RETALIATORY EVICTIONS: REVIEW AND REFORM

INTRODUCTION:

Repeated complaints made by Mr. Greene, a month to month tenant,[1] to his landlord about the rat infested hallway and faulty plumbing were ignored. In desperation, Mr. Greene notified the local housing authority. An investigation by a building inspector revealed several housing code violations. An order to repair the defects was issued to the landlord.[2] On receipt of the order, the landlord sent Mr. Greene a notice terminating the tenancy in 30 days.[3]

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1. A month to month tenancy may be created either by lease or by the implied or express consent of the landlord when a tenant holds over upon the expiration of the lease. Cf. Rekas v. Dopkavich, 362 Pa. 292, 296, 66 A.2d 230, 232 (1949). When a tenant holds over, the landlord has three options: he may evict the tenant as a trespasser; he may take no action, treating the tenant as by sufferance subject to a termination of the tenancy at any time; or he may by express or implied consent permit a periodic tenancy to arise. 2 R. Powell, Real Property § 254 (1967) [hereinafter Powell]. Consent is usually inferred from the landlord's acceptance of rent after the lease expires. See, e.g., Staples v. Collins, 321 Mass. 449, 73 N.E.2d 729 (1947). This Note's analysis of retaliation is not limited to the month to month tenancy, but extends with equal force to lease tenancies and statutory tenancies created under Rent Control laws.

2. Although such orders do not reveal the identity of the complainant, the landlord often knows who made the complaint because one tenant is either a chronic complainer, has already threatened to report the landlord, or because the violations are on the premises of one tenant.

3. This is the standard notice period required to terminate a month to month tenancy. See, e.g., Ind. Ann. Stat. § 3-1616 (1968); and Pa. Stat. Ann. tit. 68, § 250.501 (1966).

These facts illustrate a retaliatory eviction, whereby the landlord seeks to evict a tenant for having taken lawful action to compel landlord compliance with the law.[4] Normally, a landlord may evict a holdover tenant for any reason or for no reason at all.[5] If Mr. Greene, a hypothetical person with a typical problem, can prove that the landlord's overriding reason in evicting him[6] is retaliation for Mr. Green's complaint, can he prevent the landlord from evicting him? To put the question more fully, what rights does or should a tenant, who has taken lawful action[7] to compel his landlord to comply with housing regulations[8] and statutes,[9] have against conduct by the landlord intended to penalize the tenant for such action?

According to Myron Moskovitz, Chief Attorney for the National Housing and Development Law Project, some form of this problem is presented to landlord-tenant attorneys almost daily.[10] The question arises because many jurisdictions have enacted housing codes in an effort to require the

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4. The analysis presented in this Note of the respective rights of landlords and tenants leads to a conclusion that any landlord retaliation should be impermissible. Hence, even landlord actions short of eviction are to be proscribed. For example, a tenant should be permitted to refuse a demonstrably retaliatory rent increase and, if the consequence is an eviction action based on nonpayment of rent, to raise the defense to retaliatory eviction.

5. De. Wolfe v. McAllister, 299 Mass. 410, 118 N.E. 885 (1918); Wormood v. Alton Bay Camp Meeting Ass'n, 87 N.H. 136, 175 A. 233 (1934).

6. The phrase, "overriding reason," is taken from Hosey v. Club Van Cortlandt. 299 F.Supp. 501 (S.D.N.Y. 1969). See text accompanying notes 83-100 infra. In Hosey, the implication is that even an eviction sought for mixed motives (retaliation combined with otherwise valid reasons) would be denied.

7. See text accompanying note 115 infra. The first guideline lists the possible forms of lawful tenant action.

8. See, e.g., Chicago, Ill. Mun. Code (1963); New Haven, Conn. Housing Code (1961).

9. See, e.g., N.Y. Mult. Dwell. Law (McKinney 1967).

10. Moskovitz, Retaliatory Evictions - The Law and The Facts, 3 Clearinghouse Rev. 4 (1969).

maintenance of adequate building services and sanitary facilities.[11] When they complain to public authorities of landlord violations of the codes, tenants are petitioning government for a redress of grievances. They are exercising a right guaranteed to them by the first[12] and fourteenth[13] amendments.[14] To permit landlord retaliation against tenants for attempting to secure housing code compliance, therefore, is not only to frustrate the effectiveness of housing codes, but also to permit interference with constitutionally protected freedom.

A landlord's absolute right to evict a holdover tenant is a right recognized by the common law.[15] While the common law of real property has not been quick to change, it has

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11. Typically, the Denver Housing Code establishes minimum standards for the maintenance of services, sanitary conditions, and the prevention of overcrowding. Denver, Col. Rev. Mun. Code § 631.1-1 (1968). See Comment, Housing the Poor: A Study of the Landlord-Tenant Relationship, 41 U. Colo. L. Rev. 541, 543 (1969).

12. U.S. Const. amend. I: "Congress shall make no law ... abridging ... the right of the people ... to petition the government for redress of grievances."

13. The first amendment guarantee of the right to petition government for redress of grievances is incorporated into the fourteenth amendment and limits state action. See, e.g., United Mineworkers of America, Dist. 12 v. Illinois Bar Ass'n, 389 U.S. 217 (1967).

14. See text accompanying notes 56-114 infra.

15. See text accompanying notes 19-31 infra.

given way when equity and utility have so demanded.[16] In light of this trend in law, this paper proposes that, in order to promote the effective enforcement of housing codes and to preserve the tenant's right to report violations of law and petition government for redress of grievances, a further modification of landlord-tenant law to prohibit retaliatory evictions is compelled.

Certainly, neither the equities nor the law in this situation is solely on the side of the tenant. The landlord has a right to dispose of his property and may have a legitimate interest in regaining possession of the tenant's premises. This right is not to be deprived without due process of law, unless the Constitution is to be violated. Moreover, when economic burdens imposed on the landlord lead to sporadic abandonment of buildings by their landlords,[17] the public interest is not served.

Nevertheless, by reviewing and analyzing the current law concerning retaliatory evictions, this paper will demonstrate that at the present time the law weighs too heavily in the landlord's favor. A more acceptable balance between the tenant's and landlord's rights can and should be effected.

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16. As Erskine, J., wrote in Newton v. Harland, 133 Eng. Rep. 490, 499 (C.P. 1840):

> ... I cannot but apprehend that, if it were once established at law that a landlord might, in all cases where his tenant holds over, enter by force upon the premises and expel the tenant, and thereby subject himself to no greater risk than the peril of indictment for a forcible entry, under which no restitution could be awarded, the peace of the country would be endangered by the frequent resort to their summary proceedings .... (emphasis added).

The italicized language discloses a fear of both inequitable consequences for the tenant left without civil remedy and inconvenience for the country disturbed by breaches of the peace.

17. See text accompanying notes 42-45 and notes 162-167 infra.

I. THE DEVELOPMENT OF THE COMMON LAW:

Land law emerged as the most important branch of the common law.[18] Up to the most recent decade, it had remained virtually unchanged for centuries.[19] In particular, the right of the landlord to dispose of his property and to evict holdover tenants had undergone few notable revisions during the development of the common law governing landlord and tenant relations.[20] In many jurisdictions today, the maximum that a landlord is required to prove to remove a holdover tenant, if the holdover is by implied or express landlord consent, is that notice was served as prescribed by statute[21] No reason need be given by the landlord for the eviction.[22]

This is not to say that contemporary landlord-tenant law is identical with the early common law. Changes, albeit procedural and few, have been made; and to the extent that they demonstrate a degree of flexibility in the law, they are instructive. First, early common law permitted forcible entry by a landlord to remove wrongful occupiers of his land.[23] In 1381, an English statute made such entry by force an indictable offense, thereby requiring the use of the legal process to evict a holdover tenant.[24] The English rule was later modified, effectively restoring the landlord's recourse to self-help,[25] and some early decisions in this country followed

18. W. Holdsworth, Some Makers of English Law 40 (1938).

19. Powell § 220.

20. 2 W. Walsh, Commentaries on the Law of Real Property § 102 (1947).

21. See note 2 supra.

22. See Warthen v. Lamas, 43 A.2d 759 (Mun. Ct. App. D.C. 1945).

23. J. Fleming, The Law of Torts 92-93 (1965).

24. Statute of Forcible Entry, 5 Rich. 2, c. 7 (1381). The statute, which by its language applies to recovery of land from one who unlawfully disseised the rightful owner, applies to the landlord-holdover tenant situation as well. See Newton v. Harland, 133 Eng. Rep. 490, 496-97 (C.P. 1840). Newton added the possibility of civil liability for damages resulting from forcible eviction to the criminal liability already arising under the statute. Id. at 500.

