

ALASKA LEGISLATURE COMMITTEE FILES 1985-1984

3078 SSA HB 1 (FILE 2) - (FILE 3) 8672

1 the termination [RENTAL DUE] date specified in the notice.

2 * Sec. ^{5.4} AS 34.03.290(c) is amended to read:

3 (c) If the tenant remains in possession without the landlord's
4 consent after expiration of the term of the rental agreement or after
5 its termination, the landlord may bring an action for possession and
6 recovery of actual damages. If [IF] the tenant's holdover is wilful
7 or [AND] not in good faith the landlord, in addition, may recover an
8 amount not to exceed one and one-half times the actual damages. If
9 the landlord consents to the tenant's continued occupancy, AS 34.03.-
10 020 applies.

11 * Sec. ⁸ AS 34.03.310(a) is amended to read:

12 (a) Except as provided in (c) and (d) of this section, a land-
13 lord may not retaliate by increasing rent, [OR] decreasing services,
14 terminating the rental agreement or providing notice of termination,
15 or by bringing or threatening to bring an action for possession after
16 the tenant has

17 (1) complained to the landlord of a violation of AS 34.03.-
18 100;

19 (2) endeavored to enforce [AVAIL HIMSELF OF] rights and
20 remedies granted to a tenant [HIM] under the provisions of this
21 chapter;

22 (3) organized or become a member of a tenant's union or
23 similar organization; or

24 (4) complained to a governmental agency responsible for
25 enforcement of governmental housing, wage, price or rent controls.

26 * Sec. ^{7.8} AS 34.03.310 is amended by adding a new subsection to read:

27 (f) A landlord is presumed to have violated (a) of this section
28 if the landlord increases rent, decreases service, terminates the
29 rental agreement or provides notice of termination, or brings or

1 threatens to bring an action for possession within 60 days after a
2 tenant has engaged in an action listed under (a)(1) - (4).

STATE OF ALASKA
FISCAL NOTE

Revision Date March 21, 1983

I. REQUEST

Bill/Resolution No.: CSHB 1 (Judiciary)
 Title: Landlords and Tenants
 Sponsor: Representative Abood
 Requestor: House Finance Committee

II. FISCAL DETAIL

Agency Affected: Dept. of Law
 Program Category Affected: Public Protection
 BRU, Program of Subprogram(s) Affected: Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL		5.0				
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	5.0	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	5.0	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

No information provided.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues, Director
 Division: Administrative Services Division

Phone: 465-3672
 Date: March 21, 1983

Approved by Commissioner: Norman C. Gorsuch, Attorney General
 Department: Department of Law Date: March 21, 1983

Distribution:

Original to Legislative Finance
 Copy to Office of Management and Budget (for Legislature introduced bills)
 Copy to Department (for Governor introduced bills)

ANALYSIS
CSHB 1

The committee substitute does not change the department's involvement in landlord/tenant matters where we are only permitted to provide information on landlord and tenant rights.

This bill amends the state's existing statutes setting out the private rights and remedies accorded to both landlords and tenants, and in so doing the bill modifies some of those rights and remedies. Alaska law does not provide for government intervention or enforcement and any remedial action is a private civil matter of either landlord or tenant, or both. AS 44.23.020(b)(8) does provide, however, that the Attorney General shall prepare, publish and revise an information packet on landlord and tenant rights. Enactment of this bill will require the revision of existing landlord/tenant handbook, the costs for which (\$5,000) are included in this fiscal note.

WHERE HAVE ALL THE CHILDREN GONE?

TODAY, THROUGHOUT THE U.S., 27% OF ALL RENTAL HOUSING IS NOT OPEN TO PARENTS WITH MINOR CHILDREN. IN JUNEAU THE FIGURE IS MUCH HIGHER. WE ARE WORKING TO GIVE ALL FAMILIES THE SAME OPPORTUNITIES THAT SINGLES AND COUPLES WITHOUT CHILDREN HAVE.... BELOW ARE A FEW QUESTIONS AND ANSWERS ABOUT FAIR HOUSING.... PLEASE GIVE IT SOME THOUGHT.

2 br. apt., adults only, no pets. \$500 plus \$150 cleaning deposit. Call between 7-9 p.m. Available Nov. 1st.

from, JUNEAU EMPIRE 10/9/80



ANCHORAGE DAILY NEWS 6/1/81

COZY 2-3 BR. 1 1/2 bath, excellent cbnd. near West High. fireplace, carpet, w/d, dw, gd. \$650/mo no pets or child. Call Joyce, 276 8010, or 244-1061.

DOWNTOWN WALK TO WORK

NOW RENTING!
Apartments in newly renovated building. 1 blk from park Strip, off street parking and laundry room for your convenience. no dogs or children.
EFFICIENCY/2775
1 BR./2315
2 BR./2340
ALL UTIL. INCLUDED
Resident Manager, 277-7151

from, JUNEAU EMPIRE 10/15/80

2 br. unfurnished and 1 br. furnished, in West Juneau. Carpeting, dishwasher, garbage disposal, off street parking. No pets or children. Mature adult preferred. 586

Q: AREN'T MAINTAINENCE COSTS HIGHER WHEN YOU RENT TO FAMILIES WITH CHILDREN?

A: ACCORDING TO A NEW YORK COMPANCY WHICH SUPPLIES THE INSURANCE INDUSTRY WITH NATIONWIDE STATISTICS ON DAMAGES, THERE IS NO EMPIRICAL DATA TO PROVE THAT THE PRESCENCE OF FAMILIES RESULTS IN GREATER DESTRUCTION TO PROPERTY.

Q: WOULDN'T A FAIR HOUSING LAW FORCE LANDLORDS TO OVERCROWD THEIR APARTMENTS?

A: NO. FAIR HOUSING LAWS ARE REASONABLE AND ARE NOT WRITTEN IN AN ARBITRARY MANNER. A LANDLORD WOULD NOT HAVE TO RENT A ONE BEDROOM APARTMENT TO A PARENT OR PARENTS WHO HAD THREE CHILDREN. OR, A PROJECT DESIGNED FOR THE ELDERLY OR HANDICAPPED WOULD NOT BE FORCED TO ACCEPT TENANTS WHO HAD CHILDREN. A FAIR HOUSING LAW WOULD BE REASONABLE AND GIVE EQUAL OPPORTUNITIES TO PARENTS AND INSURE THAT AN ADEQUATE SIZED APARTMENT WOULD NOT BE DENIED TO THEM BECAUSE OF PARENTHOOD.

