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RETALIATORY EVICTIONS: LANDLORDS, TENANTS AND LAW REFORM

By James W. McElhaney*

To rule otherwise would be to "usurp the legislative prerogative," to "open the floodgates" to judicial legislating. We cannot cavalierly toss aside the traditions of Locke and Montesquieu, of checks and balances, of separation of powers, that are the very heart and soul of our governmental system.¹

When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves.²

For the past several years, Baltimore slum tenants have sought a means to legally withhold rent in order to induce landlords to repair faulty premises.³ This effort is a reflection of a nation-wide attempt to make law more responsive to the needs of the poor in which landlord-tenant problems have received heavy emphasis.⁴ Culminating a

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³ It is common for landlords to blame tenants and tenants to blame landlords for slum conditions. This article does not suggest that one or the other is generally more culpable. Other factors besides individual fault combine to make slums. Neither is it suggested that the slums are caused by the legal system, although some blame must be put there. To the extent that the law might alleviate some of the problems of slum housing, it has failed to do so, largely because of an inequality of the legal position of landlords and tenants. The focal point of this inquiry concerns problems involved in bringing tenants closer to a legal parity with landlords.
⁴ This vast increase in attention has occurred since the beginnings of the "war on poverty." It has been manifested in the funding of neighborhood legal services by the Office of Economic Opportunity, national conferences on landlord-tenant problems, and a profusion of law review articles. See, e.g., National Conference on Legal Rights of Tenants, Tenant's Rights: Legal Tools for Better Housing 21
series of abortive "rent strikes," picketing, an imaginatively attempted common law rent escrow, and repeated attempts to pass remedial legislation, the Maryland Legislature finally took action. In 1968, it passed Senate Bill 130, limited to Baltimore, which was intended to permit rent to be paid into court when landlords fail to keep their premises in repair. For the first year after this reform, the situation remained much the same. Landlords retained an effective weapon to prevent rent escrow: retaliatory eviction of those tenants who attempted to exercise their new right. Then, in 1969, the legislature passed a bill which was originally designed as a broad prohibition against retaliatory eviction. This bill was so severely truncated by the legislative process that it fails entirely to protect tenants who must rely on complaints to housing authorities and gives but dubious aid to those permitted to withhold rent.

I. COMMON LAW BACKGROUND

In order to put the problems in their proper setting, it is essential to examine the common law landlord-tenant relationship: the rules which governed Baltimore leases until the recent legislation and which still obtain throughout the rest of Maryland as well as most of the United States. While leases are contracts, they stand apart from the rest of contract law. A buyer of a chattel may be protected by an implied warranty of fitness, but ordinarily a tenant has no similar implied warranty. Unless the landlord has expressly agreed to repair, it is not a breach of the contract to fail to do so. A tenant must continue paying rent on faulty premises or face eviction — summary ejection for failure to pay rent, a procedure which in Baltimore takes about ten days from failure to pay until the eviction is executed.

This summary eviction can be brought even though the landlord has


The need to reform landlord-tenant law prompted the Office of Economic Opportunity to give financial support to a research program of the American Bar Foundation. This research resulted in the preparation of a model code for residential landlord-tenant relations. J. LEVI, P. HABLUTZEL, L. ROSENBERG, J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft, 1969) [hereinafter cited as MODEL RESIDENTIAL LANDLORD-TENANT CODE].

9. UNIFORM COMMERCIAL CODE § 2-315. This principle was recognized under the older UNIFORM SALES ACT § 15(1).
10. See Clarke & Stevens v. Gerke, 104 Md. 504, 65 A. 326 (1906). At common law the landlord was only held to give a covenant of quiet enjoyment. The name is misleading, however, for this covenant merely protected the tenant against interference with his occupancy by one claiming a superior legal right to the premises. Sigmund v. Howard Bank, 29 Md. 324 (1868); W.E. Stephens Mfg. Co. v. Buntin, 27 Tenn. App. 411, 181 S.W.2d 634, 636 (1944).
violated an express covenant to keep the premises in repair. Even if the tenant has a remedy against the landlord, he may be forced to assert it in a separate action. Thus it is said that the tenant has an independent covenant to pay rent. These two “doctrines,” the lack of implied warranties and the independent covenant to pay rent, shaped the entire landlord-tenant relationship. They have little to commend themselves today in an urban setting except that they have always been the law.

These rules mean that a tenant is left without any direct remedy against his landlord for failure to repair unless the landlord has violated an express covenant in the lease. While wealthy tenants often find that their leases are contracts of adhesion, sometimes making severe inroads on their common law rights, even the illusory protection of a written lease is denied most slum dwellers. The majority of poor tenants in Baltimore, as elsewhere, live under oral agreements where the rent is paid from week to week.

Building codes provide little help. In most jurisdictions tenants may lodge complaints with an administrative agency and if, upon investigation by the agency, defects are found which violate the code, the landlord is ordered to make repairs. Failure to repair may result in criminal action. Tenants complain that the process is slow and

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12. See H. TIFFANY, LANDLORD & TENANT § 182, at 1237 n.1243 (1910). This proposition is recognized in Brady v. Brady, 140 Md. 403, 407, 117 A. 882, 884 (1922).

13. In Baltimore, eviction actions are brought in the people’s court. Md. ANN. CODE art. 53, § 1 (1957). By local practice, eviction actions are heard in a division called “Rent Court,” where tenants are not permitted to assert claims against the landlord even though the people’s court’s limited jurisdiction may encompass the action. Thus, as a practical matter, a separate action must be brought. In some jurisdictions the tenant has a right of set-off. See note 65 infra and accompanying text. In Biggs v. McCurley, 76 Md. 409, 415, 25 A. 466, 468 (1892), the court said in dicta, apparently referring to cases where the landlord has breached an express agreement to repair: If the repairs are of a trifling character, requiring but a small outlay of money, it has been said in some cities, that the lessee himself ought to make such repairs, and claim an allowance for the money expended by him out of the rent.

14. The Maryland Court of Appeals has stated: [W]ith the usual covenant on the part of a landlord to keep the leased premises in repair, the covenant would, under the weight of authority, be considered as entirely independent of the covenant to pay rent, and a failure to repair would be no defence to any action founded upon non-payment of rent.

15. In a sense it would be more accurate to say that the landlord-tenant relationship shaped the doctrine, for that is the operation of the judicial process. If landlords and tenants were to start fresh with the courts today, few would argue that our present rules would result. Thus, the rules definitely shape the present relationship. For a more complete discussion of the Maryland cases, see Rhynhart, supra note 8, at 26–7.


17. The proliferation of form leases for residential tenancies has almost completely curtailed effective bargaining. Tenants, wealthy or poor, simply accept whatever terms are contained in the lease or they try elsewhere, usually finding a similar form lease. See Kessler, Contracts of Adhesion — Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943). It has been pointed out that “[c]ourts have, in other fields, nullified many unconscionable provisions of such ‘agreements’.” Schoshinski, supra note 4, at 554. Cf. UNIFORM COMMERCIAL CODE § 2–302.

18. Schoshinski, supra note 4, at 521.

19. In Baltimore, the Department of Housing and Community Development has absorbed most of what were once the functions of the Bureau of Building Inspectors.

20. E.g., BALTIMORE, MD., CODE art. 11, § 138 (1966) provides that violations of the health ordinances regarding dwellings are misdemeanors and punishable by fines.
non-responsive to their needs. Landlords, on the other hand, maintain that full code compliance is a practical impossibility which would constitute a tremendous economic burden.

Demanding code compliance is dangerous. As two recent Baltimore cases demonstrate, nothing prevents the landlord from evicting a tenant because he has complained to officials that the property violates the building code. Twenty-one days after proper notice to quit, the court will order eviction; no grounds need be given. This is a common law right to evict based on implied terms of the oral lease, the legal theory being that the contract is for the same period that the rent is paid. In Baltimore this rule has been limited by a city ordinance which requires that sixty days' notice be given for such evictions even if the tenancy is week to week. Elsewhere in Maryland, as in many other jurisdictions, thirty days' notice is required.

Instances of such retaliation for complaints to authorities are not unusual. Landlords have even stated to newspaper reporters that they brought eviction actions because tenants complained. While the Court of Appeals for the District of Columbia has recently held that retaliatory evictions are not permitted, the Baltimore People's and City Courts have refused to follow the rationale of Judge J. Skelly Wright and have instead reasoned that legislation is necessary to avoid the effect of the judge-made law.


26. The Sun (Baltimore), Sept. 8, 1968, § C, at 26, col. 1. "The way she put the law on me isn't the whole story by any means, but it made up my mind. I'm going to get rid of her." Id. at 24, cols. 3-4.
28. The reasoning of the courts in these decisions is discussed in the text following note 116 infra. The courts did not perceive the problem as one of their brethren's own making, but simply as an issue more properly resolved by the legislature than the courts. Unless there are instances of public reliance on past judicial decisions now perceived to be inadequate or inappropriate, Americans generally have little trouble in letting judges reshape their own handiwork. This has not been so in every judicial system. From 1898 until 1966, the House of Lords adhered to a rule that it could not
As a result of the independent covenant to pay rent, the ten day summary eviction for failure to pay rent, and the sixty day eviction for any reason whatever, there has been little reason to argue that the building code provides an implied covenant of fitness for habitability. Even if the Maryland Court of Appeals were to declare such an implied covenant, all that would be gained would be a cause of action for provable damages against the landlord in a separate suit. This would be a poor substitute for official code enforcement, small comfort to the evicted tenant, and miniscule power with which to threaten a landlord to force him to repair.

A direct attack was made in Maryland on the common law incidents of the landlord-tenant relationship. In Jacob Klotzman Co. v. Wilson, the People's Court of Baltimore entered judgment in favor of a rent withholding tenant who complained of defective property when an action was brought for summary eviction. The court ordered current and future rent paid to the tenant's attorney until the Bureau of Building Inspectors reported that the sixteen code violations on the premises were corrected. In a mandamus action against the Baltimore People's Court judge and the tenant's attorney, the Baltimore Superior Court held that the people's court was without jurisdiction to entertain such defenses or make such orders. The opinion of the court is instructive:

I do not have the slightest doubt that there are some instances where tenants are forced to live under conditions which should not be permitted to exist in the city of Baltimore, and that there should be some legislation to correct this overall picture of tenants being forced into housing accommodations which are inadequate and defective in many respects. . . . [B]oth sides have expressed accord today that the problem does exist, that it needs resolution, and that in all probability, the way to get to it is through the legislature.