25. Hemmings v. The Stoke Poges Golf Club, Ltd., [1920] 1 K.B. 720 (C.A.).

the self-help rule provided no more force than necessary was used to effect the tenant's removal.[26] Nevertheless, American jurisdictions are increasingly adopting the modern position that only through the legal process may a tenant be removed.[27]

Secondly, the early common law tenant whose landlord had consented to his tenancy beyond the expiration of his lease was treated as a tenant at will whole tenancy was subject to arbitrary and abrupt termination without notice.[28] In England, the courts began to cure the inconvenience caused by the old tenancy at will by finding implied in the landlord's consent a new tenancy which could not be terminated without notice.[29] In the United States, the general rule has long been that a landlord's acceptance of rent implies consent to some form of renewed tenancy.[30] Most jurisdictions now treat the extension as a tenancy at will or from period to period, requiring in either case notice before the landlord can terminate the tenancy. This has been done by both judicial decision[31] and statute.[32]

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26. Tribble v. Frame, 30 Ky. 599 (1833); Manning v. Brown, 47 Md. 506 (1878); Hyatt v. Wood, 4 Johns. 150 (N.Y. 1809); Overdeer v. Lewis, 1 W. & S. 90 (Pa. 1841).

27. For an early adherent to the modern American rule, see Larkin v. Avery, 23 Conn. 304 (1854). For a brief summary on the weight of authority in this country, see Freeway Park Bldg., Inc. v. Western State Wholesale Supply, 22 Utah 2d 266, 270, 451 P.2d 778, 781 (1969).

28. See Doe v. Porter, 3 T.R. 12, 16-17 (K.B. 1789).

29. Doe v. Porter, 3 T.R. 12 (K.B. 1789).

30. Hooe v. United States, 43 Ct. Cl. 245 (1908), aff'd, 218 U.S. 322 (1910); Leavitt v. Maykel, 203 Mass. 506, 89 N.E. 1056 (1909). See generally, Comment, Creation and Termination of Periodic Tenancies, 15 Baylor L. Rev. 329 (1963).

31. For a summary of judicial opinions finding a renewed tenancy by implication and requiring notice for termination, see Marcus, Periodic Tenancies, 7 Fordham L. Rev. 166 (1938). An early Supreme Court case recognizing the rule is Willison v. Watkins, 28 U.S. (3 Pet.) 43, 49 (1830).

32. See, e.g., Cal. Civ. Code §§ 1945, 1946 (West 1954); Mo. Ann. Stat. §441.060 (1952). For an analysis of the creation of renewed tenancies by statutory implication, see Powell §§ 254, 258.

These modifications in the common law reveal that the law is not immutable. In part, at least, these changes were made to circumvent the harshmess of the old law which resulted in public inconvenience and injustice.[33] In light of the contemporary crisis in housing, characterized by rising population density, a housing scarcity, dilapidated dwelling units, and the tenant's rights under the first and fourteenth amendments,[34] it is both unjust and impractical to permit retaliatory evictions. To tell the landlord that he may "evict for any legal reason or for no reason at all"[35] is merely to recognize that preservation of the landlord's right to evict a tenant does not require abrogation of the tenant's lawful right to compel landlord compliance with the law.

II. SUBSTANDARD HOUSING AND TENANT REMEDIES:

The law must be discussed within the context of the quantity and quality of existing housing units in the current housing market. It was estimated that in 1966 there were 6.7 million units of substandard housing in the United States.[36] In New York City alone, of 2.7 million housing units, at least 500,000 are currently estimated to be substandard.[37] The extent and tragic social effect of deteriorated housing has been treated by a legion of noted sociologists and urbanologists.[38]

The poor and members of minority groups occupy a large percentage of the substandard dwellings. In 1968, the Kerner Commission emphasized the nexus between inadequate housing

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33. See note 16 supra.

34. See text accompanying notes 56-100 infra.

35. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). Edwards appears to consciously modify the common law rule so that tenants cannot be evicted for illegal (retaliatory) purposes.

36. President's Committee on Urban Housing, A Decent Home, pt. I, at 44 (1968).

37. Urstadt, Housing Prospect Bleak in the City, N.Y. Times, March 15, 1970, § 8, at 1, col. 1. The author is the Commissioner of the New York State Housing and Community Renewal Department.

38. Two prominent examples are K. Clark, Dark Ghetto (1965) and M. Harrington, The Other America (1962).

and racial class.[39] Senator Symington (D - Mo.) recently cited a study conducted by the National Commission on Urban Problems which found that families with annual incomes below $6,500 have difficulty buying or renting housing at present market rates.[40] When almost one-third of all American families are in that income range,[41] the Commission's findings assume disturbing importance.

The statistics on substandard housing are distressingly complemented by the low percentage of housing vacancies in the country. George Romney, Secretary of the Department of Housing and Urban Development, recently summarized the problem:

> The present housing shortage is grave, and the immediate outlook is not encouraging.
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> Overall housing vacancy rates have dropped by one-third since 1965, to the lowest levels in over 10 years. The rental vacancy rate in all metropolitan areas is an unhealthy 4.4 per cent. In the Northeast, it is only 2.8 per cent. In some major urban markets like Chicago and New York, it is down to about 1 per cent.
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> New housing starts are declining rapidly. From January to December, the seasonally adjusted annual starts rate dropped 34 per cent, from 1.9 million to 1,245,000.[42]

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39. Report of the National Advisory Committee on Civil Disorders, pt. III, at 257 (1968):

> Today ... decent housing remains a chronic problem for the disadvantaged urban household. Fifty-six per cent of the country's nonwhite families live in central cities today, and of these, nearly two-thirds live in neighborhoods marked by substandard housing and general urban blight. For these citizens, condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever (footnotes omitted).

40. 116 Cong. Rec. 14,825 (daily ed. Sept. 1, 1970).

41. U.S. Dep't of Commerce, Statistical Abstract of the U.S. 322 (1970).

42. Romney, A National Housing Policy, Vital Speeches of the Day, March 1, 1970, at 309.

To add to the problem, thousands of buildings in urban areas are being abandoned yearly by landlords.[43] As a result of these developments, it has been suggested that the available housing units will fall dramatically below an expected demand for 1.75 million units a year in the near future.[44] Already, the housing shortage is affecting middle and upper class families as well as the poor.[45]

Nationally, the crisis in housing has led Congress to declare the construction of adequate housing a goal of high domestic priority.[46] The federal government has contributed funds, though insufficient, to state programs designed to replace dilapidated housing.[47] Locally, part of the effort to improve substandard dwelling conditions has been conducted by the passage of housing codes,[48] and the institution of

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43. 50,000 units were abandoned in New York City alone in 1969. See note 37 supra. According to one recent survey, there are 20,000 abandoned buildings in Philadelphia, 5,000 in Baltimore, at least 1,500 in Detroit, around 1,000 in Boston and Washington, 950 vacant buildings in Chicago, and 900 abandoned residential buildings in New Orleans. Time, March 16, 1970, at 88.

44. Fortune, October, 1968, at 30.

45. See 115 Cong. Rec. 4261 (1969) (remarks of Rep. Ryan); Wall Street Journal, Nov. 23, 1970, at 1, col. 1.

46. In 1949, Congress declared the national goal to be a "decent home and a suitable living environment for every American family." National Housing Act of 1949, ch. 338, § 2, 63 Stat. 413. In 1968, Congress passed the Housing and Urban Development Act, declaring that. "the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality." Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 2, 82 Stat. 476.

47. Note, Sponsorship of Subsidized Housing for Low and Moderate Income Families Under the National Housing Act, 38 Geo. Wash. L. Rev. 1073 (1970).

48. See note 8 and note 11 supra. Although housing codes are no replacement for massive urban rehabilitation, they can play a vital role in preserving or improving the quality of existing housing. See generally, 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). See also, Note, Private Enforcement of Municipal Housing Regulations, 54 Iowa L. Rev. 580 (1969).

tenant remedies such as rent-withholding[49] and repair-and-deduct laws.[50]

Housing codes invite tenants to report violations of law, just as they might report any criminal misconduct.[51] Although housing authorities are staffed with inspectors who often make unsolicited inspections of residential premises,[52] budgetary limitations and understaffing normally make tenant complaints a prerequisite to effective code enforcement.[53] The tenant's role in statutory tenant remedies is self-evidently vital to successful implementation of those remedial statutes.