Q: ISN'T THE SOLUTION TO BUILD MORE HOUSING?

A: THIS SOLUTION IGNORES THE FACT THAT OFTEN NEW BUILDINGS WILL NOT RENT TO FAMILIES WITH CHILDREN. ALSO, THERE IS NOTHING TO PREVENT EXISTING BUILDINGS TO ADOPT NEW RULES BANNING CHILDREN. IN THE LAST TWO MONTHS TWO APARTMENT BUILDINGS IN JUNEAU HAVE CHANGED THE RULES AND NOW EXCLUDE CHILDREN.

Q: DON'T INSURANCE COMPANIES CHARGE HIGHER RATES FOR BUILDINGS THAT ALLOW CHILDREN?

A: NO. PRUDENTIAL, SAFECO, AETNA, REPUBLIC, NORTHWESTERN, AND CONVENTIONAL INSURANCE COMPANIES SAY THAT IT IS THE CONDITION OF THE BUILDING THAT DETERMINES THE RATES, NOT THE AGE OF THE TENANTS. (IT IS IMPORTANT TO NOTE THAT IF TENANT AGE WERE A FACTOR IN SETTING ACCIDENT LIABILITY RATES, THE HEAVIEST BURDEN MIGHT FALL ON THE ELDERLY).

Q: WOULDN'T FAIR HOUSING LAWS FORCE LANDLORDS TO ACCEPT CHILDREN IN BUILDINGS THAT ARE UNSAFE FOR THEM?

A: THIS ISSUE IS MISLEADING. ACCORDING TO OUR STATE AND LOCAL BUILDING CODES, ANY BUILDING WHICH IS UNSAFE FOR A CHILD IS ALSO UNSAFE FOR ADULTS. THE REAL SAFETY ISSUE IS THAT ANTI-CHILD RENTAL POLICIES FORCE MANY FAMILIES TO LIVE IN THE MOST DILAPIDATED, UNSAFE, AND OVERCROWDED HOUSING.

Q: ARE THERE FAIR HOUSING LAWS IN OTHER AREAS OF THE COUNTRY?

A: YES. LAWS TO PROTECT RENTERS WITH CHILDREN HAVE BEEN PASSED IN MANY AREAS THROUGHOUT THE UNITED STATES. ARIZONA, MICHIGAN, ILLINOIS, NEW JERSEY, NEW YORK, DELAWARE, CONNECTICUT, MINNESOTA, AND THE DISTRICT OF COLUMBIA HAVE PASSED FAIR HOUSING LAWS. NUMEROUS CITIES HAVE ENACTED LAWS THAT PROTECT FAMILIES AND CHILDREN, THEY INCLUDE SAN FRANCISCO, SPOKANE, LOS ANGELES, OAKLAND, AND SEATTLE.

The Alaska Statutes governing Landlords and tenants is not entirely clear in defining certain areas of concern to both the landlord and the tenant. Both the landlord and the tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. I introduced House Bill No. 1 to answer some of these needs. I feel that it is fair and equitable to both parties.

Referring to Section 1. of CSSHB 1, the landlord's rights are more clearly defined in relation to termination of a "periodic tenancy" held by a tenant. As the law stands now, it refers only to a lease or agreement, (a predetermined period of time) or an "estate at will", (for which the tenant is at the mercy of the landlord, and has no say in how long the tenancy will last). A "periodic tenancy" refers to a month to month period of time. Unlike a lease or agreement, it can be indefinite, and a good majority of rental arrangements today are based on a periodic tenancy. By inserting this new paragraph, it assists the landlord in enforcing his rights, should any conflicts arise due to termination.

Section 2 of CSSHB 1 was added by the Labor and Commerce Committee to further clarify AS 34.03.290 (c) relating to the 45 day notice. If the tenant fails to give notice of termination, then the landlord is entitled to an amount not to exceed one and one-half times the actual damages.

Section 3 provides for a 45 day notice. I feel that this is a more equitable time frame to both tenants and landlords. Due to the tight rental market in Alaska at the present time, it is quite difficult to find adequate housing, especially for those families with children or pets, not to mention the elderly and minorities. General termination, (30 days), on the part of the landlord in a time of a severe housing crunch does not always give the tenant sufficient time to find suitable housing. A 45 day notice would also be beneficial to the landlord, in as much as it gives him time to locate a new tenant, and gives him an adequate time frame to make necessary repairs and alterations before the new tenant moves in. Also, in the case of condo conversion, this gives the tenant sufficient notice to vacate or purchase their unit.

"Rental due date" refers to the date on the same day each month that rent is to be paid. The landlord may wish to give notice of termination to the tenant before the "rental due date", and replacing "rental due date" with the word "termination" date provides for either time frame. It does not restrict either party to the exact date the rent is due when giving a termination notice. The question arises, "What if the tenant

gives notice on, say May 17th?" This means that the termination date would be July 2nd. Therefore, the tenant would be obligated to pay the landlord for rent through May, all of June, (and two days in July, which would be prorated). The landlord would not lose any rental income even though the termination date falls after the "rental due date". By the time the 45 day period is up, the landlord has had adequate time to find a new tenant and the tenant has been given a more equitable amount of time to find a new dwelling.

The new clause in Section 4 provides for recovery of "actual damages", as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect, is incentive to the tenant to vacate the premises.

An improper hold-over by a tenant has caused landlords financial difficulties. If a tenant continues to occupy a dwelling after his tenancy expires, he is causing the landlord loss of potential income needed to make mortgage payments, as well as the loss of time to make necessary repairs before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

Section 5 was included in this bill to protect the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the property. This new subsection also provides that the tenant may not be evicted because they have made a complaint, (for just causes), against the landlord, as long as they abide by the laws governing landlords and tenants. Sixty days is a sufficient amount of time to correct a problem or answer a complaint.