Thus we are confronted with the strange specter of judges in the Baltimore courts publicly holding their noses at the results they reach and asking the legislature to release them from the bonds of judge-made law. Maryland is not alone in this confusing picture. Most other jurisdictions exhibit similar judicial reticence. Courts are under-
standably reluctant to toy openly with laws of property. But if this is the motivation for the reluctance, it is not well founded. While landlord-tenant problems present some special policy considerations, tenants are really consumers of a particular service. The sacrosanct intention of long dead testators and the contingent interests of unborn landowners are not present here; neither are we concerned with giving permanence to a judicial declaration of what are words of purchase. There is no good reason why the rules of landlord-tenant law cannot flex to meet current needs just as do rules of some contract and most tort law.

II. Statutory Reform

During the last three or four years, several jurisdictions have tried statutory reforms of their landlord-tenant law in order to aid in the attack on slum housing. Other methods, as yet untried, have been suggested by legal commentators. Four types of reform have received principal attention: improved housing code enforcement, slum property receivership, rent withholding, and tenant repairs. Each of these offers distinct advantages and drawbacks, justifying its separate consideration.

Improve Housing Code Enforcement

The proponents of improved housing code enforcement envision a fundamental change in the administration of the codes. They call for increased inspections and larger fines imposed through civil liability to government instead of criminal sanctions. In this way the economic advantage of code violation would be diminished through increased liability for infraction. The attendance of the defendant landlord at trial would not be necessary to impose "civil damages," provided he was properly served with process. Moreover, the burden of proof and other procedural safeguards incident to criminal trials could be dispensed with.

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33. Making code violations criminal acts may help to drive reputable landlords out of the low rent housing business. NATIONAL CONFERENCE ON LEGAL RIGHTS OF TENANTS, TENANT'S RIGHTS: LEGAL TOOLS FOR BETTER HOUSING 21 (1967).

34. See Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254 (1966); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801 (1965). Creating a fiction of "civil action" to dispense with traditional safeguards attendant to criminal trials would appear to be on shaky constitutional grounds. However, it has been done elsewhere. For example, under the Safety Appliance Act, 45 U.S.C. §§ 1-16 (1954), the "plaintiff" government may recover "damages" for violations of safety standards pertaining to trains even when no accident occurs. The constitutional battles fought over this act have not been on due process and the burden of proof, but on the commerce clause and whether the statute may be liberally construed. Johnson v. Southern Pac. Co., 196 U.S. 1 (1904); United States v. Great N. Ry., 229 F. 927 (9th Cir. 1916). The "distinction" between civil and criminal actions seems to have been accepted by the courts. "The Act is not to be construed by the rules which govern the construction of criminal statutes. The action is a civil action to recover a penalty." ID. at 930.

35. For an excellent discussion of the inadequacies attendant to imposing criminal sanctions and the need for a procedurally more flexible remedy which has the effect of actually enforcing the housing codes, see Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254 (1966); Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801 (1965).
Improved housing code enforcement offers some difficulties. Apart from its controversial nature, many observers feel it is too expensive for the return. It would require increased staff on the payrolls of cities whose budgets are already swollen. The money thus spent would not itself pay for any repairs. Furthermore, code enforcement is dependent on those whose interest is not directly involved — building inspectors. The most effective aspect of the proposal is the coercive effect of increased potential liability for code infraction, a "lever" which perhaps can be obtained elsewhere.

**Receivership**

Receivership is a plan to make expensive repairs practicable should landlords be recalcitrant or lack adequate capital. It is designed to provide a broad economic base for repairs and also to use the pressure generated by lending institutions to insure that housing units are kept safe. Under receivership, a building in disrepair may be taken from the landlord and put in the hands of a receiver who is empowered to borrow the necessary capital to make repairs. The money thus expended constitutes a prior lien which, like a tax lien, must be satisfied before any mortgage debt. As with property tax, the mortgagee's security interest is severely threatened by such a lien. Supporters of this legislation hope that banks would therefore enforce code compliance on the part of the mortgagor-landlords just as they ensure that property taxes are paid.

Receivership has limitations. A court may be reluctant to order a large building into receivership if only a few of its dwelling units are in need of repair. Such a reluctance would virtually destroy the remedy for individual tenants even if they technically have an independent cause of action. Moreover, to the extent that landlords perceive such a judicial reluctance, the overall coercive effect of receivership is diminished.

The most acute problem, however, is money. Receivership is hard to operate without state funds to pay for repairs, since receivers have difficulty obtaining private capital. Banks have refused to make loans to receivers. They contend that the statutory preference given to such loans is not constitutional, and that they would therefore not have adequate security. Because the federal constitutionality of receivership has not yet been directly settled, it is still open to argument that the

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36. See, e.g., ILL. ANN. STAT. ch. 24, § 11-31-1 (Smith-Hurd 1962); N.Y. MULT. DWELL. LAW § 309 (McKinney 1965).
38. If the receivership action must be brought by some watch-dog agency, then of course the tenant has no cause of action himself. But even when a tenant may properly petition for receivership, if the awarding of receivership is dependent upon a certain percentage of fellow tenants having apartments in serious disrepair, then, for practical purposes, the tenant still has no independent cause of action. While the MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 4, § 3-301, would authorize receivership for serious defects in an apartment building "or any part thereof," it is difficult to imagine a court ordering a two hundred unit building into receivership if only one or two units need repair. The Code creates a cause of action only in an occupying tenant. See note 45 infra.
preference is an impermissible impairment of contract. Thus banks have a semblance of legal justification for their position. But the constitutionality of receivership should not be seriously in doubt. This suggests that the real reason for the banks’ refusal is not concern for the validity of the security in these loans, but rather recognition that the mortgages they hold on other slum properties would be threatened. Obviously their refusal to loan to receivers postpones litigation which would likely bring the judicial approval of preference liens and make banks enforce housing codes in order to protect their mortgages on slum properties.

But even where state or local money is available to pay for repairs, receivership has suffered since repaired buildings do not seem to be earning as much as had been hoped. This appears to be due to several reasons. First, the properties placed under receivership will often be only those which are unprofitable for the landlord to repair rather than ones owned by landlords without adequate capital or incentive to make repairs to protect their investments. Receivership is obviously a concentration of such “unprofitable” units. Second, a receiver may have to reach an unrealistically high state of repair — full housing code compliance. The additional amount of money spent in reaching this standard over what “fundamental” repairs would cost may offer only marginal benefit to the affected tenants. Private landlords are typically not required to reach full code compliance. Third, buildings may be repaired under receivership which are not economically repairable (but which are not necessarily “condemned”). Among other reasons, this may be done because of a lack of adequate substitute housing.

Evaluating the utility of receivership is difficult. It would seem improper to conclude that it is a failure if the receiver does not recoup

40. Rosen, Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 311, 322 (1968): The Chicago Title and Trust Company, in spite of a wealth of informed opinion to the contrary, feels that there is a real danger that the prior lien might be invalidated on constitutional grounds. Therefore, until there is a test case, they have refused to issue any insurance policies on the certificates [of indebtedness issued by receivers under the Illinois statute].
41. New York has held that a receivership statute which creates a lien prior to mortgage security on rents does not constitute an impermissible impairment of contract. In re Department of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964). Since this case was decided, the lien has been expanded to make the receiver’s interest prior to the entire security interest of mortgage holders. N.Y. MUN. DWELL. LAW § 309(5) (e) (McKinney Supp. 1968). Compare the problem of procedural due process discussed at note 87 infra.
the cost of repairs in a reasonable time. Certainly the threat of receivership may have a greater coercive effect than low fines for housing code violations which are often treated by landlords as a tax. Nevertheless, it is impossible to guess how many repairs are made out of fear of losing a profitable operation.43

One effect of receivership is that it can force a landlord to diminish his profits or even take a temporary loss in order to protect his overall investment. This effect is particularly evident when an individual sub-unit may not economically justify its repair. Thus owners of multiple-unit buildings may be forced to make repairs on sub-units in order to keep an entire building out of receivership. On the other hand, single and double units permit a landlord to separate out his "bad risk" units by permitting them to go into receivership. In Baltimore, which has a large number of single and double units in low income neighborhoods, part of the coercive effect of receivership would be lost. Therefore, the row house diminishes, but does not eliminate, the utility of receivership.

A corollary of this is that row house receivership would heighten the likelihood of unprofitable operation by the receiver since the concentration of defective units would be more "pure." The receiver would have fewer profitable units to help offset the cost of repairing defective units. Second, row house receivership would be more expensive than apartment receivership since there would be an unavoidable duplication of many "fixed costs" in ordering, setting up, administering, and accounting for receivership.44 The cost per unit

43. There is some data. According to Gribetz, 20% of the first 600 cases handled by the Receivership Unit were settled because of compliance by the landlord prior to formal proceedings in the case. Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1273 n.87 (1966). How many repairs were made because of the possibility of receivership instead of actual complaint is imponderable.

44. Avoiding the repetition of fixed costs is the economic underpinning of class actions. In a sense receivership of a large apartment building is a class action brought on behalf of all tenants in the building. This suggests that class actions may be a way around the seeming inutility of receivership in row house towns such as Baltimore and Philadelphia, assuming the jurisdiction has a receivership statute. An objection to this notion which immediately comes to mind is that there is no identity of issues for the class to litigate. However, this is probably not a sound objection. The issue is whether the properties have wrongfully gone without landlord repair and whether the state of disrepair is grave enough to justify the strong medicine of receivership. The particular repairs to be made may differ just as they do within one large apartment building. The aggregate of proof would really not be much different than with one large building. Apartment building receivership is not limited to instances where the common property (stairs or furnace, for example) is in disrepair, but also contemplates situations where so many of the individual apartments are dilapidated that relief will be given.

The real difficulties behind tenant class actions for receivership lie in questions of local procedure, and perhaps more importantly, problems of forming tenant organizations along landlord rather than neighborhood lines. Social workers and community action leaders find trouble enough attempting to organize neighborhood tenant organizations. Slum neighborhoods are often diffuse, typically peopled by transients and unsophisticated people who are often hesitant to join organizations. Even if these obstacles can be overcome, organization will do little for tenants whose landlords are not large operators. They would still have to depend on less powerful individual actions. Yet, with all these problems, receivership class actions may offer enough economic leverage to coerce recalcitrant landlords with large slum holdings to improve the state of repair of their properties so as to make this a worthwhile
would undoubtedly be higher, all other factors equal, than with multiple dwelling units. Nevertheless, receivership is an idea that deserves serious legislative consideration. 46

Rent Withholding

A more attractive plan for some purposes is rent withholding. 46 Withholding and “rent escrow” avoid the natural judicial reticence to employ the strong medicine of receivership, a reticence which works to the tenant’s disadvantage where less expensive repairs are to be made. The potential advantage of rent withholding seems to be twofold: first, it can provide an economic incentive to repair the premises and second, it can create a small potential fund, accumulated rent, to pay for repairs without incurring the expense of receivership.

