opposed to conservation, cannot be funded out of the rents which the tenants of such buildings are able to pay.

The 180 day grace period is designed to give the landlord sufficient time to make a thorough inspection of his building and reduce to writing its present condition in accord with the evidentiary provisions of subdivision (b). By creating a new exception to the hearsay rule for the type of written statement that it covers, subdivision (b) affords the landlord and his successors in title a simple and effective means of proving at any time in the future that a particular dilapidation existed within or before the prescribed 180 day period, in addition to whatever other evidence he may have on the issue. Of course, there is and can be nothing to prevent a tenant from introducing any proper evidence on his behalf rebutting the assertions made in the statement or attacking the credibility of the declarant.

To be sure, there are special elements of trustworthiness about such a written statement which at least in part justify a relaxation of the hearsay rule. For one, the statement is to be an affidavit, that is, made under oath and which, if untrue, may subject the declarant/affiant to

a criminal action for perjury. For another, the statement must be made within the same period of time when the dilapidations described therein are supposed to have arisen. It will be quite difficult, if not impossible, for the declarant to anticipate and falsify in reasonable detail the existence of the multitude of potential dilapidations that might occur at a later time.

But to the extent that these guaranties of trustworthiness may not appear sufficient in themselves, the proposed exception to the hearsay rule can be justified on the ground of expediency. If by these evidentiary provisions, the landlord may be able to take some benefit of the doubt in the short-run, it seems nonetheless a necessary and worthwhile sacrifice for a fair and efficient remedy on the part of the tenant in the long-run.

Subdivision (c) changes the presumption as to the reasonableness of 30 days notice from one affecting the burden of producing evidence to one affecting the burden of proof on the issue.

Subdivision (d) is taken almost verbatim from the Model Residential Landlord-Tenant Code.¹⁰³

Section 7. Section 1942.1 of the Civil Code is hereby repealed.

[*Comment:* The above provision is necessary only because the matters currently dealt with in § 1942.1 are treated in other statutes under the proposed act.]

Section 8. Section 1942.5 of the Civil Code is amended to read:

1942.5. (a) If the lessor has as his dominant purpose retaliation against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate governmental agency as to the tenantability of the building, and if the lessee is not in arrears as to the payment of his rent at the time of the exercise of rights or the complaint, the lessor may not recover possession of the lessee's dwelling unit, cause the lessee to quit involuntarily, increase the rent, or decrease any services.

(b) Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his rights under any lease, agreement, or any law pertaining to the hiring of property or his right to do any of the acts described in subdivision (a) for any lawful cause, except that within 60 days of the latest of

(1) the date upon which the lessee, in good faith, has given notice pursuant to Section 1942; or

(2) the date upon which the lessee, in good faith, has filed a written complaint, with an appropriate governmental agency, of which the lessor has notice, for the purpose of obtaining correction of a condition bearing upon tenantability; or

¹⁰³*Id.*, § 2-206(3).

(3) the date of an inspection or issuance of a citation, resulting from a written complaint described in paragraph (2), of which the lessor did not have notice; or

(4) the entry of judgment of the signing of an arbitration award, if any, when the issue of tenantability is determined adversely to the lessor,

the lessor may not do any of the acts described in subdivision (a) unless in the notice of termination or other act, and in any pleading or statement of issues in an arbitration, if any, the lessor states the lawful ground upon which he, in good faith, seeks to recover possession, or do such other act, and establishes its truth, if controverted, at trial or other hearing.

(c) Any waiver by the lessee of his rights under this section shall be void as contrary to public policy.

[*Comment:* The above provisions are intended to encompass the "best of both worlds." The safeguards against retaliation by the landlord which are currently contained in § 1942.5, including the presumption that a notice to quit, etc. is retaliatory if within 60 days of the latest of the four listed events, are retained. Added to this is the protection which the California Supreme Court, has said that §§ 1941 and 1942 in their form prior to A.B. 2033 impliedly afforded.¹⁰⁴ That is, beyond the 60 day periods referred to, the tenant is entitled to an affirmative action or defense against retaliation at any time.]

Section 9. This act shall not apply to any lease, option or other agreement entered into prior to January 1, 1972, except that it shall apply to any hiring of a dwelling unit which is renewed by agreement, or presumed to have been renewed pursuant to Section 1945, after January 1, 1972.

V. CONCLUSION

It was stated at the outset of this article that the incidence of substandard housing is generally a function of poverty. And it was subsequently argued that the purpose behind making the landlord responsible and accountable to his tenant for the habitability of a leased dwelling is not, in the proper sense, to fully cure part of that poverty by forcing the former to pay for what the latter cannot. The purpose is rather to compel the landlord to assume the burden of some or all repairs only so that the cost of such repairs will be spread

¹⁰⁴Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970). See text accompanying notes 95-97 *supra*.

over all the tenants who will benefit from them in space or through time. This simply helps hold the cost of habitability to each individual tenant at a minimum. Obviously, legislation reforming Civil Code §§ 1941 and 1942 to fairly and effectively achieve this admittedly modest goal would still leave a sizeable gap between the total cost of living in adequate rental housing today and what much of our population can yet afford. But this does not mean that the degree to which such legislation might economically alleviate the substandard housing problem would be trivial or insignificant. Moreover, such legislation could, by clarifying and defining more accurately the proper rights and duties of tenant and landlord as to repairs, serve to ease one of the most confused and bitter points of friction in their relationship. The legislature owes it to the people of California to rethink the policy problems that were involved in A.B. 2033—and then produce a better solution.

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