This bill is intended to update the present laws governing both the landlord and tenant. I feel that it provides both parties with fair and equal provisions to answer some of the overwhelming problems that have arisen over the past several years, due to the increase of the Alaskan population.

(It should be noted here that an increase in rents well as substantial or material changes in the existing rental agreement may also constitute a form of termination. This is, in effect, terminating the rental agreement then in existence and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 45 days after the receipt of notice of changes in the existing rental agreement. If the tenant does not respond to the landlord's notice of changes, then at the end of the 45 day period, the new rental agreement takes effect.)

A Letter of Intent was attached to SSHB 1 with the Labor and Commerce Committee Substitute to explain AS 34.03.290 (b) in detail regarding the 45 day notice as it applies to a rental increase. I would like to offer to the Judiciary Committee the Amendment found in your packets in place of the Letter of Intent to further clarify what transpires if a landlord or tenant makes substantial or material changes to a rental agreement. This is keeping in line with AS 34.03.290 (b). It should be inserted as a new Section 2, AS 34.03.025 as follows:

Page 1, after line 12, insert:

*Sec. 2, AS 34.03 is amended by adding a new section to read:

Section 34.03.025. CHANCES IN TERMS AND CONDITIONS OF RENTAL AGREEMENTS.

The landlord and tenant may change the terms and conditions of a rental agreement if the changes are not prohibited by law. Unless both the landlord and the tenant agree to a change in a rental agreement, the agreement remains in effect under its original terms and conditions, including provisions relating to rent and the rights and obligations of the parties, until the agreement is terminated under AS 34.03.290 or other law."

Renumber the following sections accordingly.

TO: Don

FROM: Jan

DATE: 2/17/83

RE: House Bill 1 - An act relating to landlords and tenants

Changes in the Landlord-Tenant Act proposed:

1. Increases time to give notice of termination from 30 days to 45 days
2. The termination date can be any date, not just end of period
3. Tenant is penalized if he fails to give proper notice = one and one-half damages (not in act now)
4. Tenant is penalized if he holds over willfully or not in good faith (now you must show both)
5. Landlord can sue for damages as well as possession in one action (now they are two separate suits - there will probably still be two separate proceedings, one summary unlawful detainer action and one regular trial on damages)
6. A landlord has presumptively retaliated against tenant for exercising his rights in he acts within 60 days to increase the rent, etc.

BACKGROUND

The cooperative extension services approached Abood. Apparently the cooperative is the only organization that deals with L-T on a steady basis.

The following people testified at the Labor and Commerce Committee: Abood, Tamara Cook of legal services, Barbara Eichner of CES, and Dave Donnelly of Josephson's staff. Dave was roped in at the last minute to discuss the word "willful". Dave stated that J. Andrews has interpreted the word to mean more than intentionally holding over.

There is a letter of intent coming out of labor and commerce on the bill. I haven't seen it. Ann Bly of Abood's office says that it contains a mistake. It's supposed to make clear the fact that the 45 day notice also must be given when changing the rent. Please review the letter.

Issues - thoughts on the bill

1. it is not clear what willful is, this might become more important now that that factor alone can become the sole basis for punitive damages.

2. Requiring 45 days notice and then punishing the tenant for failure to give notice seems harsh. If the tenant is 15 days late, does that really warrant punishment since that was the original time required? Donnelly says that its very hard to get the judges to impose punitive damages and that's why they did this.
3. Right now the landlord must file two complaints to get possession and damages. The change would require only one. It's not clear that the tenant has a right to trial on the damages issue. Dave and J. Andrews both believe that the court will interpret the law as such but it's not clear.
4. The presumption against the L.Lis great .

I've contacted Don Surgeon(?) of Anchorage Legal Services and Janine Reep of Juneau L.S. I left a message with Anchorage Tenants Union.

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (L&C)

OFFERED TO JUDICIARY
COMMITTEE 3/14/83

"An Act relating to landlords and tenants."

We have reworked HB 1 to reflect some of the changes recommended in the Judiciary meeting of February 25th.

The Bill has been re-drafted to reflect the three amendments and the sections have been renumbered to correspond to the Amendments. Also, note Page 2, Line 15 of the re-draft "AS 34.20.020" should be "AS 34.03.020".

Please refer to the re-draft of HB 1:

(Amendment No. 1)

New Section 1 - AS 09.45.085 is amended by adding a new paragraph to read:

ENFORCEMENT. A judgement for the restitution of real property rendered in an action for forcible entry or detention may be enforced by the plaintiff without further judicial action and the plaintiff may not be required to obtain a writ of assistance or other order to enforce the judgment.

This Amendment is offered to assist the plaintiff in settling his case. As it stands now, if a landlord (for example), wins his suit against the tenant who is holding over without the landlord's permission needs to first receive a judgment from the court, and then go to the Court or State Troopers to file an additional form or forms to enforce the judgment. In some cases, a delay in action results in the tenant disappearing before the correct forms can be served upon him, and would alleviate the additional costs of filing additional forms.

Section 3 - Page 1, Line 16 through 23 - (Amendment No. 2)

"AS 34.03 is amended by adding a new section to read:

Sec. 34.03.025. CHANGES IN TERMS AND CONDITIONS OF RENTAL AGREEMENTS. The landlord and tenant may change the terms and conditions of a rental agreement if the changes are not prohibited by law. Unless both the landlord and tenant agree to a change in a rental agreement, the agreement remains in effect under its original terms and conditions, including provisions relating to rent and the rights and obligations of the parties, until the agreement is terminated under AS 34.03.290 or other law.

I offered this as Amendment No. 1 to the Judiciary committee on February 25. In order to correspond to the Bill Sections, I am now offering this as Amendment No. 2. This is simply in place of the Letter of Intent by the Labor & Commerce Committee to define AS 34.03.290 (b) in detail regarding the 45 day notice as it applies to a rental increase. It gives further clarification to what transpires if a landlord or tenant makes substantial or material changes to a rental agreement. It does not change the bill, but defines AS 34.03.290 (b). If the landlord (for example), gives a tenant a notice of rental increase, and the tenant does not approve of the increase, then the tenant can give his notice as defined in AS 34.03.290 (b).