Some distinctions are necessary in order to assess rent withholding techniques. Rent withholding differs from rent escrow in that withholding means that the tenant keeps the rent and escrow means that he pays it to a third party stakeholder. Rent withholding is distinct from rent abatement in that withheld rent would be paid when repairs were made, but abated rent would not. 47 A defensive remedy is one which may be employed only after a landlord starts eviction proceedings, while an offensive remedy permits judicial determination

effort. Thus the threat of a tenant class action could enhance the effect of receivership legislation in row-house slums.


45. Receivership is an important part of the Model Residential Landlord-Tenant Code, supra note 4, §§ 3-301 to 3-307. Enforcement is dependent upon tenant initiation (§ 3-301) but admits of government intervention (§ 3-302(3)). This is probably not enough to permit government initiation, and hence seems unnecessarily narrow. More importantly, it is limited in application to apartment buildings, although that term, as defined by §§ 1-205 and 1-206, is rather broad. This is probably an indication that the Code was written against the background of cities such as Chicago and New York, where multiple dwelling units are the norm, rather than Baltimore and Philadelphia.

46. One of the most serious omissions of the Model Residential Landlord-Tenant Code, supra note 4, is its failure to make adequate use of rent withholding or escrow. Instead, it relies principally on receivership (§§ 3-301 to 3-307) and repair and deduct (§ 2-206). But where the repairs to be made do not justify receivership or where the tenant cannot afford the luxury of “loaning” the landlord repair money under the repair and deduct concept, the tenant is largely without protection. Similarly, the expansion by the Code (§§ 2-204 and 2-205) of the tenant’s right to terminate is a remedy of dubious utility for the poor tenant who is likely to find no better conditions elsewhere. The need for rent withholding or escrow is further emphasized by the limited scope of rent abatement in the Code. Section 2-207(1) provides that the tenant may, when the landlord fails to supply hot water, either terminate the rental agreement or keep one-fourth of the rent. Pursuant to § 2-207(2), the tenant may terminate the agreement or procure adequate substitute housing at the landlord’s expense for failure to provide a reasonable amount of water or heat. Thus, the rent abatement in the Code only applies to heat, water and hot water. This and the fact that rent abatement penalizes a landlord without creating a source of money for repair illustrate the significance of the omission of rent withholding or escrow from the Code.

47. Pennsylvania has enacted a mixed system. Rent is paid into court for six months, and, if the landlord has not made repairs by that time, the money is returned to the tenant. Pa. Stat. Ann. tit. 35, § 1700-1 (1969).
before the tenancy is jeopardized. In addition, offensive remedies may be divided into tenant initiated and agency initiated remedies. Tenant initiated remedies permit the tenant to bring his own affirmative action, while agency initiated remedies require a health, housing, welfare, or similar bureaucratic agency to bring the action on the tenant's behalf. Adding differing procedural settings to these variables, it can easily be appreciated that rent withholding and rent escrow, where they are available, present a rather interesting collage.

Defensive rent withholding and escrow exist in several jurisdictions.\textsuperscript{48} With these remedies the aggrieved tenant withholds rent if the landlord refuses to repair. Proof of the defect and of the landlord's refusal to repair after notice constitutes a defense to eviction for failure to pay rent. In the sense that the tenant takes the initiative by withholding rent when repairs are not forthcoming, it appears to be an offensive remedy. However, the eviction action is the landlord's suit, and should the defense fail, the tenant is evicted.\textsuperscript{49} This demonstrates one real disadvantage of a defensive remedy: the tenant may be required to guess, at his peril, whether the defect for which he withheld rent was justified.\textsuperscript{50}

The defensive nature of the remedy has certain advantages. Placing the burden of commencing legal action on the part of poor, unsophisticated tenants who are, for the most part, unfamiliar with or untrusting of lawyers, will inhibit the use of the remedy. For such tenants, provided the grounds are clear-cut, the danger of a defensive remedy is outweighed by the relative ease of giving notice and withholding rent until an eviction action is commenced. Furthermore, if rent withholding truly becomes an operative part of the landlord-tenant relationship, real bargaining between the parties may emerge. Then

\textsuperscript{48} E.g., N.Y. REAL PROP. ACTIONS LAW §§ 769-82 (McKinney Supp. 1968); R.I. GEN. LAWS ANN. § 45-24.2-11 (Supp. 1968).

\textsuperscript{49} Eviction is subject to a right of redemption which the tenant may have. See note 78 infra. To redeem, a tenant may not only have to pay all back rent, but also certain costs.

\textsuperscript{50} A major failing of the \textit{MODEL RESIDENTIAL LANDLORD-TENANT CODE}, supra note 4, is that it would permit retaliatory eviction in instances where the tenant in good faith notified building inspectors of defects or even merely requested the landlord to repair defects if no Code violation existed at the time. § 2-407(2)(i). Thus the tenant must wager his tenancy against his interpretation of the housing code. The commentary, in justification of this policy choice, puts forth three reasons: 1) that a landlord whose property is in code compliance is not likely to be angered by complaints; 2) that "this is an additional impetus to the landlord to bring his building into compliance with codes"; and 3) that it is doubtful policy to restrict a property owner's right to select tenants without some fault on the landlord's part. \textit{Id.} at 70-71. It is suggested that two of these three ideas cannot stand close examination. First, if a landlord is not likely to be angered by complaints when the property is in full code compliance, then not much is taken from him by denying him retaliatory eviction in return for encouraging good faith complaints and requests to repair. Second, the additional impetus to the landlord to bring the property into Code compliance is hard to see. If landlords are to meet Code standards the impetus is not the hope that they will be able to evict tenants in retaliation for making complaints. The real justification for the policy choice must be the freedom of selection argument: making a landlord keep a tenant six months longer than he would like is a small encroachment which would result in giving tenants fundamental protection in their effort to improve their conditions. This is particularly so since it is not hard to imagine a civilized legal system which would require good cause for all evictions. See note 107 infra and accompanying text.
the defensive remedy would appear to enable less sophisticated tenants to take part in this bargaining process with greater ease.\footnote{51}

On the other hand, where a tenant has a more doubtful case, requiring him to wager his tenancy to give definition to a new statutory procedure would inhibit him from exercising what may turn out to be a well-founded complaint. This is not an illusory quibble. Where the grounds for withholding are vague standards,\footnote{52} the problem for the tenant becomes quite real. It would appear important, then, that both offensive and defensive remedies appear in any well-planned statutory scheme.

The choice between rent withholding and rent escrow seems a bit easier. Permitting a tenant to withhold rent provides him with an economic incentive to commit waste to the leased premises if he does not have the rent money. He has nothing to lose. If he convinces the court that the defective condition is the landlord's responsibility, he can continue his tenancy without paying rent. Should he fail to do so, he is in no worse position than if he had not damaged the property since he would have been evicted anyway. Landlords are usually not interested in spending additional legal fees in getting judgments against those who are, for practical purposes, recovery proof. Moreover, leaving accumulated rent in the hands of a poor tenant would jeopardize a potentially growing fund which might pay for repairs.\footnote{53} Such a provision would endanger the passage of proposed legislation, since landlords, who maintain that many of the repairs they make are necessitated by vandalism,\footnote{54} would be inalterably opposed to rewarding intentional property damage, no matter how small the actual number of cases.

Rent withholding, as a remedy, does not seem to be as desirable as rent escrow. However, it has a proper place in a well-organized statutory set-up because it serves the legitimate function of initiating "defensive" rent escrow. Since an unpaid landlord can reasonably be expected to start eviction proceedings quickly, withholding rent is a relatively simple way for an aggrieved tenant to "get into" court. Once he is there, it is not unfair to require him to pay both back and future rent into\footnote{55} court where it will be held in "escrow" until the necessary repairs are made. Requiring him to do so eliminates the potential economic incentive to commit waste. Without this type of withholding, the burden would be on the tenant to commence the action.

There are agency initiated remedies within the scope of rent withholding. In New York City many welfare recipients have their rent paid directly by the Welfare Department.\footnote{56} When a landlord of such

\footnote{51} So far the most realistic gains in tenant bargaining power seem to have come through tenant unions rather than through the existence of any particular remedy, but organizing poor tenants who are likely to be transients in communities where there are large amounts of single and double dwelling units is difficult. See note 44\supra.

\footnote{52} See note 77\infra and accompanying text.

\footnote{53} One of the failings of the Model Residential Landlord-Tenant Code,\supra note 4, is that it provides for rent abatement rather than rent escrow. See note 46\supra.

\footnote{54} See The Sun (Baltimore), Aug. 4, 1969, § C, at 20, col. 7.

\footnote{55} The court might, however, order the rent diminished. See note 88\infra and accompanying text.

\footnote{56} N.Y. Soc. Services Law § 143-b (McKinney 1966).
a tenant fails to repair the premises, the department is empowered to investigate the facts and, if substantiated, to withhold rent payments.\textsuperscript{57} This has the advantage of obviating the economic incentive to commit waste. It serves to verify the complaint and tends to insulate the tenant from the hazard of guessing whether it is a rent-impairing defect. However, it is dependent on bureaucratic concern which is indirect, and bureaucratic judgment which may differ from that of the courts as to what justifies rent withholding, a judgment which well may not vindicate some interests nor seek judicial definition of uncertain areas.\textsuperscript{58} It is limited to welfare recipients who live under a system which does not trust them to handle personal affairs, a kind of paternalism which does not encourage people to assume responsibility and break out of a position of dependency.

In Illinois,\textsuperscript{59} Massachusetts,\textsuperscript{60} New Jersey,\textsuperscript{61} and Pennsylvania\textsuperscript{62} there are procedures for agencies to initiate rent withholding or rent escrow. Of these, only Massachusetts makes provision for the initiation of proceedings by both the tenant and the respective agency.\textsuperscript{63} While it is helpful to have “watch-dog” agencies protecting private interests, there does not seem to be any compelling reason why tenants should be forced to rely solely on them.