The effectiveness of the housing code as a tenant remedy is seriously impaired by the landlord's absolute power to terminate leaseless tenancies in the context of the existing housing shortage.[54] Because most low income tenants

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49. See, e.g., Mass. Gen. Laws ch. 239, § 8A (Supp. 1970); N.Y. Soc. Wel. Law § 143-b (McKinney 1966) (applicable to welfare recipients). The New York law was upheld in Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824 (1967).

50. See, e.g., N.D. Cent. Code §47-16-12, -13 (1960).

51. Many codes do, in fact, impose criminal penalties. This practice has been heavily criticized. See Gribetz and Grad, supra note 48, at 1275-81.

52. In fiscal year 1966, the Department of Licenses and Inspections in Washington, D.C. handled 47,701 cases of building violations. Of these, 32,861 (approximately 65%) originated with inspections which had not been prompted by tenant complaints. Hearings on S.2331, S.3549, S.3558 Before the Subcomm. on Business and Commerce of the Senate Comm. on the District of Columbia, 89th Cong., 2d Sess., at 52 (1966).

53. For instance, inspections in Denver are made almost exclusively on a complaint basis. Comment, Housing the Poor: A Study of the Landlord-Tenant Relationship, 41 U. of Colo. L. Rev. 541, 544 (1969).

54. Loeb, The Low-Income Tenant in California: A Study in Frustration, 21 Hastings L. J. 287, 296 (1970). It is likely that there are less formal factors intimidating tenants in the exercise of their right to complain. For instance, fears of unlawful landlord reprisal short of eviction may inhibit tenant action. The solution to this problem may be an educational program to inform tenants of their rights and of what the landlord may and may not do.

are leaseless tenants in substandard housing,[55] the burden of landlord retaliation would fall most heavily, though not exclusively, on them.

These practical considerations support an argument that tenants resorting to lawful means to compel landlord compliance with housing codes are entitled to protection from landlord retaliation. Failure to protect the tenant might constitute an unintentional legislative squeeze, whereby the state invites citizen participation in the effectuation of its laws, and then either stands by passively or participates actively, by force of its statutes and courts, in the penalty imposed on a citizen-tenant by a vengeful landlord.

III. THE PRESENT STATE OF THE LAW: CASES AND STATUTES:

The practical considerations and constitutional arguments against permitting retaliatory evictions have been discussed in the leading case, Edwards v. Habib.[56] In Edwards, the appellant, a month to month tenant, vainly complained to the landlord, Habib, of the unsanitary conditions existing in her apartment. After receiving no response, Mrs. Edwards complained to the District of Columbia Department of Licenses in March, 1965. The Department's investigations of her premises revealed 40 sanitary code violations and led to the issuance of orders to the landlord to make the required repairs. In August, 1965, Mrs. Edwards received from the landlord a 30-day statutory notice to vacate her premises.[57] This was followed by a default judgment giving the landlord powwession of the premises.[58]

A prolonged court battle ensued. First, Mrs. Edwards was granted a motion to re-open the judgment by the D.C. Court of General Sessions on the grounds of excusable neglect,[59] with permission to enter the defense of retaliatory eviction.[60]

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55. R. Powell, Real Property ¶253, at 177 (Abr. ed. 1968).

56. 397 F.2d 687 (D.C. Cir. 1968).

57. Id. at 688, citing D.C. Code § 902 (1967).

58. Id., citing D.C. Code § 910 (1967).

59. There is no indication in the printed reports as to the grounds claimed for this excusable neglect.

60. 397 F.2d at 689.

On retrial, evidence of retaliation was held inadmissible and judgment entered for the landlord.[61] Subsequently, the U.S. Court of Appeals granted Mrs. Edwards a stay of judgment, pending appeal to the D.C. Court of Appeals.[62] In his special concurrence to the per curiam grant of stay, Judge Skelly Wright expressed support for the appellant's contention that she could not be evicted if the landlord's motive were proven retaliatory:

> ...[I]f this defense can be proved, then a court may not participate with the landlord in the implementation of his illegal purpose.[63]

The D.C. Court of Appeals affirmed the eviction judgment, relying on the theory that only the legislature can provide protection against retaliatory evictions.[64] The case was returned to the U.S. Court of Appeals on direct appeal. Writing now for a 2-1 court, Judge Wright settled the confusion in the lower courts as to whether retaliatory evictions are permissible, holding that such evictions are contrary to public policy. He noted that, by directing the enactment of housing and sanitary codes, Congress had already manifest concern for the tenant's plight.[65] He continued that retaliatory evictions cannot be tolerated:

> ...in light of the appalling condition and shortage of housing in Washington, D.C., the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions.[66]

The court also found that the practical effect of retaliatory evictions is to frustrate the operation and purpose of housing codes.[67]

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61. Edwards v. Habib, No. 75895 (D.C. Ct. Gen. Sess., Nov. 23, 1965).

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

63. Id. at 629.

64. 227 A.2d 388 (1967).

65. 397 F.2d at 700.

66. Id. at 701.

67. Id.

The Court of Appeals expressed strong sympathy with the constitutional claims advanced by the appellant. Although it discussed these claims at great length, it refused to rule on them. A careful examination of the opinion discloses that considerations unrelated to the substance of these constitutional arguments prevented the court from reaching its conclusion on the basis of appellant's constitutional rights.

First, appellant interpreted the first amendment by analogy to the fourteenth amendment concept of "state action,"[68] as foreclosing not only congressional abridgment of the right to petition government for redress of grievances but judicially-enforced limitations as well.[69] Responding to this contention, the court diligently enumerated the authority for asserting that a state and its courts, by either action or inaction, may not constitutionally permit private curtailment of first amendment freedoms.

But at every point at which the court seemed to approach endorsement of the appellant's position,[70] it stopped short. Apparently, the court was disturbed by the status of the District of Columbia, which is not a state and to which the fourteenth amendment does not directly apply.[71] In the court's view, to accept the analogy between the first amendment's express reference to Congress and the fourteenth amendment concept of "state action" would be to concede that both amendments provide co-extensive protection. Whether the court was willing to accept the analogy is at best unclear.

Initially, the court noted that the fourteenth amendment's "equal protection of the law" clause was written to eradicate slavery. The court continued:

> In addition, the language of the First Amendment, "Congress shall make no law..." is not as amenable as the fourteenth amendment is to the construction that there is state action by inaction or by judicial action which merely gives legal effect to privately made decisions.[72]

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68. The concept was developed in the Civil Rights Cases, 109 U.S. 3 (1883).

69. The major cases extending "state action" to include judicial action are New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Barrows v. Jackson, 346 U.S. 429 (1953); and Shelley v. Kraemer, 334 U.S. 1 (1948).

70. 397 F.2d at 693, 696.

71. Wight v. Davidson, 181 U.S. 371 (1901).

72. 397 F.2d at 693.

However, in a subsequent paragraph, the court suggested that

> ...there is no reason to think that review under the First Amendment is more limited [than under the Fourteenth],73

adding that at least review under the "due process" clause of the fifth amendment is as extensive as under the identical clause in the fourteenth amendment.74

But the court never adopted a clear stance on the question. The reason the court gave is that it need not decide the constitutional issue if it could base its opinion on non-constitutional grounds.75 In spite of this, the court did make a substantial effort to develop the arguments supporting the appellant's constitutional contentions. Perhaps the court was unwilling to depart from the traditional reluctance of District of Columbia courts to incorporate the terms of the fourteenth amendment into the first amendment.76 Whatever his reason, Judge Wright's efforts to fully consider the first contention suggest that, had a state been the forum for this suit, he would have directed the lower courts to abstain from enforcing the retaliatory eviction on both constitutional and public policy grounds.

Appellant's second argument was that the right to report violations of law is one arising out of citizenship itself, immune from interference by either government or individuals. Counsel for Mrs. Edwards cited In re Quarles and Butler,77 in which the Supreme Court affirmed the

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73. Id. at 694.

74. In Bolling v. Sharpe, 347 U.S. 497, 499 (1954), the Supreme Court held that segregation, which it had found repugnant to the "equal protection" clause of the fourteenth amendment in Brown v. Board of Education, 347 U.S. 483 (1954), was " ... so unjustifiable as to be violative of due process." Hence, the fourteenth amendment "state action" analysis was applied to the District of Columbia through the fifth amendment. But Edwards may not have considered retaliatory evictions so extremely inequitable as to allow such an analogy here. See note 76 infra.

75. 397 F.2d at 690 n. 6.

76. See Hamilton National Bank v. District of Columbia, 156 F.2d 845 (D.C. Cir. 1946), cert. denied, 338 U.S. 891 (1949).