(Amendment No. 3)

(See Page 1, Line 26 and 27, and Page 2, Line 1,2 and 3)

Section 4 (was Section 2) AS 34.03.270 is amended by adding a new subsection to read:

(b) If the rental agreement is terminated by the tenant [and] ; and the failure to provide the notice is wilful or not in good faith, the landlord may recover an amount not to exceed one and one-half times the actual damages. Failure by the tenant to provide the notice required under AS 34.03.290 (a) or (b) is presumed to be wilful and not in good faith.

These changes are offered as Amendment No. 3. The key word here is "presumed". The burden of proof lies with the tenant to prove that his intentions were in good faith. This shortens the judicial process in some circumstances. It is up to the tenant to explain why he did not give notice or had a good reason for not giving notice, (i.e. an emergency operation, a death in the family, etc.). Until that time, the court presumes that the tenant failed to give notice and the landlord can proceed with recovery of the premises.

Alaska State Legislature

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HOUSE MAJORITY WHIP

CHAIRMAN
STATE AFFAIRS

MEMBER
TRANSPORTATION
LEGISLATIVE COUNCIL

Representative Mitch Abood
HOUSE DISTRICT 11

February 23, 1983

Jeanne M. Fortier
Coalition for Economic Justice
204 East Fifth Avenue, Suite 201
Anchorage, Alaska 99501

Re: CSSSHB 1
"An Act relating to Landlords
and Tenants"

Dear Ms. Fortier:

In response to your letter to Representative Don Clocksin dated February 17, 1983, I have enclosed a copy of the synopsis of the Committee Substitute for the Sponsor Substitute for House Bill 1. I am also enclosing a copy of this bill for your reference.

The Bill was drafted to update the Landlord-Tenant Act. It is fair to both the landlord and the tenant.

I am not sure what you are referring to when you cite "Section 1 (b)"; assuming you mean "Section 1" of CSSSHB 1, this Section was added to stipulate a "periodic tenancy". A lease agreement or an "estate at will" are noted in AS 09.45.090, but a month-to-month, or "periodic" tenancy is not listed. This just brings the Statute up to date as far as periodic tenancy is concerned.

Section 2, AS 34.03.270 (b) was added by the Labor and Commerce Committee to more specifically clarify AS 34.03.290 (c). (See enclosed Summary.)

Section 3 - AS 34.03.290 (b) provides a more equitable time frame to both the tenant and the landlord. It requires the landlord to notify the tenant of a raise in rent, or a substantial or material change in the rental agreement 45 days before it takes effect. The tenant may chose not to accept the higher rent, or new terms and then must vacate the premises at the end of the 45 day period. If the tenant does not acknowledge the changes, then at the end of the 45 day period, the new changes go into effect as a new rental agreement. The tenant, on the other hand, must give a 45 day notice to the landlord if he intends to vacate the dwelling.

Jeanne M. Fortier
Coalition for Economic Justice
February 23, 1983
CCSSHB 1
Page Two

If you refer to Section 5, AS 34.03.310, this new subsection has been included to protect the tenant from the landlord who abuses the right to access or evicts the tenant for retaliatory reasons. This provides that the tenant may not be evicted because they have made a complaint against the landlord, (for just cause), i.e. complained to a government agency regarding unfair rent hikes, or requesting that certain necessary repairs be made to the premises or common area. The tenant is given 60 days to go through the process of filing a complaint and receiving action on that complaint. The landlord may not evict the tenant during that 60 period, provided the tenant uses the proper procedures listed in AS 34.03.140. Once the 60 day period has expired, the landlord should refer to AS 34.03.220 and the tenant should refer to AS 34.03.160 for remedies to their problem(s).

Please read over the enclosed summary, and give my office a call if you have further questions. Thank you for your interest in this Bill.

Yours very truly,



Representative Mitch Abood

encl.
MA/ab

cc: ~~Representative Clocksin~~



Coalition for Economic Justice

204 East Fifth Ave., Suite 201 • Anchorage, Alaska 99501 • 907-276-7788/272-6113



February 15, 1983

Don Clocksin, House Representatives
Pouch V
Juneau, Alaska 99811

Dear Mr. Clocksin:

I appreciate your prompt response to the telegram I sent! I would like to respond to some of the changes being proposed in House Bill #1 in order to clarify our concern as tenants.

Section 1 (b) is of concern to us, as tenants, because it leaves the required 30 day written notice to raise rent or make a major change in the rental agreement untouched, while increasing the eviction notice to 45 days.

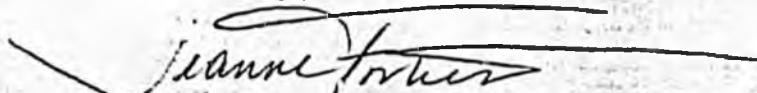
This enables the landlord to not only give an eviction notice, but also to substantially change the rental agreement without increasing legal protection to the tenant. I'd like to suggest that the Legislature, particularly the Labor and Commerce Committee, consider amending their current proposal in a manner more adequately protective of tenants during this 45 day period. I think there should also be legislative clarification regarding the extent of the tenant's responsibility for paying rent should she/he be evicted mid-month.

In addition, Section 4 (f) creates a problem for actively unionized or unionizing tenants insofar as the 60 day time specification is concerned. I appreciate that this portion of the law is attempting to protect us, as tenants, but it doesn't go far enough. Sixty days allows the landlord enough time to get good and angry before slapping a 30-45 day notice on his/her renters. Tenants are scared stiff, as it is, to take any action, even when their apartments are infested with roaches and mice, or have serious heating or plumbing problems. I have mixed feelings about this section, Don, and would appreciate your consideration as far as improving it. What may be needed is the establishment of municipal or state panels to review whether substantial changes in the rental agreement, which occur after organizing or grievance efforts, are retaliatory or just cause.

PAGE TWO

Thanks for your interest and consideration, Don. I appreciate your much needed assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jeannie Fortier", with a long horizontal flourish extending to the right.