\textit{Tenant Repair}

In addition to the other major types of reform directed toward the landlord-tenant problem — improved housing code enforcement, receivership, and rent withholding or escrow — there are lesser remedies.\textsuperscript{64} Notable among these are the California Civil Code provisions.\textsuperscript{65} After receiving notice from a tenant that the leased premises violate the housing code, a landlord has a reasonable time to make repairs. If the landlord fails to repair, the tenant may vacate the premises and thereby be released from paying rent, or have the repairs made himself and deduct the expense from the next rent payment.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Cf. Sax and Hiestand, \textit{supra} note 4; Note, \textit{Enforcement of Municipal Housing Codes}, 78 \textit{Harv. L. Rev.} 801 (1965).
\item \textsuperscript{59} Ill. Ann. Stat. ch. 23, § 11–23 (Smith-Hurd 1968).
\item \textsuperscript{63} See note 60 \textit{supra}.
\item \textsuperscript{64} In addition to the broad range of remedies discussed in this article there has even been the suggestion that courts make “slumlordism” a tort. See Sax and Hiestand, \textit{supra} note 4; Sax, \textit{Slumlordism as a Tort — A Brief Response}, 66 \textit{Mich. L. Rev.} 465 (1968). \textit{But see} Blum and Dunham, \textit{Slumlordism as a Tort — A Dissenting View}, 66 \textit{Mich. L. Rev.} 451 (1968).
\item \textsuperscript{65} Cal. Civ. Code §§ 1941–42 (West 1954).
\end{itemize}

Repair and deduct is, for practical purposes, a common law remedy in some jurisdictions. Where a tenant is permitted to plead a violation of the lease agreement in mitigation or set-off to an action by the landlord for unpaid rent, the tenant has, in effect, the right to repair and deduct, since the cost of repairs would be recoverable
The right to vacate does not seem to be much of a remedy for poor tenants who are likely to have week to week or month to month tenancies; for practical purposes they already have that remedy and it does them no good. The trouble and expense of moving, including time lost from work, makes it too expensive. The right to vacate may do something for middle class individuals whose written leases purport to relieve the landlords of the obligation to repair. 67

The interesting part of this statutory plan is the right to repair and deduct. Limited to a maximum of one month's rent in some jurisdictions, 68 this remedy is suited to inexpensive repairs which may be quite important. Many electrical, plumbing, and heating repairs may fall within this category, disputes over which should not require the tenant to institute legal action. If the landlord elects to contest the deduction, he may do so by bringing an action for rent or eviction for failure to pay rent, contending that the condition did not exist, or that it was the tenant's fault.

The repair and deduct remedy is not useful for large repairs. It also has the disadvantage of requiring an expenditure of "rent" money before rent is due in order to pay for the repairs. Nevertheless, repair and deduct is a sensible complement to other tenants' remedies. 69

III. MARYLAND'S LEGISLATIVE ACTION

Before the 1968 legislative session, numerous unsuccessful attempts were made to enact legislation which would permit tenants to withhold rent or put it in escrow when landlords refused to repair. 70 On May 7, 1968, the Governor of Maryland approved Senate Bill

by the tenant in an action against the landlord. See MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 4, at 38.

This is operative only where mitigation or set-off may be pleaded in the landlord's action as opposed to a separate tenant's action for damages, and only when the landlord has violated an explicit promise in the lease to repair. This limitation severely circumscribes its utility to poor tenants with one-sided oral or written leases. Moreover, in many jurisdictions the remedy of repair and deduct can be avoided by bringing an action for eviction on the grounds of a default in rent. Id. at 39.

67. The Model Residential Landlord-Tenant Code, supra note 4, places considerable emphasis on the right to vacate. §§ 2-204, 2-205, 2-207, and 2-208. While this may be a mis-appraisal of the utility of an expanded right of constructive eviction to poor tenants, it is probably better seen as an indication of the broad range of purposes to which the Code was intended to serve.

68. The California statute limits the amount to the equivalent of one month's rent and the right is waivable by contract. CAL. CIV. CODE § 1942 (West 1954). The Model Residential Landlord-Tenant Code, supra note 4, suggests a limitation of fifty dollars which could be increased to one month's rent if the tenant submits "a written estimate by a qualified workman at least [four weeks] before having the work done...." § 2-206(1).

69. The Model Residential Landlord-Tenant Code, supra note 4, places considerable reliance on the remedy of repair and deduct. § 2-206. Low income tenants though are not likely to benefit greatly from this remedy. They will probably lack the money to "loan" their landlord for the cost of necessary repairs. Inevitably, some might pay for repairs in expectation of a deduction from rent only to find the landlord able to persuade the court that the repairs were not necessary. In the latter case, the landlord could apparently evict the tenant in retaliation for having made a complaint in good faith when the premises were in full Code compliance. § 2-407(2)(f). In effect the evicted tenant would make a gift of repairs to the landlord without deriving any benefit from them.

This new law creates a tenant's remedy by providing a new defense to a landlord's action or proceeding to recover either rent or possession of the premises. For practical purposes, this new defense would almost

71. Ch. 459, [1968] Md. Laws 832. The new law is relatively short and it is here set out in full in order to help the examination of its provisions. Included are additions and deletions as shown in the Maryland Laws of 1968.

AN ACT to add new Section 459A to the Code of Public Local Laws of Baltimore City (1949 Edition, being Article 4 of the Code of Public Local Laws of Maryland), title "Baltimore City," subtitle "Landlord and Tenant," to follow immediately after Section 459 thereof, as last amended by Chapter 176 of the Acts of 1955, to authorize a tenant of leased premises in Baltimore City to raise certain defenses in actions based on rent due, to provide conditions for this defense and rebuttal thereof, and to authorize the issuance of certain orders in such cases, allowing a set-off under certain circumstances for rent due, PROVIDE FOR CERTAIN SAFEGUARDS FOR TENANTS UNDER CERTAIN CIRCUMSTANCES, AND TO MAKE OTHER PROVISIONS IN RELATION THERETO.

SECTION 1. Be it enacted by the General Assembly of Maryland, That new Section 459A be and it is hereby added to the Code of Public Local Laws of Baltimore City (1949 Edition, being Article 4 of the Code of Public Local Laws of Maryland), title "Baltimore City," subtitle "Landlord and Tenant," to follow immediately after Section 459 thereof, as last amended by Chapter 176 of the Acts of 1955, and to read as follows:

459A.

(a) In an action of distress for rent or in any complaint proceeding brought by a landlord to recover rent or the possession of leased premises for nonpayment of rent (including a proceeding brought under Section 456 hereof), where the property is leased for residential use for a term of one year or less, the tenant may assert as a defense, in addition to any other defenses authorized by law, that there exists upon the leased premises, or upon the common property

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of which the leased premises form a part, a condition which constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof, including but not limited to, a lack of heat or of running [COLD AND HOT] water or of light or of electricity or of adequate sewage disposal facilities or an infestation of rodents.

(b) The assertion of the defense provided for in subsection (a) shall be conditioned upon the following:

(1) Prior to the commencement of the action of distress for rent or the complaint, the landlord or his agent was notified in writing by certified mail of the aforesaid condition or conditions by the tenant or was notified by a violation or condemnation notice from an appropriate State or municipal agency, but that the landlord has refused, or having a reasonable opportunity to do so, has failed to remedy the same.

(2) Payment by the tenant into court of the amount of rent [stated in the action of distress for rent to be in arrears or stated in the complaint to be due and unpaid,] FOUND BY THE COURT TO BE DUE AND UNPAID, to be held by the Court pending the issuance of an order under subsection (d) of this section.

(c) It shall be a sufficient answer to such a defense if the landlord or his agent establishes that:

(1) The condition or conditions alleged in the defense does not in fact exist or that such condition or conditions have been removed or remedied; or

(2) Such condition or conditions have been caused by the tenant or members of the family of such tenant or of their guests; or

(3) The tenant has UNREASONABLY refused entry to the owner or his agent to the premises for the purpose of correcting such condition or conditions;

(4) The conditions were known by the tenant to exist prior to the letting of the premises.

(d) The Court shall make findings of fact upon any defense raised under this section or the answer to any defense and, thereafter, shall pass such order as the justice of the case shall require, including any one or more of the following:

(1) An order [or judgment which includes a] OF set-off to the tenant as determined by the Court in such amount as may be equitable to represent the
always be raised in an action for ten day summary eviction for failure to pay rent. The defense is that the landlord has failed to correct a defect on the leased or common premises which constitutes "a fire hazard or a serious threat to the life, health or safety of occupants thereof, including but not limited to, a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities or an infestation of rodents." The law provides that assertion of this defense is "conditioned upon" : the landlord having been notified of the defect prior to commencement of the proceedings either by certified mail from the tenant or by a violation or condemnation notice from an appropriate governmental agency; the landlord having failed or refused to correct the defect; and "[p]ayment by the tenant into court of the amount of rent found by the court to be due and unpaid."

Although the new law provides a defensive tenant's remedy, the tenant must take some action to be able to assert the defense. Some
insist that it is unfair to require poor tenants, perhaps illiterate and unlikely to be familiar with the post office except on a most elementary level, to send formal written notification to landlords about defects in order to raise the defense. Landlords may fear that without this measure they will go to needless expense in bringing fruitless eviction proceedings. At any rate, producing a receipt for a certified letter is likely to go far to cut off dilatory quibbling concerning whether the defense is properly before the court. This is a requirement which tenants’ organizations can help their members meet. The alternative is to complain to the building inspectors. If they issue a violation notice and if the tenant learns of it, then he may withhold rent if the repairs are not made.

A more serious objection is that the Rent Escrow Act forces tenants to guess at their peril whether a defect constitutes a “fire hazard or a serious threat to the life, health or safety of occupants” of the leased premises. Since the enumeration which follows the phrase is, by its terms, merely representative of defects which might justify the defense, this important speculation could apply to a large number of conditions. The danger to tenants in guessing which defects qualify is the risk of eviction and even payment of landlords’ counsel fees.

Ordinarily a tenant in default may redeem and avoid eviction by paying back rent and costs (not attorneys’ fees) within the specified period. Two questions arise because of the new statute. First, whether the eviction clause permits eviction without redemption and second, whether the “in terrorem” clause, when read with the eviction clause, permits such evictions. For what seem to be sound reasons, the answer to both questions should be “no.”