77. 158 U.S. 532 (1895).

conviction of two men for threatening one Worley for having informed federal officers that the defendants were violating federal liquor laws. The Quarles opinion plainly found that a "right and duty" of citizens to report violations of law arises, not from the Civil Rights Act[78] under which the men were prosecuted, but "from the necessity of government itself...."[79]

Judge Wright was apparently so persuaded by this argument that he criticized the lower court for disagreeing with the appellant and misreading Quarles as holding the right to report violations of law to have originated ab initio from the legislation.[80] Nevertheless, he refused to conclusively declare that citizens are immune from interference with their right to report violations of law. In a footnote, Judge Wright explained that the court will not declare new rights where an appeal is based on a defense and is not one originating in an affirmative action.[81] Moreover, though the court would explicitly protect the interests of tenant-complainants in each case, it would not assume a legislative function; to declare rights would require the court to detail those rights, indicating what landlord action constitutes retaliation, which tenant actions are protected, and during what period of time after such tenant action an eviction would be presumed retaliatory.[82] This, the court implied, should be done by the legislature.

Any doubts left by Edwards about the constitutional infirmity of retaliatory evictions were dispelled by a federal District Court ruling in New York. In Hosey v. Club Van Cortlandt,[83] a week-to-week hotel tenant, who had occupied the premises on the same terms for two years, sought a federal injunction on constitutional grounds to prevent landlord retaliation for organizing a tenant group which complained about code violations.[84]

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78. Rev. Stat. § 5508 (1873-1875) (codified by the Act of March 4, 1909, ch. 321,§ 19, 35 Stat. 798).

79. 158 U.S. at 536.

80. 397 F.2d at 698.

81. Id. at 699 n. 37.

82. The court was evidently sensitive to comments made by Judge Greene in the lower appellate court ruling in favor of the landlord at 227 A.2d at 391-92.

83. 299 F. Supp. 501 (S.D.N.Y. 1969).

84. Id. at 502.

As a result of two conflicting New York State court opinions,[85] the law in New York was unsettled at the time Hosey commenced his action. Therefore, the federal court refused to issue an injunction.[86] The court found that

> 3) ... there is no clear danger that a violation of the 14th Amendment will occur ....
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> ....
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> 5) Issuance or refusal to issue a preliminary injunction would cause no significant harm to the plaintiff or defendants pending a final disposition of this case.[87]

However, the court did express the view that the dual operation of state law and state judicial enforcement of summary dispossession, though not inherently unconstitutional, would become so when applied at the behest of a landlord whose motive is retaliatory.[88] Accordingly, the court stated that

> ... the 14th Amendment prohibits a state court from evicting a tenant when the overriding reason the landlord is seeking an eviction is to retaliate against the tenant for an exercise of his constitutional rights.[89]

The conflicting opinions referred to in Hosey were Portnoy v. Hill,[90] a Binghamton City Court ruling, and Lincoln Square Apartments, Section I, Inc. v. Davis,[91] a case decided by the Appellate Term, First Department in New York City.

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85. Portnoy v. Hill, 57 Misc.2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968) held the defense of retaliatory eviction admissible; contra, Lincoln Square Apartments, Section I, Inc. v. Davis, 58 Misc.2d 292, 295 N.Y.S.2d 358 (N.Y. City Civ. Ct. 1968).

86. The court felt an injunction should not issue until the state courts had been given the opportunity to grant Hosey the relief or protection he sought. 299 F.Supp. at 508.

87. Id.

88. Id. at 506.

89. Id.

90. See note 85 supra.

91. Id.

Portnoy relied on the public policy implicit in the Housing Code of Binghamton to declare proof of retaliatory eviction admissible as a defense to eviction proceedings. Regarding itself as a court of first impression in the state,[92] Portney cited Edwards as persuasive authority, adding that the argument to permit the defense of retaliation is even stronger in New York State where, by statute, equitable and legal defenses are permitted in summary proceedings.[93]

On the other hand, Lincoln Square held the defense inadmissible. The court placed heavy emphasis on the nature of the landlord's retaliation, which was in the form of a refusal to renew a lease with no self-renewing clause.[94] In dictum, the court rejected the tenant's claim of a right to petition government grounded in the first and fourteenth amendments on a technicality, without discussing the merits. The court felt that an action for summary repossession requires speedy adjudication and does not afford the time to weigh the competing constitutional interests of landlords and tenants.[95] Lincoln Square did not indicate what form of action would be appropriate for a weighing of these interests.

Having been denied the injunction he sought, Hosey re-asserted his constitutional arguments unsuccessfully in defense to an eviction action brought by his landlord.[96]

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92. 57 Misc.2d at 1098, 294 N.Y.S.2d at 279. The court was not entirely correct. In 1964, a federal District Court judge in New York granted a preliminary injunction against a retaliatory 400 per cent increase in rent. Tarver v. G & C. Construction Co., Civil No. 2845 (S.D.N.Y., November 9, 1964).

93. N.Y. Real Prop. Actions § 743 (McKinney 1963).

94. In 58 Misc.2d at 294, 295 N.Y.S.2d at 361, the court found that

> Their [the tenants'] lease has expired and no new lease has been executed. The lease contained no self-executing renewal provision and, specifically stated that the tenants did not have a vested right to renewal, and indeed, it provided that upon the expiration of the term, the tenants were to surrender the apartment to the landlord.

95. 58 Misc.2d at 294, 295 N.Y.S.2d at 361. But see discussion in text accompanying notes 195-196 infra.

96. Club Van Cortlandt v. Hosey (1st Dep't June 11, 1970), in 163 N.Y.L.J. No. 112, p. 2, col. 2.

On appeal, the same Appellate Term which had earlier decided Lincoln Square now held that the defense was to be admitted.[97] However, the court refused to overrule Lincoln Square, commenting:

> Our affirmance in Lincoln Square...was limited to the particular situation there prevailing and there involved. It was not intended and should not be interpreted to mean that the equitable defense of retaliatory eviction may in no event be interposed in a holdover proceeding.[98]

Evidently, the court was attempting a factual distinction between Hosey and Lincoln Square. Nevertheless, even if Lincoln Square is narrowly construed to permit retaliatory eviction only at the moment a lease expires, its survival is precarious. The federal court's opinion in Hosey clearly held retaliatory evictions to be inconsistent with the fourteenth amendment. Before declaring this position, the court defined "retaliatory" as

> ...any conduct intended to penalize a person for exercising a constitutional rights.[99]

This is a broad definition. It would appear to control even a Lincoln Square situation. Concededly, it may be argued that such a construction of Hosey would virtually force a landlord to renew the tenant's lease. However, this objection only demonstrates the difficulty which a tenant may encounter in proving retaliatory motive where a lease has expired by its own force. The decision to renew a lease is one made by a landlord and, conceivably, a notable departure from the practice of renewing such leases could be proven. Combined with other evidence,[100] a case of retaliation may be proven.

The defense of retaliatory eviction has been judicially recognized in one other state and is likely to gain acceptance in the courts of a third state. Ruling on grounds of public policy similar to those advanced in Edwards, the Wisconsin Supreme Court declared that a tenant may not be evicted if he can prove the landlord's sole

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97. Id.

98. Id.

99. 299 F.Supp. at 504.

100. The evidentiary problems confronting counsel for tenants are notable and can only be met on a pragmatic, case-by-case basis by the attorneys and courts. See text accompanying note 173 infra.

motive to have been retaliatory.[101] In a Florida case,[102] the majority implied that retaliation would be a defense to an unlawful detainer[103] action. There, the tenant claimed landlord retaliation for a complaint made to the Dade County authorities of a code violation.[104] The court considered evidence of a violation insufficient to present a question of retaliation. In his dissent, Chief Judge Carroll thought it obvious that there was a retaliation and that Edwards should be followed.[105] The highest Florida court denied certiorari to review the decision.[106] In a different case involving the eviction of mobile-home tenants who claimed retaliation, the U.S. District Court in Florida reportedly granted an injunction against the eviction.[107] If proof of retaliation is conclusive in a future case, it may be expected that Florida will follow Edwards.

In addition, elsewhere courts at the trial level have admitted the defense. A Minnesota Municipal Court held the defense admissible in an unlawful detainer suit;[108] and the California Supreme Court has recently issued a writ ordering a trial court to hear the defense.[109]

Hence, the combined effect of Edwards and Hosey has been to supply precedent and firm constitutional support for tenant resistance to retaliatory evictions. It should be noted, of course, that these courts represent a minority of courts to have ruled this way.

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101. Dickhut v. Norton, 173 N.W.2d 297 (Sup. Ct. Wis. 1970).