Jeannie Fortier

P.S. Thanks for straightening me out on HB131. Yes, of course, it's an improvement!

JF/ttb



COOPERATIVE EXTENSION SERVICE

UNIVERSITY OF ALASKA, USDA & SEA GRANT COOPERATING

ANCHORAGE DISTRICT, 2651 PROVIDENCE AVENUE, ANCHORAGE, ALASKA 99508

NOTE: SSHB 1 TESTIMONY GIVEN BY BARBARA EICHNER TO LABOR AND COMMERCE COMMITTEE ON 2/10/83. THE BILL HAS BEEN UPDATED BY THE LABOR AND COMMERCE COMMITTEE --- BARBARA EICHNER WILL SPEAK TO THESE CHANGES AT THE JUDICIARY MEETING 2/25/83.

Testimony on House Bill 1
Barbara G. Eichner
District Home Economist - Cooperative Extension Service
February 10, 1983

Good morning and thank you for providing the opportunity for me to testify on one of the most important bills before the 1983 legislature.

This is Barbara Eichner speaking. I am district home economist for the Cooperative Extension Service in Anchorage. Briefly, our agency is the non-credit educational arm of the land-grant university in every state, which includes the University of Alaska. Our job is to disseminate practical information to consumers on a wide variety of topics such as gardening, nutrition, agriculture and housing.

Three years ago because of a fluke answer to a consumer newspaper column, the Cooperative Extension Service was propelled to the forefront as the only impartial agency or organization who would and could answer landlord-tenant questions quickly, simply and at no charge. I am not an attorney and I do not give legal advice. All I can do is give people an idea of their rights and responsibilities under the law and yet despite that, over 4000 landlords and tenants have sought my advice through telephone counseling and seminars. In addition, over 14,000 copies of our landlord-tenant handbooks have been distributed statewide and 9 hours of radio and television time have been used to discuss landlord-tenant issues. In short, the concerns relating to rental housing are numerous and the effect of inadequate assistance is widespread. People in Bethel, Kodiak, Nome, Dutch Harbor and North Pole all want the same thing according to my statistics - available and affordable housing managed in a business-like manner. People in 26 Alaskan communities have all said the same thing - change the law.

You all know the history of rental housing in the boom and bust economy of Alaska's towns and villages. In good times housing has responded well to the laws of supply and demand. In poor times, landlords and tenants alike have asked for help in keeping housing available, affordable and soundly managed. Despite the steady growth of Alaska's overall economy, the supply of rental housing in the last 3 years has remained the same while the population increased. Anchorage alone has experienced a rental vacancy rate of less than 1% for almost 2 years. Newspaper headlines like "Tenants Feel Pinch of Escalating Rents", "Anchorage Renters May Form Union" and "Man Sues Landlady for \$2.8 million" only underscore the tension prevalent in the rental market.

Continued...

The stories that didn't capture headline attention are the sometimes unbelievable but everyday problems the Extension Service has faced such as:

- the tenant who hasn't had heat for 6 months and whose landlord says if she doesn't like it she can move
- the landlord who is left with a \$3000 outstanding bill in damages and back rent when the tenant moves out in the middle of the night
- the tenant whose rent has been raised \$350 in just one month
- the landlord who needs to evict 8 people who are living in a one-bedroom apartment
- the tenant who was physically assaulted by his landlord, and
- the landlord who must replace a whole bedroom wall section because the permeating odor of a previous tenant's pet snake that crawled into the wall and died. (Yes, it is a true story).

If consumers are to act as responsible citizens in the marketplace, then our laws must reflect the needs of our citizens. It really doesn't matter whether you are a landlord or a tenant, the fact is that Alaska's Uniform Residential Landlord and Tenant Act is out-of-date and unclear. Many issues such as those just named, are not addressed at all.

In the three years that I have dealt with rental housing questions, the problems that have loomed largest include evictions, improper holdover, lack of written rental agreements, abuse of the right to access, retaliation, security deposits and forceable entry and detainer without due process.

I am pleased to see that House Bill 1 makes an effort to address four of these issues.

Section 1 and Section 3 make it clearer for landlords in knowing when they can prosecute for improper possession. Far too many tenants have told me that they feel landlords are obliged to house them until it is convenient for them to move. Not only has this attitude complicated the rights of landlords to negotiate new deals with new tenants, it has been held with little consequence or risk.

I believe Section 2 will be a welcome relief to both landlords and tenants in outlining a clearer way of determining when a tenant will move. The 45-day proviso is a compromise on just-cause eviction which is fairer to landlords. At the same time, I don't know how many landlords and tenants have been stuck with nearly 60 days notice when they have accidentally missed a rental due date. Almost everyone should be able to count 45 calendar days.

Page three
H.B.1

And finally, in Section 4, I believe it is appropriate to shift the burden of proof for retaliatory measures to the landlord without sticking them with an enforced lease behind which unsavory tenants could hide. Retaliatory action is clearly illegal in our current statute but my experience indicates that it is practically impossible for tenants to prove. Landlords, by virtue of their position, have the greater power here and therefore I believe should have the greater burden. It is a question of social equity for tenants who see themselves as helpless victims and should create no hardship for the vast majority of our landlords who are straight-forward business people.

Housing issues have deep psychological roots. The fiber of the good life in this country appears to weigh heavily on access to shelter. We must give consumers the tools with which to manage their own affairs at a satisfactory level. Even though there are many issues yet to address, House Bill 1 has taken an equitable stance on at least 4 of these and I urge your serious consideration of this proposed legislation.

Thank you.

Offered: 3/16/83
Referred: Rules

Original sponsor: Abood

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 1 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 THIRTEENTH LEGISLATURE - FIRST SESSION
5 A BILL

6 For an Act entitled: "An Act relating to landlords and tenants."
7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 09.45 is amended by adding a new paragraph to read:

*only State Troopers
can evict.*

9 Sec. 09.45.085. ENFORCEMENT. A judgment for the restitution of
10 real property rendered in an action (for forcible entry or detention
11 may be enforced by the plaintiff without further judicial action and
12 the plaintiff may not be required to obtain a writ of assistance or
13 other order to enforce the judgment.