It might be argued that the eviction clause, which permits the court to “terminate the lease or order the surrender of the premises to the landlord,” allows the court to evict without redemption by the tenant. The theory would be that by failing to provide for redemption explicitly, the legislature intended the act to be a partial repealer of the right to redemption. The eviction clause, however, was quite evidently inserted to permit the court to order eviction and does not deal with the procedures or limitations on evictions. The Rent Escrow Act was not designed to supplant the old law but to add a defense.
not previously recognized. Negative repealers are not typical devices in statutory drafting. Taking away the substantial right to redemption should not be presumed from an oblique statutory construction.

Whether the "in terrorem" or "bad faith" subsection, when read with the apparently unqualified power to order eviction, permits eviction without redemption, is a related question. It might be asserted that where a tenant raised the defense in "bad faith," or where he actually caused the defect complained of, he ought not be entitled to the right of redemption. This argument would not seem to comport with sound construction or policy. First, the "in terrorem" clause contains explicit punishment. Costs, including counsel fees and court costs may be awarded to the landlord when the defense is raised in "bad faith." In addition, the cost of repairs may be awarded when the tenant has caused the defect complained of in the defense. Additional sanctions would not seem justified. Second, the right to redemption is an essential one which mitigates the harsh right of the landlord to demand summary eviction for failure to pay rent. Indeed, the only justification for the landlord's power is the valid presumption of irrevocable loss of rent. When rent is not threatened, there is no justification for imposing summary eviction.

Although the statute cannot reasonably be read as directly limiting redemption, there is a possibility that it might do so indirectly. If attorneys' fees were awarded to the landlord because the tenant raised the defense in "bad faith," the tenant might be able to pay rent, but not the fees. Would the landlord be permitted to insist on payment of the attorneys' fees first? In addition to providing greater sanction than the statute calls for on its face, conditioning a tenant's retention of possession on payment of more than the rent does not seem to have any good policy justification. If the reason for summary eviction is to protect the landlord from irrevocable loss of rent, that end is not served by denying redemption. Furthermore, there does not seem to be any good reason for granting special collection powers for recovering a "debt" for attorneys' fees.

The basic propriety of the "in terrorem" clause seems to be doubtful. Apparently it is designed to insulate landlords from captious assertions of the defense of rent escrow. Perhaps it is "fair" to keep the landlord from having to pay the attorneys' fees in order to refute a specious defense. However, no correlative protection is accorded to the tenant for his attorneys' fees when the landlord brings the eviction in "bad faith." For the poor tenant whose income is just above entitlement for legal aid, payment of attorneys' fees may be

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81. See Baltimore People's Court, Part XXIV, right to pay rent into court, 1 Judgment of Restitution, printed in THE LEGAL AID BRIEFCASE, Oct. 1968, Vol. XXVII, No. 1 at page 25. This rule, which was adopted in response to the passage of the Rent Escrow Act, recognizes the right of the tenant to redeem.

82. Cf. MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 4, § 2-304(1)(a) (which provides that upon the tenant's failure to properly maintain the leased premises, the landlord may remedy the failure, and treat the expenses so incurred as rent).

83. But see MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 4, § 2-407(3) (providing that a tenant from whom possession has been improperly recovered may receive three months rent or threefold the damages sustained, including reasonable attorney's fees).
very important. Whether counsel fees should be awarded generally is a subject fraught with debate, but, if they are going to be permitted, why not on an equal basis? Since a similar club is not held over the landlord, perhaps this is a denial of equal protection of the laws offensive to the fourteenth amendment.

Summing up the "in terrorem" subsection, it would seem that, where the tenant raised a defense which was recognized, he would get the relief of being permitted to pay rent into court. Where he raised, in good faith, a defense held not to justify rent withholding, eviction may ensue, but the right to redemption is not cut off. In those cir-

84. One of the most interesting provisions of the Model Residential Landlord-Tenant Code, supra note 4, is the requirement that indigent tenants be given court appointed counsel.

In any proceeding brought by or for a landlord against a tenant to recover possession of his dwelling unit, the court shall inform the tenant of his right to counsel, and if the tenant is unable to afford his own, the court shall appoint counsel. Id. at § 3-101(1).

While superficially attractive, this proposition requires far more discussion than the meager fifteen-line commentary offered by the writers of the Code to the effect that when one's home is at issue, counsel should be required.

This is not to dispute the general idea that where there are issues to be litigated, indigents should have counsel. Indeed, it is relatively simple to make the legal argument that there is even a constitutional right to counsel in civil cases. See, e.g., Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1967) and Note, Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967). The social and economic effects of such a "right" are more difficult to work out. The same may be said of this section.

First, it would greatly slow down the handling of eviction actions, or require many more courts and judges. The preponderance of eviction actions are summary proceedings to evict for failure to pay rent. In practice most tenants never appear, and the cases are disposed of in "rubber stamp" fashion. The provision would require court-appointed counsel "in any proceeding" of eviction. Would it be necessary for defendants to appear personally to be advised of their rights? Landlords could not be expected to acquiesce in such a practice. In addition to the delays thus engendered, defendants could avoid summary ejectment by never appearing voluntarily to be advised of their rights. This could be prevented by advising tenants of their rights in the pleadings, a less effective approach. Still, dilatory tactics could be expected from counsel. If nothing else could be done, evictions could be delayed. It may be important to make reforms in eviction actions to insure that tenants are aware of the proceedings and to keep them from losing fundamental rights in summary actions which are, for practical purposes, ex parte. Nevertheless, this provision would not seem to be the way to do it.

Second, the cost may be too great for the return. The right to counsel in civil cases is a desirable goal, but granting counsel in every eviction action may be starting from the wrong end. It would obviously require a substantial reallocation of the scarce commodity of justice (in which legal services are included) to eviction cases. Legal representation in such cases may be desirable, but there surely are higher priorities. See Hazard, Rationing Justice, 8 J. Law & Econ. 1 (1965).


86. The Model Residential Landlord-Tenant Code, supra note 4, would invalidate lease provisions which allow recovery of attorney's fees by either party. § 3-402. The Code views any court proceedings by either party as less desirable than negotiation or the pursuit of another remedy under the Code. To this end, a lease provision holding one party responsible for the other's legal expenses cannot be allowed, since it allows the latter to enter court with less expense, thus ensuring that he will be more likely to do so. . . .

Id. at 19.

Compare this policy of discouraging litigation with the change in eviction proceedings which might result from adoption of the Model Residential Landlord-Tenant Code's provision for appointment of counsel for indigent tenants discussed in note 84 supra.
cumstances the court should exercise its discretion to refuse to order eviction, provided the rent is paid, and save the tenant “costs.” Where the defense is raised in “bad faith,” attorneys’ fees may be charged against the tenant, provided this is constitutional, and eviction ordered. However, the right to redemption should not be cut off.

A serious omission in the list of possible orders the court can employ is the failure specifically to empower the court to order the landlord, under the risk of contempt, to make repairs. A similar hiatus is the failure to empower the court to pay for repairs through the offices of the clerk or to permit the appointment of an administrator to do so should a landlord remain recalcitrant. One of the virtues of rent escrow is that it permits the accumulation of money for repairs. The failure specifically to provide this device is unfortunate, but perhaps it is implicit in the statute. The source would seem to be the broad power in subsection (d) to “pass such order as the justice of the case shall require, including any one or more of the following.” It might be argued that “including” is somehow more narrow than the phrase “including but not limited to” which is used preceding representative defects. Thus it might be asserted that only orders very similar to those listed would be permissible. Furthermore, the original bill was amended to give specific authorization to pay a mortgagee in order to stay foreclosure. If it was thought that specific authorization was needed for this, then how can the statute be interpreted to allow a court to pay laborers and materialmen?

In addition to being contrary to the plain meaning of the statutory language, this restrictive interpretation should fail for other reasons as well. Obviously the court must be able to dispose of the rents it receives. Other than the broad power to “pass such order as the justice of the case shall require,” the statute wholly fails to tell the court what to do with the money once it has it other than to permit payment to prevent mortgage foreclosure. While courts may be understandably reluctant to supervise the repair of slum housing, it is appropriate to do so on the rare occasions when keeping rents from

87. Ch. 459, § 1(d)(3) [1968] Md. Laws 832. There is the argument that failure to permit payment of the mortgage out of collected funds would constitute an impairment of contract which would be forbidden by the due process clause of the fourteenth amendment of the Constitution. If receivership is constitutional, however, there would be no sound reason why a device, which was designed to enhance enforcement of local building codes and which actually resulted in less impairment of the security interest, should be unconstitutional. See notes 39–41 supra.

The real problem is procedural due process. Since mortgages typically give the mortgagee a lien on rents when the mortgagor defaults, there is an obligation which rent withholding would impair. While such an impairment may pass constitutional muster, the lienholder has a legitimate concern in appearing at the hearing which may adversely affect his security interest. Therefore, failure to notify the lienholder of the action might result in a denial of procedural due process. An early New York receivership statute was held unconstitutional in that it failed to provide for notification of lienholders. Central Sav. Bank v. City of New York, 279 N.Y. 266, 18 N.E.2d 151 (1938), cert. denied, 306 U.S. 661 (1939). A subsequent statute which required such notification was held constitutional. In re Department of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964).

Thus the provision of the rent withholding act which permits withheld rent to be disbursed to pay a mortgage avoids encumbering the action with procedural complexities. At the same time, it pro tanto diminishes the lienholder’s motivation to insure that the property is kept up to minimal standards. See Levi, note 37 supra.
landlords is insufficient to induce them to repair. Under the proper circumstances, the court should exercise the power to order the landlord to have the repairs made, order the appointment of an administrator to have the repairs made, order the payment of the repairmen out of the accumulated rent, or order the return of the withheld rent to the landlord. The apparent legislative intent behind the general grant of power was to create an equity-like flexibility. This conclusion is strongly supported by the power to order a set-off in favor of the tenant because of defective conditions. Such broad powers are what the occasion demands.

A more serious problem in statutory construction is presented by the short enumeration of defects which will justify the defense. Particularly interesting is the legislative deletion of the words "cold and hot" and "vermin." There are two ways of interpreting these deletions: 1) lack of hot water and infestation of vermin do not raise the defense at all or 2) they do not raise the defense as a matter of law, but the court is still free to find that they do. These are serious matters. Baltimore is certainly in the cockroach belt. If there is infested property in common in multiple dwelling units, tenant care and cleanliness may be of no avail. On the other hand, if the tenant has caused or is substantially responsible for the infestation, the landlord would appear to be amply protected by the "bad faith" clause. The lack of hot water, particularly in the winter, is a fundamental deprivation which most Americans would feel most keenly. It is suggested that if these problems arise, the court should consider that it is permitted, but not required, to find that the conditions justify the defense. If the legislature had in fact intended to render these conditions no defense at all, it could have easily done so. It would be most offensive for any court to hold that asserting the defense because the landlord refused to repair a defective water heater was "bad faith" which required imposition of counsel fees.