102. Wilkins v. Tebbetts, 216 So.2d 477 (Dist. Ct. App. Fla. 1968), cert, denied, 222 So.2d 753 (Fla. Sup. Ct. 1968).

103. An unlawful detainer action is an action to oust a tenant whose lease has expired or terminated. See Brandley v. Lewis, 97 Utah 217, 92 P.2d 338 (1939).

104. 216 So.2d at 478.

105. Id. at 479.

106. See note 102 supra.

107. Bowles v. Blue Lake Dev. Corp., 2 CCH Pov. L. Rep. ¶10201 (D.C. S.D. Fla. 1969).

108. Botko v. Cooper, 4 Clearinghouse Rev. 99 (Minn. Mun. Ct. Hennepin County, April 15, 1970).

109. Schweiger v. Superior Court of California, 4 Clearinghouse Rev. 219 (Cal. Sup. Ct., writ issued May 29, 1970). For a brief discussion of a new law concerning retaliatory evictions in California, see note 117a infra.

There may be two additional limitations to the viability of the Edwards-Hosey principle. First, the fourteenth amendment has long been held not to apply to private action.[110] Where self-help is permitted,[111] a landlord could retaliate against a tenant by removing him without use of bodily force and without involving the state's judicial machinery in his action. A tenant so removed might seek judicial assistance in regaining his premises, urging that the Fourteenth Amendment requires affirmative state action to prevent private retaliation. Generally, however, courts have rejected attempts to so extend the fourteenth amendment.[112]

Secondly and more significantly, Edwards was reluctant to apply the reasoning in Quarles[113] and declare that tenants have a right to report violations of housing codes and are immune from even private retaliation for such reports; none of the other courts discussed the contention that such a right should be recognized. The result is that tenants who dare complain will have to await court vindication of their rights. For an incalculable number of tenants, the mere threat of landlord retaliation may still have a chilling effect[114] on tenant complaints.

Because statutes may be more detailed in their protection of tenants and universal in their application than judicial opinions, and because the initiative in regulating the interaction between citizens belongs to the legislature, legislation is a more effective vehicle for guaranteeing tenant rights than judicial dicta. To afford the tenant the broadest possible protection consistent with the landlord's valid interest in controlling the use of his property, the following guidelines are necessary for any statutory scheme:

1. The tenant should be protected from retaliation for any lawful activity designed to compel landlord compliance with housing codes. These include

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110. See, e.g., United States v. Guest, 383 U.S. 745, 755 (1966).

111. See text accompanying notes 23-27 supra.

112. See note 110 supra.

113. See note 79 supra.

114. Cf. Dombrowski v. Pfister, 380 U.S. 479 (1965).

complaints to public authorities, rent-withholding as prescribed by law,[115] repair-and-deduct actions, and organization of or participation in tenant groups;

2. As Hosey evidently reasoned, if the fact of retaliation is itself repugnant to public policy and to the Constitution, then any form of retaliation should be prohibited. This would preclude not only evictions, but also rent increases and refusals to renew tenancies or leases when found to be retaliatory;

3. A lawful tenant action should be protected until such time as it is reasonable to assume that a retaliatory motive has dissipated. Once a tenant has taken lawful action and has raised the defense of retaliation, the landlord should be required to show good cause[116] for the eviction; and

4. Protection should not be confined to instances where retaliation has been proven the sole motive. The cases suggest that, once the defense of retaliation is entered and some lawful tenant action proven, the landlord should be required to prove that his good cause, if any, is not a pretense for retaliation.[117]

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115. In some states, court permission must be obtained before the tenant may withhold rent, e.g., New York. N.Y. Real Prop. Actions § 755 (McKinney 1963). In Massachusetts, the tenant need not obtain such permission. Mass. Gen. Laws Ann. ch. 238 § 8A (Supp. 1970).

116. "Good cause" refers to reasons which would usually justify eviction of a tenant even where the right to evict is otherwise limited by law. For example, a landlord may ordinarily evict a tenant who 1) is guilty of causing a serious and continuing health hazard; or 2) is using the premises for illegal purposes. The landlord may also recover possession if 1) he desires to immediately rennovate or demolish the premises; or 2) he desires the premises for the immediate occupancy of his immediate family. See, e.g., Mass. Comp. Laws Ann. § 600.5634 (Supp. 1970).

117. Edwards spoke of a "retaliatory purpose." 397 F.2d at 702. Hosey proscribes evictions where the "overriding reason" is retaliation. 299 F.Supp. at 506. This language strongly suggests that a mixed motive situation, where an otherwise legitimate affirmative ground is claimed by the landlord and a possible retaliatory motive is demonstrated by the tenant, forces the court to inquire whether the legitimate ground is merely being used as a pretense for retaliation.

(continued next page bottom)

Eight states currently provide statutory protection against different forms of retaliatory actions by the landlord. The Michigan,[118] Rhode Island,[119] and, most recently, New Jersey[120] legislatures have enacted the broadest measures. In New Jersey, a criminal statute barring retaliatory evictions was replaced by a statute prohibiting landlord retaliation for a tenant's organization of or membership in a tenants' group,[121] non-compliance with a substantial alteration of the tenancy in retaliation for lawful tenant action,[122] or a "good faith" complaint to public

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117a. After this Note was prepared, a retaliatory eviction statute in yet a ninth state, California, became effective. Cal. Civ. Code § 1942.5 (West Supp. 1971). The law has several useful features. First, it precludes several types on landlord actions, including eviction, rent increases, and decreases in service, where the "dominant motive" is retaliatory. Id. § 1942.5(a). Even if the landlord claims a good faith motive for his action, the tenant may controvert that claim and put the landlord to the burden of proving that retaliatory motives do not dominate his action. Id. § 1942.5 (d). Furthermore, any retaliatory action is prohibited within 60 days after the latest of 1) a good faith complaint to an appropriate public agency; 2) an inspection by or citation issued from such agency; or 3) an arbitration award for the tenant on the issue of tenantability. Id. § 1942.5(a). On the other hand, there are two significant limitations in the California law. First, its operation is entirely prospective; the law affects only new or renewed tenancies arising or agreements entered into after January 1, 1971, the effective date of the law. Secondly, the law's provisions may be invoked by a lessee only once in a twelve-month period. Id. § 1942.5(b). While this latter limitation may be designed to prevent tenants from spacing complaints so as to effectively preclude eviction altogether, it may prove self-defeating. A newly discovered violation or one which has become hazardous only after a tenant has complained once may go unreported and unabated while the landlord evicts a potential complainant, at once ridding himself of this "troublemaker" and intimidating future tenants.

118. Mich. Comp. Laws Ann. § 600.5646 (Supp. 1970).

119. R.I. Gen. Laws Ann. § 34-20-10 (1969).

120. Ch. 210, [1970] N.J. Acts 588 (to be codified as N.J. Stat. Ann. § 2A:42-10.10 et seq.).

121. Id. § 1(c).

122. Id. § 1(d).

authorities.[123] It is unclear whether "good faith" requires a showing that a violation was actually found, or covers even complaints which do not lead to a finding that violations exist but which resulted from a good faith belief that such violations would be found.[124] The statute bars any reprisal, giving the tenant authorization to commence a civil action against the landlord[125] or seek an injunction against retaliation. The most significant feature of the statute is the provision that, at any time after a lawful tenant action, the landlord's action against the tenant will be rebuttably presumed retaliatory.[126] The burden of proof is thus placed on the landlord to show that a suspected retaliatory motive has dissipated. From this provision it is inferable that even a "good cause" eviction suit will fail if the court finds an unmistakable odor of retaliation.

The Michigan and Rhode Island statutes are identically worded. They protect all lawful tenant action[127] against a wide range of landlord reprisals[128] but lack any reference

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123. Id. § 1(b).

124. Compare, Mass. Gen. Laws Ann. Ch. 239 § 2A (Supp.1970) wherein report of a "suspected violation of law" is also protected.

125. Originally, New Jersey imposed only criminal penalties for retaliatory evictions. N.J. Stat. Ann. § 2A:170-92.1 (1967). Criminal sanctions were replaced by the current law subjecting violators to civil liability.

126. See note 120 supra.

127. These include "justifiable complaint(s)" and "any other justified lawful act" of the tenant. R.I. Gen. Laws Ann. §34-20-10(B), (C) (1969); Mich. Comp. Laws Ann. § 600. 5646(4)(b), (c) (Supp. 1970).