14 * Sec. 2. AS 09.45.090 is amended by adding a new paragraph to read:

15 (4) when, after a notice to terminate the tenancy as pro-
16 vided in AS 34.03.290 with reference to termination of a periodic
17 tenancy, a person continues in possession of a dwelling unit after
18 expiration of the time for determining the tenancy.

*specific
time*

19 * Sec. 3. AS 34.03.270 is amended by adding a new subsection to read:

20 (b) If the rental agreement is terminated by the tenant, the
21 tenant fails to provide the notice required under AS 34.03.290(a) or
22 (b), and the failure to provide the notice is wilful or not in good
23 faith the landlord may recover an amount not to exceed one and one-
24 half times the actual damages. Failure by the tenant to provide the
25 notice required under AS 34.03.290(a) or (b) is presumed to be wilful
26 and not in good faith.

etc. fine

27 * Sec. 4. AS 34.03.290(b) is amended to read:

28 (b) The landlord or the tenant may terminate a month to month
29 tenancy by a written notice given to the other at least 30 days before

1 the termination [RENTAL DUE] date specified in the notice.

2 * Sec. 5. AS 34.03.290(c) is amended to read:

3 (c) If the tenant remains in possession without the landlord's
4 consent after expiration of the term of the rental agreement or after
5 its termination, the landlord may bring an action for possession and
6 recovery of actual damages. If [IF] the tenant's holdover is wilful
7 or [AND] not in good faith the landlord, in addition, may recover an
8 amount not to exceed one and one-half times the actual damages. If
9 the landlord consents to the tenant's continued occupancy, AS 34.03.-
10 020 applies.

11 * Sec. 6. AS 34.03.310(a) is amended to read:

12 (a) Except as provided in (c) and (d) of this section, a land-
13 lord may not retaliate by increasing rent, [OR] decreasing services,
14 terminating the rental agreement or providing notice of termination,
15 or by bringing or threatening to bring an action for possession after
16 the tenant has

17 (1) complained to the landlord of a violation of AS 34.03.-
18 100;

19 (2) endeavored to enforce [AVAIL HIMSELF OF] rights and
20 remedies granted to a tenant [HIM] under the provisions of this
21 chapter;

22 (3) organized or become a member of a tenant's union or
23 similar organization; or

24 (4) complained to a governmental agency responsible for
25 enforcement of governmental housing, wage, price or rent controls.

26 * Sec. 7. AS 34.03.310 is amended by adding a new subsection to read:

27 (f) A landlord is presumed to have violated (a) of this section
28 if the landlord increases rent, decreases service, terminates the
29 rental agreement or provides notice of termination, or brings or

1 threatens to bring an action for possession within 60 days after a
2 tenant has engaged in an action listed under (a)(1) - (4).

An Overview of
Committee Substitute for Sponsor Substitute for HOUSE BILL NO. 1 (L&C)
"AN ACT RELATING TO LANDLORDS AND TENANTS"

The Alaska Statutes governing Landlords/Tenants, (Title 34- Property), has not been clear in defining certain areas of concern to both the landlord and the tenant. Whether oral or written, both the landlord and tenant hold certain unalienable rights in the property they own as a landlord or rent as a tenant. With the 0% to 4% vacancy rate in most of Alaska, and because over 35% of the population in Alaska rent their dwellings, it is necessary to update the laws to answer the needs of the landlord and tenant. The following is a summary of CSSHB 1, and how it answers some of these needs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 09.45.090 is amended by adding a new paragraph to read:

(4) when, after a notice to terminate the tenancy as provided in AS 34.03.290 with reference to termination of a periodic tenancy, a person continues in possession of a dwelling unit after expiration of the time for determining the tenancy.

This new paragraph is being added to stipulate a "periodic tenancy" termination. AS 09.45.090 (3) cites termination of an "estate at will" tenancy, which can be defined as a tenancy that transpires on a day to day basis or an indefinite term at the will of the lessor. In this case, the tenant has no say in the matter of how long the tenancy will last. The landlord may, at any time, terminate the tenancy and the tenant has no right to a notice. (This type of tenancy was developed in a few hundred years ago in England, and rarely applies "modern day" tenancy.) For this reason, it is necessary to add Paragraph 4, as periodic tenancy, (month to month), is not referenced in the present context.

Section 2. AS 34.03.270 (b) was added by the Labor and Commerce Committee to more specifically clarify AS 34.03.290 (c), to read:

(b) If the rental agreement is terminated by the tenant and the tenant fails to provide the notice required under AS 34.03.290 (a) or (b), the landlord may recover an amount not to exceed one and one-half times the actual damages.

If the tenant decides to cancel his rental agreement, but does not notify the landlord, the landlord may collect one and one-half times the damages incurred, (i.e. rent). The tenant is obligated to give the landlord written notice of his intention to vacate the premises 45 days before termination, (See AS 34.03.290 (b)). If it is a case where the tenant remains in possession of the dwelling past the termination date

without the landlord's permission, then the landlord is entitled to one and one-half times the damages PLUS the actual damages, (2½X the actual damages), as compensation. (See AS 34.03.290 (c)).

Section 3. AS 34.03.290 (b) is amended to read:

(b) The landlord or the tenant may terminate a month to month tenancy by a written notice given to the other at least 45 [30] days before the termination [RENTAL DUE] date specified in the notice.

This amendment provides a more equitable time frame to tenants and landlords. The vacancy rate for apartments at the present time in the Anchorage, Fairbanks, Ketchikan and Juneau markets ranges from 0% to 4%. Because of this tight rental market, it is sometimes quite difficult for low income families, minorities, pet owners, families with children, and the elderly, (to name a few), to find adequate and habitable housing. General termination, (30 days), on the part of the landlord, in a time of a severe housing crunch does not always give the tenant sufficient notice to find other adequate housing. Also, in the case of a condo conversion, this gives the tenant sufficient notice to vacate or purchase their unit. In a future situation where the rental market is not so tight, this 45 day notice allows the landlord adequate time to make necessary repairs and alterations, as well as locate a new tenant.