The foregoing infelicities in drafting, a result of the compromise origins of the law and the normal progression of the legislative process, do not present insurmountable problems, but seem typical of difficulties which are encountered in new legislation. Although it falls far short of a well coordinated statutory plan which would provide different remedies suitable for different problems, the statute appears to provide a start toward giving tenants an economic weapon to force landlords to repair. It would do so except for one fundamental, deliberate omission — the statute fails to prevent retaliatory evictions.

88. The power to diminish unconscionably high rents seems to be an important one. It is analogous to the power of the courts to rewrite sales contracts for unconscionability under § 2-302 of the Uniform Commercial Code. See Leff, Unconscionability and the Code — The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

Functionally, sales concepts might very well carry over to some lease problems. To the extent that the Uniform Commercial Code is a broad declaration of policy by the legislature, its provisions should be considered, a suggestion which might offend those who favor conceptualistic distinctions even if there is no sound ethical basis for doing so.


89. See note 77 supra.
IV. RETALIATORY EVICTIONS — A DELIBERATE LEGISLATIVE OMISSION AND A HALF-WAY REFORM

Before approving the Rent Escrow Act, the legislature deleted a provision which would have prevented retaliatory eviction for withholding rent.90 Because of this omission, a landlord against whom a successful defense of rent withholding was asserted can nevertheless evict the "prevailing" tenant in sixty days with a simple notice to quit. During the first year of its enactment, the rent escrow defense was only employed in nine cases. In four of those instances the landlord issued a sixty day eviction notice.91 Thus the entire statutory plan was effectively frustrated.

Responding to tenants' complaints, the legislature enacted the anti-retaliatory eviction statute of 1969.92 In its original form this bill was intended to be a broad prohibition against all retaliatory eviction which would have protected tenants complaining to building inspectors and other agencies as well as those withholding rent.93 It would have protected against retaliatory eviction, rent increases, or cuts in services for a year after such tenant action.94 An entire section was devoted to protection of landlords' interests.95 This provided that such retaliatory action could be taken if the tenant, his family, or "invitee"96 caused the complained of condition beyond ordinary wear and tear. It also permitted the landlord to recover possession of the property for his own personal use as a dwelling or to increase the rent because of increased taxes or mainte-

90. The deleted provision, subsection (G) of Senate Bill 130, is set out in full at note 71 supra.
91. See note 25 supra and accompanying text.
93. Proposed subsection 1(b)(1). Ch. 223, § 1(b)(1) [1969] Md. Laws 681. The statute was drafted by the Department of Housing and Community Development, a Baltimore City agency, in response to the direction of Mayor D'Alesandro, a few days after the decision in Sommers v. Goode, No. 8-078979 (Baltimore City Ct., Feb. 4, 1969) in The Daily Record (Baltimore), Feb. 8, 1969, at 5, col. 1. Interview with Robert C. Embry, Director, Housing and Community Development, in Baltimore, Sept. 22, 1969. See note 100 infra. Sommers permitted retaliatory eviction where the tenant had complained to the housing authorities. Thus, apparently it was the original mandate to produce a statute which would not only protect tenants who employed rent withholding, but also those who did not have grounds for doing so and instead complained to the building inspectors.
95. Ch. 223, § 1(c) [1969] Md. Laws 682.
96. Ch. 223, § 1(c)(1) [1969] Md. Laws 682. Was a social guest meant to be encompassed by the term invitee? Under conventional tort law, an invitee is a business guest, whereas a social guest is merely a licensee. W. PROSSER, TORTS § 60, at 386 (3d ed. 1964). Why there should be derivative "liability" in the form of loss of protection from retaliatory eviction from the actions of business guests but not social guests is not clear. It could have been the drafters' intention to have such a result for those who informally sublease by "sharing" housing with the lessee, but this is far from plain. It appears rather that the language came from a form book of sorts. The MODEL RESIDENTIAL LANDLORD-TENANT CODE, supra note 4, permits retaliatory eviction if the condition complained of was caused "[b]y the tenant or another person in his household or on the premises with his consent..." § 2-407(2)(e). The last phrase is overbroad, since the landlord himself could be on the premises with the consent of the tenant, as well as a number of others whose actions ought not necessarily be charged to the tenant, despite his consent to their presence.
nance expenses other than those incurred in repairing code defects.\textsuperscript{97} It similarly permitted raising the rent if the landlord made substantial improvements on the leased premises.\textsuperscript{98} In addition, the landlord was permitted to recover possession or raise rent for any other "good cause."\textsuperscript{99}

Thus, as originally drafted, it provided protection to landlord and tenant alike. However, in enacting this bill the legislature emasculated the tenant's protection but left the protection afforded to the landlord intact.\textsuperscript{100} Retaliatory eviction or rent increase is prohibited only where a tenant has complained of defects found by the court to be conditions which justify the imposition of rent withholding.\textsuperscript{101} Retaliatory action is prohibited for six months.\textsuperscript{102} Since rent with-
holding is permitted only for major defects, the tenants who must rely on the remedy of ordinary code enforcement to remedy minor defects are given no protection by this statute.

Beyond these overt limitations, there is even some question as to whether the new law gives protection to the tenant who qualifies for rent withholding. The statute protects the tenant if eviction or other action is "in retaliation for the tenant withholding rent which the court determines a proper exercise of rights under [the Rent Escrow Law]." There is an important ambiguity here. Does this mean that a tenant must be successful in withholding rent, or does it mean that he would be entitled to successfully withhold rent? If it means that the tenant must prevail in defending an eviction action for failure to pay rent because defects justify rent withholding, then the bill is almost a nullity.

The Rent Withholding Act requires a tenant to demand repairs by certified mail in order to withhold rent. Upon receipt of such a notice, a landlord who wanted to retaliate would merely issue a sixty day notice to quit. While this could mean giving up two months' rent, landlords may find this loss economically sound in comparison with having to repair and finding rent frozen. On a broader level, it may pay the landlord to create a climate of apprehension of retaliatory eviction.

The ambiguity which may permit this evasion, whether the tenant must actually withhold rent or merely be entitled to withhold rent, is in part a product of the defensive nature of the rent withholding statute. In order to give the statute any real effect, it must be construed to mean that retaliatory eviction is prohibited where the tenant has good grounds for withholding rent. A previous judicial determination of proper rent withholding should be unnecessary. Otherwise the statute would permit the landlord to circumvent the protection given to tenants by not evicting for failure to pay rent, but rather by simply giving notice to quit before rent is withheld.

This construction does not solve tenants' problems. The anti-retaliatory eviction statute accentuates the evils of the defensive nature of the Rent Escrow Act. Now, when the tenant guesses at his peril whether the condition he complains of will be held to justify rent

103. See text at note 77 supra.
104. Ch. 223, § 1(b) (1) [1969] Md. Laws 682.
105. A governmental agency may also notify the landlord by violation or condemnation notice. Ch. 459, § 1(b) (1) [1968] Md. Laws 833.
106. Issuing a sixty day notice to quit does not prevent a landlord during this period from successfully evicting a tenant for failure to pay rent if the rent withholding defense of the tenant fails. Because retaliation is clearly prohibited should the tenant be successful in withholding rent, landlords are not likely to evict for failure to pay rent if the tenant's chances for withholding appear favorable. If it appears that the tenant's chances are not favorable, the landlord may elect to pursue both types of eviction if he wants to insure retaliation, since the right to redemption permits the tenant to remain after successful summary ejection if the rent is paid in time. Waiting until after a tenant has redeemed to issue a sixty day notice would simply delay the tenant's removal.
withholding, the danger he runs is clearly retaliatory eviction. This will be the case unless the courts prohibit retaliation where rent was withheld in “good faith,” a construction which may be desirable,107 but which requires stretching the statutory language. So, on the one hand, the new statute fails to encourage tenants to vindicate their rights. On the other hand, it may encourage rent withholding to the exclusion of code complaints. Assuming that a tenant living in defective premises views rent withholding and complaints to authorities as alternatives, he will elect to use the stronger remedy — rent withholding — in order to increase his protection against retaliatory eviction. It may be that the scope of the anti-retaliatory eviction statute was limited out of antipathy for tenants’ remedies. If so, this result would be proper irony.

The anti-retaliatory eviction statute does little. It does nothing for a tenant whose dwelling has defects which do not justify rent withholding, and it possibly does next to nothing for a tenant who is entitled to withhold rent. Since it is unlikely that the legislature will broaden the ambit of this law, the question is put quite squarely: can the courts fill the gap?

V. RETALIATORY EVICTION — JUDICIAL RESPONSE

In Edwards v. Habib,108 the Court of Appeals for the District of Columbia was faced with an instance of retaliatory eviction for the tenant’s complaint of code violations to the housing authority. After the tenant, Mrs. Yvonne Edwards, complained, the Department of Licenses and Inspections discovered more than forty violations which it ordered the landlord, Nathan Habib, to repair. Thereupon the landlord gave Mrs. Edwards notice to vacate. A default judgment for the plaintiff-landlord was set aside by the Court of General Sessions after the defendant made a prompt motion to reopen. The court considered, in setting aside the default, that, if retaliation were proved, the eviction would not lie. The court reasoned that the right to report violations of law is constitutionally protected against private interference. However, when the action came to trial before a different judge of the Court of General Sessions, retaliation was held irrelevant, and the plaintiff-landlord was granted a directed verdict.109 The District of Columbia Court of Appeals affirmed, rejecting the constitutional and policy arguments of the tenant.110 The Court of Appeals for the District of Columbia reversed, two to one, with a thorough opinion by Judge J. Skelly Wright.111

The court initially considered the constitutional assertions of the tenant: first, that the private action of the landlord in retaliating

107. The contrary choice was made by the drafters of the Model Residential Landlord-Tenant Code, supra note 4, § 2-407(1). See note 50 supra.
109. Id. at 689.
against the tenant for petitioning the government for redress and reporting violations of the law became impermissible governmental action when enforced by the courts and second, even if this is not unconstitutional governmental action, that the right to report violations of the law has direct protection not only against governmental but also private interference. However, the court felt it did not need to decide the constitutional issues; instead, it held that Congress, in enacting housing codes and regulations for the protection of tenants, had evinced a strong policy which would be contravened by retaliatory eviction. In concurring, Judge McGowan felt that the policy question was so strong that the constitutional arguments did not even need discussion. Judge Danaher dissented, reasoning that if retaliatory eviction is to be prohibited it must be by legislative action and not by judicial decree.