128. Mich. Comp. Laws Ann. § 600.5646(5) (Supp. 1970); R.I. Gen. Laws Ann. §34-20-11 (1969):

> When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges and it appears by a preponderance of evidence that the plaintiff intended to increase the defendant's obligations under the letting as a penalty for such justified lawful acts as are described in the preceding section, and that the defendant's failure to perform such additional obligations was a material reason for the alleged termination, judgment shall be entered for the defendant on the claim of possession and all such additional obligations shall be void. (emphasis added).

to a rebuttable presumption of landlord retaliation after such tenant actions. The statutes do, however, prohibit landlord "intent" to retaliate.[129] The burden of proof appears to be placed on the tenant. If he can demonstrate such an intent, he presumably cannot be evicted, no matter how long after he took his action. Furthermore, use of the term "intent" may fairly be construed as a legislative declaration that even a "good cause" action, brought by the landlord with retaliatory intent, may be denied by the court.

In Massachusetts, the operation of two sections, one covering tenant complaints[130] and the other allowing a tenant to withhold rent[131] give the tenant broad protection against retaliatory eviction. The first provision declares that an evictions will not be permitted if it is in retaliation for a tenant's report of a violation or "suspected violation of law."[132] For six months after the complaint, there is a rebuttable presumption of retaliation.

The second Massachusetts provision protects rent-withholding from landlord reprisal if the condition

> ...of any tenement rented or leased for dwelling purposes...[133] are in violation of the standards of fitness for human habitation established under the state sanitary code or any ordinance, by-law, rule or regulation and, if such violation may endanger or materially impair the health or safety of persons occupying the premises.[134]

Before the tenant may withhold his rent, he must have obtained a statement from the appropriate local agency that such a violation exists and must have notified the landlord of his intention to withhold his rent.

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129. The language is "intended as a penalty...." See notes 118, 119 supra. It should be noted that the Michigan law contains a provision enumerating valid causes for eviction. See note 116 supra.

130. Mass. Gen. Laws Ann. ch. 239, § 2A (Supp. 1970).

131. Id. § 8A.

132. See note 130 supra.

133. Premises excluded from the law are hotel or motel rooms and rooms in a lodging or rooming house which have been occupied for less than 3 months. Mass. Gen. Laws Ann. ch. 239, §2A(3) (Supp. 1970).

134. See note 131 supra.

In Connecticut, evictions which are solely retaliatory are prohibited by statute.[135] The provision protects any lawful means by which the tenant sought to remedy violations of the health law and building codes. The statute provides that "the obligation to pay rent" is not affected by this particular provision. However, elsewhere in the Connecticut laws[136] the tenant is granted permission to withhold rent as long as the premises he occupies remain untenantable or "unfit for occupancy."[137]

Illinois protects only complaints to public authorities.[138] The landlord may not terminate or refuse to renew a lease or tenancy in retaliation for such complaints. Because they contribute to the same ends, membership in a tenants' group and organization of tenants' groups to complain about code violations should also be protected by judicial inference from this statute.

In Maryland, the legislature has enacted an amendment to the Code of Public Local Laws of Baltimore City barring retaliation for rent withholding.[139] The law permits eviction for certain enumerated causes[140] but creates a rebuttable presumption of retaliation for six months after rent is withheld.[141] Although the "Findings and Purposes" of the Act declare that tenant complaints should themselves be protected,[142] the prohibitions apply only to retaliation for

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135. Conn. Gen. Stat. Ann. § 52-540(a) (Supp. 1970).

136. Conn. Gen. Stat. Ann. §47-24 (1949).

137. This provision appears to have been construed strictly in favor of rent being paid. See Webel v. Yale University, 125 Conn. 355, 7 A.2d 215 (1935); Weiner v. Frauenglass, 10 Conn. Supp. 355 (C.P., Hartford County 1942).

138. Ill. Ann. Stat. ch. 80, § 71 (Smith-Hurd 1966).

139. Ch. 223 [1969] Md. Laws 681. For a thorough study of the history of retaliatory eviction legislation in Maryland, see McElhaney, Retaliatory Evictions: Landlords, Tenants, and Law Reform, 29 Maryland L. Rev. 193 (1969).

140. Ch. 223, § 1(c) [1969] Md. Laws 682.

141. Id. § 1(b)(2), at 682.

142. Id. § 1(a)(4), (5), at 682.

rent-withholding. Furthermore, rent may be withheld for major defects only.[143] Hence, although the forms of landlord reprisal forbidden include eviction, rent increase, action for rent, and decrease in services,[144] an exhaustive list, the tenant is protected only at the point rent is withheld, not at the time the complaint is first made.

Finally, in Pennsylvania[145] rent may be withheld if the premises are certified by appropriate public authorities[146] as unfit for human habitation or until the tenancy is terminated for any reason other than non-payment of rent. The statute further provides that "no tenant shall be evicted for any reason whatsoever" while rent is deposited in escrow.[147]

These are the state provisions specifically addressed to retaliatory evictions. When emergency conditions arise,[148] these statutes may be joined by rent control legislation which expressly enumerates the only permissible grounds for eviction. The prospect of retaliation as the sole landlord motive is thereby eliminated by exclusion.[149]

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143. Ch. 459, § 1 [1968] Md. Laws 832. In part, such defects include 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 water or of electricity or of adequate sewage disposal facilities or an infestation of rodents.

144. Ch. 223, § 1(b)(1) [1969] Md. Laws 681.

145. Pa. Stat. tit. 35, § 1700-1 (Supp. 1970).

146. Id. The appropriate authority may be the Department of Licenses and Inspection, Department of Public Safety, or Public Health Department, depending upon the statutory classification of the state's subdivision.

147. Id.

148. See Block v. Hirsh, 356 U.S. 135 (1921).

149. See, e.g., New York City Rent and Rehabilitation Law § Y 51-6.0(b) (1967).

In New York City,[150] for example, it has been estimated that 69% of the housing is regulated by rent control.[151] An additional number of city residents have been brought under the new Rent Stabilization Law,[152] which similarly limits the grounds for eviction to those enumerated by law.[153] The combined effect of these regulations has led one authority on landlord-tenant law in New York City to observe that indigent tenants there are rarely plagued by retaliatory evictions.[154]

However, the degree of protection offered by the Rent Control and Rent Stabilization provisions combined is not maximum. Numerically, approximately 31% of those living in rented apartments in New York City were not covered by any regulation of evictions prior to Rent Stabilization;[155] about 10% of those New York City residents who earned under $4,000 did not live in rent controlled apartments.[156] The increase in the number of regulated tenancies as the result of Rent Stabilization has not yet been calculated. Rent Stabilization regulates privately-owned buildings having six or more units. Presumably, a substantial number of formerly non-rent controlled buildings are now regulated. However, even under those regulations a landlord may plead a permitted cause for eviction.[157] He may succeed even though he would not have sought the eviction but for a retaliatory motive. Unless Hosey is followed and broadly applied, even statutory, rent control tenants are subject to retaliatory evictions.

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150. Id.

151. Note, Residential Rent Control in New York City, 3 Columbia J. of Law and Soc. Prob. 30 (1967).

152. New York City Rent Stabilization Code (1969).

153. Id. pt. V.

154. N. LeBlanc, A Handbook of Landlord-Tenant Procedures and Law 27 (1969). Miss LeBlanc is Associate Director of the Mobilization for Youth Legal Services in New York City.

155. See note 151 supra.

156. New York City Rent and Rehabilitation Administration, Rent Control in 1967 (1967).

157. See note 149 supra.

IV. BEYOND THE PRESENT STATE OF THE LAW:

Two conclusions should emerge from the foregoing discussion: 1) There are substantial constitutional and public policy grounds for affording the tenant full protection against landlord retaliation, even where a "good cause" is claimed as a pretense for reprisal; and 2) the statutes do not expressly provide such complete protection. Some laws may be broadly construed by the courts. Others require further legislative expansion.

To understand why the statutes are limited, we have to remember that the landlord's interests are also protected by the Constitution. The fifth[158] and fourteenth[159] amendments guarantee that no one may be deprived of his property without the process of law. To legislate an abridgment of the landlord's right to recover property occupied without a lease or after a lease expires might be to invade the landlord's constitutional rights.

However, the Supreme Court has recognized that the landlord's property rights are not absolute. They may, the Court acknowledged, be clothed "with a public interest so great as to justify regulation by law."[160] The issue, then, turns on another question. What in the public interest justified regulations against landlord retaliation? The Supreme Court has spoken to this point:

> The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government.[161]

But it is insufficient to ignore the landlord's predicament when discussing issues of public policy. Rising costs of labor, materials, maintenance, and property taxes place a formidable financial burden on landlords.[162] These costs

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158. U.S. Const. amend. V.