"Rental due date" refers to Sec. 34.03.020 (c) which is the date on the same day each month that rent is to be paid. The landlord or the tenant may wish to give notice of termination on either side of the "rental due date", and replacing "rental due" with "termination" date provides for either time frame. It does not restrict either party to the exact day the rent is due when giving a termination notice.

The question arises, "What if the tenant gives notice on, say March 19?" This means that the termination date would be May 2nd. Therefore, the tenant would be obligated to pay the landlord for rent through March, all of April, (and two days in May, which would be prorated). The landlord would not lose any rental income even though the termination date falls after the "rental due date". By the time the 45 day period is up, the landlord has had adequate time to find a new tenant and the tenant has been given a more equitable amount of time to find a new dwelling.

(It should also be noted here that an increase in rent may also constitute a form of termination, as well as new rules put into effect by the landlord, i.e. no pets, adults only, etc. This is, in effect, terminating the rental agreement then in existence and offering a new rental agreement at different terms. If the tenant does not accept the "new terms", then he must vacate 45 days after the receipt of notice of substantial or material changes from the landlord. If the tenant does not respond to the landlord's notice of substantial or material changes, at the end of the 45 day period, the new rental agreement takes effect.)

Section 4. AS 34.03.290 (c) is amended to read:

(c) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after its termination, the landlord may bring an action for possession and recovery of actual damages. If [IF] the tenant's holdover is wilful [and] or not in good faith the landlord, in addition, may recover an amount not to exceed one and one-half times the actual damages. If the landlord consents to the tenant's continued occupancy, AS 34.20.020 applies.

An improper hold-over by a tenant has caused landlords financial hardships. If a tenant continues to occupy the dwelling after his tenancy expires, he has caused the owner loss of income needed to make mortgage payments, as well as loss of time to make necessary repairs, alterations, etc., before renting the unit to the next party. Alaska law allows landlords to sue for damages, but the time, effort and money involved is not always feasible to pursue.

The new clause noted above provides for recovery of actual damages, (i.e. lost rent income, lost time needed to make necessary repairs, etc.), as well as one and one-half times the actual damages as compensation to the landlord. This deters the tenant from staying on past termination or the expiration of the rental agreement and in effect is incentive to the individual(s) to vacate the premises. (Also see AS 34.03.270 (b)).

Section 5. AS 34.03.310 is amended by adding a new subsection to read:

(f) A landlord is presumed to have violated (a) of this section if the landlord increases rent, decreases service, or brings or threatens to bring an action for possession within 60 days after a tenant has engaged in an action listed under (a)(1) - (4).

This new subsection protects the tenant from landlords who abuse the right to access or evict the tenant for retaliatory reasons. The tenant has a right to his/her privacy, and the landlord must give "reasonable" notice to the tenant before entering the premises, (See AS 34.03.010). This new subsection also provides that the tenant may not be evicted because they have made a complaint using the proper procedures, (See AS 34.03.140), i.e. complained to a government agency regarding unfair rent hikes, or requesting that certain necessary repairs be made to the premises or common area. Sixty days is a sufficient amount of time to correct a problem or answer a complaint. After the 60 day period has expired, the tenant should refer to AS 34.03.160 and the landlord should refer to AS 34.03.220 for remedies to their problem(s).

SOME ANCHORAGE HOUSING UNITS, BY LEGISLATIVE DISTRICT

	<u>Mobile Hms. in Parks</u>	<u>On Lots</u>	<u># of Apts.</u>
District 7 (Szymanski, partial)	29	316	830
District 8 (Cowdery and Pestinger)	497	394	828
District 9 (Hayes and Flood)	0	87	1805
District 10 (Busse1 and Lindauer)	1543	144	5222
District 11 (Abood and Tischer)	109	42	1546
District 12 (Clocksin and Uehling)	130	8	5904
District 13 (Ward and Martin)	858	31	4481
District 14 (Barnes and Furnace)	2862	211	4362
District 15 (Phillips and Liska, partial)	187	381	650
District D (P. Fischer, Gilman, partial)	29	316	830
District E (Pettyjohn, Faiks)	97	481	2633
District F (Sturgulewski, Rodey)	1652	186	6768
District G (Josephson, Fischer)	988	39	10385
District H (Halford, Kelly, partial)	187	381	650
<hr/>			
Municipality of Anchorage	6484	1723	26009

Information compiled from the Municipal Housing Survey, undertaken summer of '83. The Community Planning Dept. originally compiled the info. by Community Council. AkPIRG reorganized it according to legislative districts. Boundaries of the two types of areas are not congruent, though we attempted to make them as compatible as possible. Only housing units within Community Councils are tallied, though only 200 apartments, 416 mobile homes in parks and 3 on lots are not included in the figures because of this. Additional methodology available from AkPIRG.



ALASKA PUBLIC INTEREST RESEARCH GROUP
Post Office Box 1093/Anchorage, Alaska 99510/(907) 278-3661

October 18th, 1983

Rep. Don Young
US House
Washington, DC 20515

Dear Rep. Young:

I am writing in support of Section 208 of the HR 1, dealing with the "Fair Market Rent" for Section 8 housing.

As you probably know, certain low-income renters are given Section 8 certificates to participate in federal housing assistance programs. Provided they can locate housing under the Fair Market Rent determined for their area, these renters pay 26-30% of their incomes towards rent and the federal government picks up the balance up to the rent level. The current "FMR" is that level below which 40% of the state's rental units fall, with certain exclusions.

Unfortunately, the national Fair Market Rent formula is not appropriate to Alaska. According to the AK State Housing Authority, over a quarter of the Section 8 certificate holders in the state are unable to find housing renting at less than the "FMR". Some landlords in Anchorage have started taking rent under the table from tenants so the landlords appear to rent at below the FMR--the State Ombudsman's Office will soon be receiving a formal complaint on the issue.

If Section 208 remains intact, it will increase the FMR from 40% to the 50% level. It's a step in the right direction, and will allow more tenants to take advantage of the federal programs already funded but not being fully utilized here in Alaska. (The FMR for a two bedroom apartment is \$512, while the HUD office here in Anchorage quotes \$650-700 a month as an average low-income rent for the same sized apartment.)