Weinberg v. Scheper and Sommers v. Goode, decided in the Baltimore courts subsequent to Habib, are two cases evoking published opinions where the defense of retaliatory eviction has been raised. In each case the tenant had complained to the housing authority and was subsequently evicted on sixty day’s notice. In each case the court assumed that the eviction was in retaliation to the complaint, and in each case the court held that legislation was necessary to make retaliatory eviction a defense. The subsequent anti-retaliatory eviction statute has failed to do this since these were not rent withholding cases.

In Weinberg, Judge Rogers of the Baltimore People’s Court relied on three principal reasons for concluding that legislation was necessary: first, the concept of separation of powers required that fundamental changes in the law be made by the legislature; second, that setting a time limitation on the defense of retaliatory eviction was a legislative function; and third, that the defendant could have protected himself with a written lease. The first two are grounds relied on in Sommers and will be discussed shortly. The third ground, that the tenant could have protected himself with a written lease, deserves separate comment. One would have thought that by now the notion that the market place is peopled by sophisticated parties of equal bargaining power, able to look out for themselves, had been thoroughly discredited. Oral and written leases of both rich and poor tenants are products of a “take it or leave it” situation where tenants have no effective power to control the terms of the bargain.

In Sommers v. Goode, a trial de novo on appeal from the Baltimore People’s Court, Judge Sodaro of the Baltimore City Court also concluded that substantial changes in law had to come from the legislature and that prohibiting retaliatory evictions necessitated set-

113. 397 F.2d at 699.
114. Id. at 703.
115. Id.
118. Id.
ting a time limit for asserting the defense, an action which should not come from the judiciary. The opinion went further than that in Weinberg and considered the constitutional arguments raised in Habib and the effect of the Rent Escrow Act on retaliatory evictions. The court said that, had the tenant withheld rent instead of simply complaining to the housing authorities, he would have been entitled to the protection afforded by the Rent Escrow Act. This statement seems strange since the court recognized 1) that the defects complained of were not serious enough to justify rent withholding and 2) that the act provided no protection against retaliatory eviction.

The court asserted, “The tenant’s First Amendment rights to report housing code violations and to petition for redress of grievances was protected by this specific legislation [the Rent Escrow Act]. . . .” This is interesting since the act does not afford any protection to complainants but only prevents summary eviction for failure to pay rent. The Rent Escrow Act gives only limited protection to a remedy — rent withholding. While it may be argued that asserting such a remedy is “speech,” the act does not protect this speech from retaliation by notice to quit and does not undertake to protect the tenant’s right to make complaints to building inspectors at all, except as an alternative means of initiating rent withholding. Nevertheless, the court concluded that failure to take advantage of this “protection” was a waiver of the constitutional rights the tenant asserted. “This Court does not view the situation of the tenant as one where constitutional rights have been denied but rather as a case where he, for reasons of his own, failed to follow the precepts of existing laws.”

Moreover, the court felt that prohibiting landlords from retaliating for reporting code violations would somehow conflict with the purposes of the Rent Escrow Act. “If this Court were to agree with the tenant’s contention, a minor code violation when reported to the Bureau could form the basis of a defense of retaliatory eviction but could not be used as a defense under the Rent Escrow Act. Certainly such a result would be irrational.” It is difficult to see any irrationality. The defense would come from the constitution or from fundamental state policy implicit in the housing code. Second, simply because the greater remedy, rent escrow, is reserved by statute for greater defects does not mean that retaliatory evictions should be permitted when tenants must use the lesser remedy. Retaliatory evictions should be prohibited whether or not rent escrow is permitted.

The contention that reform must come from the legislature, the central point in both Weinberg and Sommers, needs more complete consideration. The problem may be seen as two separate issues: first, whether the legislative action in the field has closed the door to judicial

119. Id. at col. 4.
120. Id. at col. 5.
121. Id. at col. 4.
122. Id.
123. Indeed, it can be argued that prohibiting retaliatory eviction of those who can withhold rent and not those who can only make code complaints is an irrational discrimination repugnant to the equal protection clause of the fourteenth amendment. See text accompanying note 142 infra.
reform and second, if not, whether prohibiting retaliatory eviction is simply too big a change for the courts to make.\textsuperscript{124} Had the legislature not dealt with retaliatory eviction at all, it would be easy to make the argument relied on by the Court of Appeals for the District of Columbia in \textit{Habib} that the existence of building codes implies a strong policy against circumvention by retaliatory eviction. But the Maryland legislature refused to pass the anti-retaliatory eviction section of the Rent Withholding bill and, a year later, passed a law which fails to protect tenants who may not withhold rent, but who simply complain to the building inspectors. Does it follow that, from July 1968 to July 1969 Maryland had a policy which favored all retaliatory eviction and from July 1969 on, has a policy favoring retaliatory eviction of only those who complain to building inspectors? Surely it makes some sense to assert that there is no policy in favor of blatant circumvention of protective legislation — the building codes.\textsuperscript{125} The failure to enact legislation is explicable for so many disparate reasons that it is dangerous to use it as a major premise in an attempt to reach a reasoned conclusion. Maryland's legislative action is probably a false lead to solving the problem, and the question ought to be put more directly: can the courts adequately resolve the conflicting social interests which retaliatory eviction presents? This calls for an examination of those interests.

One argument in favor of legislative action is that courts are not in a position to provide a cut-off time to the defense of retaliatory eviction. The legislature adopted a six-month period in the recent anti-retaliatory eviction statute,\textsuperscript{126} a measure which seems corroborative of the assertion that legislative action is required. Most courts would feel extremely uncomfortable decreeing such a time limit. Whether or not legislatures are in fact more competent than courts to choose arbitrary limits, they are more accustomed to doing so. It is not surprising that the intermediate court in \textit{Habib}, Judge Danaher's dissent in that case on appeal,\textsuperscript{127} and the opinions in \textit{Weinberg} and \textit{Sommers} assert that legislative judgment is required.

The argument makes some sense, but it falls short of being compelling. Its major fallacy is the assumption that the defense of retaliatory eviction must have a time limitation. If there is a statutory

\textsuperscript{124} Such a decision would hardly be the sort of judicial activism, for example, as McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Brown v. Board of Educ., 347 U.S. 483 (1954), or Baker v. Carr, 369 U.S. 186 (1962). Nor would it reach the judicial innovation of the abolition of charitable immunity by the Supreme Court of Illinois in Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950), and Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

\textsuperscript{125} The legislative findings and purpose of the Anti-Retaliatory Eviction Act declare retaliatory eviction to be against "public policy." Ch. 223, § 1(a)(5) [1968] Md. Laws 682.

\textsuperscript{126} The drafters of the \textit{Model Residential Landlord-Tenant Code}, \textit{supra} note 4, impliedly take the position that legislation is required with the observation that "In the absence of any statute, only one court has denied the landlord an absolute right to retaliate." \textit{Model Residential Landlord-Tenant Code}, \textit{supra} note 4, at 70, citing, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968). However, in Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (1968), the Binghamton City Court followed \textit{Habib}. In addition to the holding that retaliatory eviction may be proven by the tenant, the case may be cited for the more general proposition that there is a defense to Portnoy's Complaint.

\textsuperscript{127} 397 F.2d at 783.
presumption of retaliation which would arise after rent withholding or complaints to housing authorities, this would be so, for otherwise the presumption would continue indefinitely. But if there is no statutory presumption that eviction is retaliatory, there is no need to end it. Thus the majority in Habib permitted a showing by the tenant that the eviction was retaliatory but did not need to create a cut-off time. Absent a statutory presumption of retaliation, the only necessity for a cut-off time is the unfounded supposition that otherwise a perpetual tenancy would result, producing an unconstitutional encroachment on the landlord’s property rights. It is difficult to imagine a court holding that proof of a complaint to the housing authorities in years past would satisfy the burden of proof that a tenant must meet to raise the defense of retaliatory eviction. Using this “danger” as an excuse for not prohibiting retaliatory evictions is rank sophistry.

Even though perpetual tenancies would not result, it is plain that prohibiting retaliatory eviction limits the landlord’s freedom to deal with his property as he chooses. The same may be said of zoning regulations, building codes, health and safety laws, the sixty day wait to evict a tenant who is not in default, and many other rules. Completely unfettered property has probably always been a myth. So long as the invasion of the landlord’s property rights is moderate, only carried to the extent reasonably necessary to give effect to the competing legitimate interests of tenants, there should be no doubt of its constitutionality. In this respect, a judge-made prohibition against retaliatory eviction is no more an invasion of the landlord’s interests than is a statute.

This is not to say that there is no utility in setting a definite time period for the defense of retaliatory eviction. Having a time certain for rights and liabilities is desirable in many areas — this is one. A definite period of protection where the burden of proof is virtually dispensed with has a stabilizing effect conducive to tenants making justified complaints. For the landlord, it is desirable to know exactly when a tenant may be evicted without a successful defense so that needless litigation may be avoided. But a court-declared prohibition against retaliatory eviction would not be unworkable. As a practical matter, showing a code complaint and prompt eviction would meet the tenant’s burden for a few months after the complaint. After three, four, or five months, this effect would dwindle, and the tenant would have to show more to keep his tenancy. Indeed, with the burden of proof on the tenant, the landlord would probably be in a slightly better position with a judge-made rule than if the legislature simply extended the ambit of the present statute.

Seeing that a definite time limitation is not indispensable, but merely a desirable aspect of legislative action, permits the question

129. Similarly, the vision of an unscrupulous tenant cleverly making periodic complaints to insure his tenancy is nonsense. If they are legitimate complaints, he should be protected. If not, he may be evicted. Even if such action is something to guard against, a court need not reject many worthy claims to uncover it.
130. See note 102 supra.
whether it would be better for a prohibition against retaliatory eviction to come from the courts or the legislature. It is an impossible question to answer. Better for whom and why? Better for landlords to have a diluted prohibition which would be the result of judicial action, or better to have certainty from legislation which would probably give tenants more protection and encourage complaints more effectively? Better for the tenant to have the burden of proving retaliation which will become increasingly hard to meet as time wears on, or better to have a presumption which completely disappears at a certain time? One is tempted to join Judge Traynor in his rhetorical question: "Can you weigh a bushel of horsefeathers against next Thursday?" The questions are not easily answered, and certainly are not answered by vague shibboleths concerning the proper roles of courts and legislatures. While legislative action may offer slight advantages, it does not exclude judicial action. Perhaps the most obvious reason for the hesitancy of the courts to act is that rent escrow and retaliatory eviction have been considered political questions by the general public. This opinion has been created, in part, by the self-fulfilling prophesy of the courts that the matter needed legislative correction, and by the supreme bench's unusual step of mandamus to curtail an adventurous people's court which ordered a common-law rent escrow. If the courts will not act, then the legislature must. If the legislature must, how can it be a matter for the courts? One must recall that the present anti-retaliatory eviction statute was drafted in response to the decision of the Baltimore City Court in Sommers v. Goode.

131. Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754 (1963). According to Currie, Traynor is indebted to Professor Prosser for this quotation; Prosser to an unknown English judge.

132. Most attempts to define the proper scope of judicial lawmaking powers have been understandably vague.

133. If the courts will not act, then the legislature must. If the legislature must, how can it be a matter for the courts? One must recall that the present anti-retaliatory eviction statute was drafted in response to the decision of the Baltimore City Court in Sommers v. Goode.


One usually does not think of criticizing lower courts for failing to make innovative decisions. However, when they sit as appellate courts, they should behave as appellate courts. They recognize this unaccustomed role by publishing their opinions. The obligation of appellate-like law-making is most evident in the case of the Baltimore City Court when it hears appeals from the people's court as trials de novo. Then it is not simply an intermediate appellate court since review by the court of appeals is discretionary by writ of certiorari.

VI. JUDICIAL RESPONSE — CONSTITUTIONAL COMPULSION

If the problem of whether the courts should prohibit retaliatory eviction cannot be answered by considering matters of local policy, perhaps it may be resolved by federal policy. For if retaliatory evictions are unconstitutional, then the question of whether judicial or legislative action is more desirable becomes moot.

It would seem that the area which the Maryland legislature left unprotected — where tenants are evicted for making complaints to the housing authorities but have taken no other action — is where it is easiest to argue that retaliatory eviction is unconstitutional. Complaint to the housing authorities is speech of a very important kind. If any speech is deserving of protection by the courts, certainly complaints to officials charged with protecting a large segment of the public interest should be protected. As in Shelly v. Kraemer, where the judicial enforcement of restrictive covenants was held to be "state action" in contravention of the equal protection clause of the fourteenth amendment, the judicial approval of an eviction retaliatory to such a complaint could be said to be state action which has a significant freezing effect on the exercise of protected speech and the right to petition the government for redress.

While the court in Sommers dismissed the Shelly v. Kraemer argument with the distinction that racial discrimination was not claimed in Sommers, the state action theory has not been limited to racial discrimination and the equal protection clause. In the familiar case of New York Times v. Sullivan, the Supreme Court applied it through the due process clause to a state court libel judgment which had a freezing effect on freedom of speech. The state action is the same — enforcing a "private" cause of action. The Supreme

137. The first amendment right to petition the government for redress of grievances has traditionally been given broad protection. E.g., United States v. Rumely, 345 U.S. 41 (1953); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).
140. The constitutional discussion in Habib was relied upon in "holding" that retaliatory eviction was unconstitutional in Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969). Instead of resting on due process grounds, the decision apparently relies on the equal protection clause of the fourteenth amendment. Despite this holding, the court refused to enjoin a state court eviction proceeding under 42 U.S.C. § 1983 (1964) (Civil Rights Act) because it was not sufficiently clear to the court that the New York state courts would refuse to recognize the defense of retaliatory eviction. 299 F. Supp. at 507.
Court's use of the guarantee of free speech as the underpinning of several recent important decisions lends weight to this argument.\textsuperscript{141}

Another fourteenth amendment argument is that the present anti-retaliatory eviction statute denies some people the equal protection of the laws. It distinguishes between those who withhold rent and those who merely report violations to the housing authorities. The justification for this is that rent withholding is reserved for greater defects. However, this is not a sound reason for failing to prohibit retaliatory eviction. The greater defect is justification for granting the greater remedy. It is not justification for failing to give protection to the use of both remedies. However, the Supreme Court has stretched so far to justify seemingly irrational state classifications that this argument, while perhaps cogent, might not be adopted.\textsuperscript{142}

The next basic argument is that one has a constitutional right to report violations of the law — a right which is protected against private as well as governmental interference. This grows out of \textit{In re Quarles & Butler}.\textsuperscript{143} The argument was distinguished by the District of Columbia Court of Appeals in \textit{Habib v. Edwards}\textsuperscript{144} on the ground, apparently, that \textit{In re Quarles & Butler} involved the Civil Rights Act. This distinction was convincingly rejected by Judge J. Skelly Wright in \textit{Edwards v. Habib}:

\begin{quote}
[T]he enforcement section of the Civil Rights Act provided remedies for the deprivation of rights secured by the Constitution or laws of the United States. It did not create new rights. . . . It is not necessarily relevant, therefore, that because of the peculiar requirements of the civil rights statutes they may not provide her [Mrs. Edwards] with additional affirmative civil or criminal remedies for violations of the same right.\textsuperscript{145}
\end{quote}

It would seem, therefore, that the argument that retaliatory eviction is unconstitutional does not need to rest upon the shifting sands of "state action."\textsuperscript{146}

\begin{footnotes}
\textsuperscript{142} "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." \textit{Metropolitan Cas. Ins. Co. v. Brownell,} 294 U.S. 580, 584 (1935), \textit{citing,} \textit{Rast v. Van Deman & Lewis Co.,} 240 U.S. 342, 357 (1916) and \textit{Tax Comm'r v. Jackson,} 283 U.S. 527, 537 (1931). Of course race was held to be an unacceptable ground for school segregation in \textit{Brown v. Board of Educ.,} 347 U.S. 483 (1954). The recent case of \textit{Shapiro v. Thompson,} 394 U.S. 618 (1969), in which one year residence requirements for welfare benefits were held to be unconstitutional, may mark a willingness to subject state classifications to even more stringent standards. "But in moving from State to State, or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." \textit{Id.} at 634.
\textsuperscript{143} 158 U.S. 532 (1895).
\end{footnotes}
But while cogent constitutional arguments can be made that retaliatory evictions should be prohibited, it is unfortunate that they need to be made. It is rather a pity that courts need to resort to the ever-growing umbrella of constitutional compulsion in order to make desirable policy changes. To be sure, it puts the responsibility of decision making on federal shoulders, taking the burden of controversial cases from local courts. Even when a decision is made in a state court, making it on constitutional grounds tends to insulate the judge from possible criticism of "making law." This merely reaps a short-run advantage, however, since it tends to centralize policy decisions. The holding of Habib, that it is implicit in the policy of the jurisdiction which has a housing code to prevent circumvention, makes good sense. Without a holding that retaliatory eviction is prohibited, our meager statutory plan is frustrated. Certainly the fundamental job of the courts is to make the law work; surely it is within their domestic competence to do so.

VII. Conclusion

Comparing the desirability of various tenants' remedies and the ways in which they might be reached calls for the type of policy analysis which, if it cannot present clear choices, can at least identify competing interests. Evaluating the real usefulness of any remedy or combination of remedies is an absorbing but speculative process. We really do not know how good any of these propositions are. We cannot say whether they will make much difference in the abominable conditions in which millions of poor people live. Few commentators seriously contend that tenant remedies are themselves sufficient to make a substantial change.

The question raises the basic issue whether law reform is a realistic way to bring about change, one of the central tenets of faith behind the Legal Services Program. The question starts a chicken-egg sort of argument — whether law makes or reflects social power. Certainly it does both, but the relative percentages of what it does are most difficult to assess. Law reform is doing something for the poor, but it is important to observe that the wave of legal services truly got started in 1965 when the poor were beginning to become a more potent political and social force.

During the same time the political and economic power of the landlords has been declining somewhat. The low income housing market is not economically healthy. While some landlords manage to make unconscionably high profits "milking" their properties, others cannot survive, and thousands of abandoned dwellings haunt our inner cities. Insurance and financing become more scarce and more expensive, sometimes unobtainable. Property tax rates climb

150. President's National Advisory Panel on Insurance in Riot-Affected Areas, Meeting the Insurance Crisis of our Cities (1968).
and the fleeing middle class take their incomes to bedroom communities which are not responsive to the economic needs of the cities. The cities themselves lack economic health. To think that rent escrow, receivership, repair and deduct, and all the other tenant remedies, however cleverly conceived, will reverse "urban blight" is terribly naive.\(^5\)

The continued presence of the "private sector" in low income housing is in substantial jeopardy. As the poor continue to grow in political, social, and even economic power, private landlords will be supplanted, in large measure, if they fail to provide adequate housing. The additional involvement of the federal government in public housing in the past few years has been striking. Accurately perceiving these threatening circumstances, landlords fear that tenants' remedies will accelerate their replacement.\(^5\)

On the contrary, it would seem that tenants' remedies represent a fundamentally conservative force which will tend to preserve the position of private housing in the low cost market. This would seem to hold both advantages and disadvantages for poor tenants. Paternalistic bureaucracies are not always benign. Government may engage in retaliatory evictions and other repressive actions for reasons which would not even occur to private landlords.\(^5\) Moreover, while the public undoubtedly has the power to solve the problem of low cost housing, there is no indication that it is willing to do so.

In order to make an intelligent attack on slum housing, imaginative public projects must be complemented with adequate tenants' remedies. For that we need law reform. It is in this drama that the law — the courts and the legislatures — cannot seem to learn its part. The wave of rising expectations of the poor has been augmented by the promise of change, and its absence is already keenly felt. The curtain has been rung up on the act of landlord-tenant law reform. Only after riots has the law stumbled on stage; now it stands mute while its cues are being repeated. Whether it will stay to read its lines remains to be seen.

151. "Until a much more effective administration of the housing regulations is achieved, it would seem that the major hope for relief for the indigent tenant must lie in the civil courts." Schoshinski, \textit{supra} note 4, at 558.

152. The Daily Record (Baltimore), Feb. 18, 1967, at 5, col. 4, contained an advertisement measuring nine inches by three and three-quarters inches, the top portion of which read:

\begin{quote}
LANDLORDS
YOU CAN BE PUT OUT OF BUSINESS
By House Bill No. 410
If it is passed
\end{quote}

House Bill No. 410 was a proposed rent escrow bill which probably would have resulted in stricter code compliance. The advertisement was paid for by a group known as the Property Owners Association.