159. U.S. Const. amend. XIV.

160. Block v. Hirsh, 256 U.S. 135, 155 (1921).

161. Frank v. Maryland, 359 U.S. 360, 371 (1959).

162. See, "Tenants Put the Heat on the Landlord," Business Week, Nov. 3, 1969, at 72-73.

have resulted in widespread abandonment of buildings.[163] One public official has estimated that hundreds of thousands of apartment buildings may be abandoned by their owners within the decade.[164]

The public interest clearly is not served by forcing landlords to abandon buildings. But it is equally clear that the solution to the problem of deteriorated housing and abandoned buildings should not work to the detriment of tenants. Commissioner Charles Urstadt of the New York State Housing and Community Renewal Department has suggested better zoning and planning, financial assistance for landlords and builders, and mortgage financing as partial, direct solutions.[165] H.U.D. Secretary Romney has proposed that federal assistance be given landlords.[166] Finally, buildings on the brink of abandonment may have to be replaced by public housing if receiverships are not adequate solutions.[167]

Hence, attempts to relieve the economic problems of landlords should be mainly a matter of government financial and housing policy. The burden should not be imposed on tneants by means of the severe and unconstitutional measure of retaliatory evictions.

Once the problem of economic burdens of landlords is seen as a dilemma separate from the far more narrow legal problem of retaliatory evictions, the legislature and the courts should be concerned with balancing the landlord's traditional property rights against the tenant's right to compel landlord compliance with the law, free from fear of retaliation. On this legal issue, Edwards declared how the interests are to be weighed. The legislature

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163. See note 43 supra.

164. N.Y. Times, March 5, 1970, at 34, col. 3. The estimate was made by Commissioner Urstadt, N.Y. State HOusing and Community Renewal Department.

165. See note 37 supra.

166. See note 42 supra.

167. The receivership program in New York City has had major disadvantages, including its tendency to make New York City a slumlord. For brief critiques, see Gribetz and Grad, supra note 48, at 1272; see also 78 Harv. L. Rev., supra note 48, at 828.

> ...by directing the enactment of housing codes, impliedly directed the court to prefer the interests of the tenant who seeks to avail himself of the code's protection.[168]

When the tenant's defense is retaliation, special judicial vigilance is called for. To assure that the tenant's rights are adequately protected, the following "but for" test is proposed: The eviction should be denied if, but for the tenant's complaint or other lawful action taken to compel the landlord to comply with housing code regulations or other laws, the landlord would not have sought an eviction order.

A more diligent inquiry into the landlord's purpose when applying this test would not automatically foreclose any action commenced by the landlord after a tenant has complained of a violation or taken lawful action to compel its repair. For instance, if the landlord claims a compelling necessity to recover the premises for the immediate use of his immediate family (child, spouse, parent(s), sister or brother), and the action is brought in good faith,[169] the court may reasonably find just cause to grant the eviction, despite the proximity of the eviction to a tenant complaint or action.

On the other hand, less compelling reasons offered by the landlord may be found to constitute mere pretense for retaliation. For example, an action commenced for an economic motive, such as the demolition or renovation of the premises, which the landlord would not have brought in the absence of the tenant's action, should not be allowed.[170] The possible consequence of the court's inquiry, a denial of eviction, will force the landlord to seek alternative, legal means of accomplishing his alleged purpose for seeking an eviction of his tenant.

Conceivably, a case may arise where the building is indeed in poor condition, but the proven facts suggest that the landlord would have let it deteriorate as long as he collected rent; the landlord changed his mind and sought an eviction only after the tenant's complaints brought orders to make costly repairs. Under these circumstances, the court should order an eviction only if conditioned upon the relocation of the tenant by either the landlord or the local government to comparable, adequate dwellings.

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168. 397 F.2d at 696.

169. See, "Landlord Fails in Appeal to Evict Tenant to Provide Space for Mother," 164 N.Y.L.J. No. 101, p. 1, col.7.

170. See text accompanying note 173 infra.

In cases where an eviction is sought because of tenant violations, the court should consider whether eviction, often a severe penalty, is the appropriate remedy. Housing codes have been strongly criticized for imposing criminal penalties on violators instead of compelling correction of the violations.[171] The same logic challenges the eviction approach to tenant violations. Instead, tenant violators should be required to attend education programs on the proper care of dwellings [172] and to pay for or contribute to the repair of damages.

The foregoing solutions to eviction proceedings where retaliation is suspected apply only after certain prerequisites are satisfied: 1) The tenant must have raised the defense of retaliatory eviction and proven some lawful action to compel landlord compliance with the law (in the case of a tenant complaint, the tenant need only show a good faith suspicion of a violation); and 2) if a valid cause is pleaded by the landlord and the tenant believes it to be a subterfuge for retaliation, evidence should be introduced showing an unexplainable departure by the landlord from his past tendency to allow the tenancy to continue. Where no other cause is pleaded by the landlord, a retaliatory eviction should be presumed for six months, the period provided in some states by statute.[173]

Counsel for tenants threatened with eviction may resort to three legal theories to encourage the court to apply the but for test presented above[174] in states where legislative protection is incomplete:

A. Waiver

The causes which a landlord may claim for eviction may be classified as: 1) causes arising out of the landlord's personally-motivated desire to use the tenant's premises for other purposes, such as substantial renovation or the resettlement of his immediate family; or 2) causes relating to tenant violations of housing or sanitary regulations.

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171. See Gribetz and Grad, note 48 supra, at 1277-81.

172. Such a suggestion was made by Senator Robert F. Kennedy (D - N.Y.), introducing a proposed landlord-tenant code for Washington, D.C. in Congress. 112 Cong. Rec. 14071 (1966).

173. See, e.g., Mass. Gen. Laws Ann. ch. 239 § 2A (Supp. 1970).

174. See text accompanying note 168 supra.

The but for test may be urged for the first class of evictions on the theory of waiver. If the cause claimed by the landlord is shown to have existed for a substantial period of time before the eviction action was brought, and the landlord is shown to have accepted rent during that time until the tenant took lawful action to compel landlord compliance with the law, the court should find a waiver of the landlord's "right" to evict his tenant.

The waiver concept, in its traditional form, is comfortably applicable to retaliatory evictions. A waiver is an act of not insisting upon some claim, right, or privilege belonging to the person who executes it.[175] In general, the law has always been reluctant to recognize forfeitures of tenancy and has sought to find a waiver.[176] Usually, a waiver consists of an act done by the landlord with a knowledge of a breach of tenancy, which recognizes a continuance of the tenancy.[177] While a breach of tenancy need not have occurred for a retaliatory eviction to arise, when an eviction is grounded on otherwise "good cause," the same analysis should apply. Following a report to public authorities or other lawful action by the tenant, an unexplained departure from the landlord's tendency to continue the tenancy should be disallowed by the court because of the odor of retaliation and the implication of a waiver. A sufficiently clear indication of the landlord's intent to waive a ground for eviction and continue the tenancy is generally demonstrable by his past and continued acceptance of rent up to the time he decided to seek an eviction order.[178]

On the other hand, the second class of causes relate to duties arising under the housing and sanitary codes, which have been considered non-waivable by private parties in the courts.[179] Therefore, it is unlikely that a landlord would

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175. Trustee Co. v. Bresnahan, 119 Cal. 311, 315, 203 P.2d 499, 501 (1949).

176. Brazael v. Bohelman, 270 F.2d 943, 946-47 (8th Cir. 1959).

177. Trent v. Corwin, 76 N.Y.S.2d 198, 203 (Sup. Ct. Westchester County 1947).

178. See, e.g., Pierce v. Kennedy, 205 Ark. 419, 168 S.W. 2d 1115 (1943), where the habitually late payment of rent was held to have been waived by the landlord as a cause for repossession because the landlord had regularly accepted late payments.

179. See, e.g., Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Buchner v. Azulais, 251 Cal. App. 2d Supp. 1015 (1969).

be able to waive a tenant violation of the code. Of course, the landlord need not have commenced the action; but once in court, the "waiver" theory is not likely to avail the tenant. However, if the court adopts the approach advanced here that an eviction is not the appropriate response to tenant violations, an eviction will not result.

B. "Clean Hands"

In Portnoy,[180] the court treated retaliatory eviction as an equitable defense, presumably because it arises more from public policy than from positive law. However, Edwards[181] and Hosey[182] found constitutional sources for the retaliatory eviction defense. When the tenant complains to a government agency, the local housing authority, he is petitioning government for redress of grievances caused by the landlord's default in his legal responsibilities; when the tenant asks the court to protect his complaint from retaliatory eviction, he is seeking to prevent a grievance arising from government action in the form of judicial enforcement of the landlord's retaliation. The right to petition government is, as has been explained, embodied in the guarantees of the first amendment. Additionally, Quarles[183] suggests that the natural law of the formation and continuation of government itself creates a duty in citizens to report violations of law. From these precedents, it is clear that the defense of retaliatory eviction is a legal defense, grounded in the Constitution, not an equitable defense as the Portnoy court claimed.

However, classifying retaliatory eviction as an equitable defense would still require interpretation and application of the law favorable to the tenant. When equitable remedies are sought, the rule is that "he who comes into equity must come with clean hands."[184] This principle may have either of two applications to retaliatory eviction proceedings. On the one hand, it may be said that a landlord who comes into court with a retaliatory motive for eviction does not come into court with "clean hands," particularly if he has violated the housing code. Therefore, he should be denied the order he seeks. This position was reportedly taken by a California court which granted a stay of an order for rent pending evidence that the premises were marked with housing code violations for which the landlord was

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180. See note 85 supra.

181. See note 35 supra.

182. See note 83 supra.

183. See note 77 supra.

184. See note 85 supra.

responsible.[185]

On the other hand, the landlord may claim that retaliation is only an equitable defense and that the tenant does not come into court with "clean hands" if he has violated a condition of his tenancy. But at most, this objection calls upon the court to weigh the interests of the parties. As the Supreme Court declared in Johnson v. Yellow Cab Transit Co.,[186]

> We may assume that because of the clean hands doctrine a federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law. But this does not mean that the courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law in the transactions involved. The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but "upon considerations that make for the advancement of right and justice." ... It is not a rigid formula which "trammels the free and just exericse of discretion." ....[187]

Hence, the "clean hands" doctrine does not foreclose discussion of the relative merits of the parties' arguments. Rather, it prompts inquiry into the interests claimed by both parties. In a retaliatory eviction situation, the interests have been held to favor the protection of the tenant.[188]

C. Real Motive

Speaking in a civil rights case where voting districts had been redrawn to diminish the electoral power of Black voters, the Supreme Court observed that

> ..."Acts generally lawful may become unlawful when done to accomplish an unlawful end, ..., and a constitutional power cannot be used by way of condition to attain an unconstitutional result," ....[189]

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185. Johnson v. Cotton, 1 CCH Pov. L. Rep. ¶2210.85 (Cal. Mun. Ct., Oakland Piedmont Jud. Dist. 1968).

186. 321 U.S. 383 (1944).

187. Id. at 387 (emphasis added)(citations omitted).

188. 397 F.2d at 696.

189. Gomillion v. Lightfoot, 364 U.S. 339, 347-48 (1960) (citations omitted).

When constitutional rights are involved, and the landlord's motive is retaliatory despite the presence of an otherwise lawful cause, the court should reject the lawful claim instead of trampling upon those rights. The situation presented here is analogous to the case in labor relations where, though cause has long existed for the discharge of an employee, the employee is discharged only after having participated in union activities.[190]

The policy of the National Labor Relations Board has been not to regard discharges as being for cause if the real motive of the employer was antipathy toward a union, even though the circumstances were such that a sufficient cause for discharge would have been present in the absence of such a motive.[191]

The most extraordinary case where such a discharge was not allowed by the Board and the Board's order to re-instate the employee was enforced by the federal courts involved a Walter Weigand.[192] Mr. Weigand was charged with habitually being drunk on duty and coming to and leaving work at his pleasure. However, Mr. Weigand was not discharged until his union activities began. Even though his extremely unsatisfactory and unproductive performance was clear cause for discharge, Mr. Weigand was insulated from retaliation for union activities.[193]

It may be contended that Weigand's rights arose under specific statutory provisions of the National Labor Relations Act,[194] while the tenant has no such express statutory protection. But this and the preceding two legal theories are premised on the courts' recognition of the tenant's rights arising from the Constitution. Certainly, a constitutional right merits protection at least commensurate with that accorded a statutory right.

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190. See, e.g., Oklahoma Transportation Co. v. N.L.R.B., 136 F.2d 42 (5th Cir. 1947); Agwilines, Inc. v. N.L.R.B., 87 F.2d 146 (5th Cir. 1936). For a general review of the Board's and courts' attitude toward employee dismissals for union activities, see Annot., 83 A.L.R.2d 532, 540-44 (1962).

191. Id.

192. Edward G. Budd Mfg. Co. v. N.L.R.B., 138 F.2d 86 (3rd Cir. 1943).

193. 138 F.2d at 90-91.

194. National Labor Relations Act (Wagner Act) 29 U.S.C. §§ 157, 158(1), (3) (1964).

It bears repetition that these three legal theories are not intended and cannot be invoked to support a tenant's right not to be evicted under any circumstances. A challenge to the landlord's right to recover his premises is only valid where the landlord's reasons are tainted by retaliatory motives. The conflict between landlord and tenant rights requires careful judicial scrutiny to assure that unlawful retaliation is not abetted.

Perhaps, careful judicial scrutiny will place an additional burden on the courts. In some cities, such as New York City, landlord-tenant matters are heard by a special court. Such courts may be unwilling to assume the new burden. The premise behind this reluctance, that present court facilities are inadequate to hear retaliatory eviction evidence and arguments, is at least debatable and may be unfounded.

Even if the premise is accepted, the federal court in Hosey was not unaware of the problem, but nevertheless declared that the burden must be borne:

> We do not overlook the burden that hearing proof of retaliation might place on state courts; a man's constitutional rights cannot be reduced simply to achieve judicial economy.[195]

If necessary, preservation of those rights would require either an expansion of the facilities of the special courts or a transfer of the action, upon a showing of cause to believe that retaliation may be the real motive, to the regular civil court docket. The latter alternative may, in large cities, cause lengthy delays in eviction proceedings because of the congested civil court calendars.[196] Whichever alternative is preferable, the judicial system must choose one or both to comply with the constitutional and public policy mandate to protect tenant rights.

CONCLUSION

The necessity of reforming landlord-tenant law to broadly protect tenants from retaliatory evictions springs from two sources: 1) The proliferation of housing codes and an increasing awareness on the part of all levels of government that substandard housing and diminishing vacancy rates are reaching critical proportions; and 2) the guarantees provided by both the first and fourteenth amendments of the right of citizens to petition government for redress

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195. 299 F.Supp. at 506 n. 30 (emphasis added).

196. See, "Text of Report on the Civil Court," in 164 N.Y.L. J. No. 118, p. 1, col.7.

of grievances. In addition, there is a duty and right, arising from the nature of citizenship itself, of every citizen to report violations of law. Although not recognized by the courts in the context of retaliatory evictions, this right is compelling if only because of the consequences which accrue when citizens close their eyes to criminal misconduct.

In some jurisdictions, the urgency to protect tenants from landlord retaliation has drawn judicial support and reemphasis; in other jurisdictions, the tenant enjoys express statutory insulation from retaliatory eviction. But these components of the present law are not complete enough. Even where the forms of tenant action protected and of landlord action proscribed are complete, the law has its gaps. In particular, none of the laws expressly provide that, in a mixed motive situation where both a just cause for eviction and retaliatory motive are present, a finding that the retaliatory motive is overriding or dominant shall lead to a dismissal of the landlord's action and a recovery or retention of the premises by the tenant.

The most compelling explanation for this limitation in the law would be consideration of the landlord's economic problems. However, the financial burdens of landlords should be the object of governmental housing policy. The remedy for these problems should not find a method in retaliatory evictions.

Once the problem is narrowed to the legal questions, an accommodation must still be made with the constitutionally protected rights of landlord to determine the use of their property. Specifically, the landlord has traditionally not been asked to justify his action to recover property from a leaseless tenant. The accommodation was equitably made in Edwards: The landlord may evict for any legal reason or for no reason at all. The presence of a retaliatory reason or motive renders the proceeding an illegal one in which the courts may not participate.

Beyond this principle, it remains for the legislatures of those states still lacking retaliatory eviction legislation to enact provisions affording tenants broad protection against landlord retaliation in the directions herein suggested; states which currently have some form of legislation should expand it to its fullest scope. Ultimately, the tenant's source of redress is the court. If not on statutory grounds then on the basis of public policy and constitutional principles, the judiciary should follow Edwards and Hosey in vindicating the tenant's right to secure compliance by landlords with housing code provisions; the courts should also beware of becoming participants in a subterfuge whereby the landlord's retaliatory motive is disguised as "good cause" for the purpose of achieving an illegal eviction.

I.F.