Can we count on your support of the present working of Section 208 in HR 1?

Sincerely,

Maureen Kennedy
Director

In holdover situation, rent is determined at fair market value.

good

easy

red. from security

demise. if Landlord ~~believes~~ wanted to evict person due to rent increases. Doesn't hold water (see above).

1/2 times actual damages for deciding to go to court.
- willful decision to holdover based on a good faith agreement.
*subject to punitive damages

~~that way~~
inattentive people differently because tenants ^{than other} in ~~the~~ financial proceedings.

Landlord does not suffer economic loss.

10,000
11,000

Files in
master file

Section 5:

DUE PROCESS ISSUE. WANT FED
TRADING TO COVER getting kicked out
& actual damages.

- Serv tenant summons

& complaint:

- 1st count possession
FED

← Damages.
20 days to
claim.
contractual.

absorbs
will would
settle actual
damages. counterclaim.

Under present law,
landlord renting

going to be
heard before you
file your answer.
question of whether person
should be kicked out

landlord, suffering loss, landlord should get award of FEET proceeding.
Due process problem, equal protection problem

Procedural
Due
Process

(A) Has their been adequate notice of claim?

(B) Has their been meaningful opportunity to be heard?

Someone being hauled to court on 2 to 4 days notice, is that enough time for (A) + (B).

(B) ~~other side of~~ what do you do in other similar circumstances, are you doing same thing here.

Is there a fair and substantial relationship between what you are doing and the purpose of the law (legitimate state purpose)?

= any other time re: money, you always have 20 days.

- for this party, we give relief on 2 to 4 days notice.

? FORCIBLE ENTRY OR DETENTION.

MEMO:

MEMO HB1

TO: VIL

FROM: S. W.

RE: HB1

SECTION 1:

WOULD ALLOW LANDLORD OR LANDLADY TO ENFORCE A JUDGEMENT FOR RESTITUTION OF REAL PROPERTY. ~~HE~~ CURRENTLY THE LANDLADY MUST OBTAIN A WRIT OF ASSISTANCE TO BE SERVED BY THE STATE TROOPERS IF THE TENANT DOES NOT PERCEIVABLY VACATE AS THE COURT HAS DIRECTED. THE

PROPOSED SECTION 1 WOULD ALLOW LANDLORDS TO TRY TO
— THOUGHTS ON SECTION 1, FORCIBLY EVICT A TENANT.

1) PLACES THE POWER OF STATE INTO HANDS OF INDIVIDUALS (LANDLORDS), AND PLACES THEM IN CONFRONTATIONAL SITUATION.

2) IF THE STATE IS GOING TO ALLOW CONDONE THE USE OF FORCE. SHOULDN'T THE ^{CONDITIONS + THE} LEVEL OF FORCE BE DEFINED.

FOR EXAMPLE, WHEN WOULD IT BE OK FOR THE TENANT TO USE FORCE TO PROTECT THEMSELVES.

3) WHO IS LIABLE FOR INJURIES?

4) WOULD THE TENANT HAVE TO BE PRESENT TO HAVE POSSESSIONS REMOVED FROM RENTAL UNIT?

5) WHO WOULD BE RESPONSIBLE FOR POSSESSIONS IF THE TENANT WAS NOT PRESENT, AND SOME WERE STOLEN?

6)

SECTION 2

SECTION 3: STATES THAT IF THE RENTAL AGREEMENT IS ⁽¹⁾ TERMINATED BY THE TENANT, ⁽²⁾ THE TENANT FAILS TO GIVE NOTICE (AND FAILURE IS WILFUL & NOT IN GOOD FAITH), THE LANDLORD MAY AN AMOUNT NOT TO EXCEED $1\frac{1}{2}$ TIMES THE ACTUAL DAMAGE.

We deny them the opportunity
to ~~do~~ of discovery.

Is this something we can do,
considering constitutional
equal protection.

Can we treat tenants
differently than others
concerning money.

← Landlords are one upon
process.

- give property back
- give damages w/out
allowing other civil
case proceedings.

Landlord doesn't want to go to

← ^(B) damages hearing.

← Economic loss

← There is no economic cost.

← The landlord is entitled rent.

← Rent owed can be deducted
from security deposit.

←

CHAPTER 1307

An act to add Section 527.6 to the Code of Civil Procedure, relating to harassment.

[Approved by Governor September 26, 1978. Filed with Secretary of State September 26, 1978.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3093, Egeland. Harassment.

Under existing law, a court may enjoin certain acts of harassment. This bill would provide for an expedited procedure to obtain such an injunction.

The Judicial Council would be required to promulgate forms and instructions, and rules for the service of process and related matters. The plaintiff could obtain a temporary restraining order.

Upon filing of the petition, a hearing for an injunction would be held within 15 days. If granted, the injunction would be in force for up to 3 years, unless renewed. The prevailing party could receive attorney's fees.

The bill would define harassment as knowing and willful conduct which would cause substantial emotional distress by seriously alarming, annoying, or harassing a person, as specified.

A violation of the injunction would be a misdemeanor.

The bill would provide for the transmittal of specified information to law enforcement agencies.

The bill would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant to the bill.

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

SECTION 1. The Legislature intends by this act to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution.

SEC. 2. Section 527.6 is added to the Code of Civil Procedure, to read:

527.6. (a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order, and an injunction prohibiting harassment as provided in this section.

(b) For the purposes of this section, "harassment" is a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys or harasses such person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

H.A. ROSSIGNOL

"Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with the provisions of subdivision (a) of Section 527 of the Code of Civil Procedure. A temporary restraining order may be granted with or without notice upon an affidavit which, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court.

(d) Within 15 days of the filing of the petition, a hearing shall be held on the petition for the injunction. The defendant may file a response which explains, excuses, justifies or denies the alleged harassment. At the hearing, the judge shall receive such testimony as is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting such harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section.

(e) Nothing in this section shall preclude either party from representation by private counsel or from appearing on his or her own behalf.

(f) Upon filing of a petition for an injunction under this section, the defendant be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition.

(g) The clerk shall transmit a copy of each temporary restraining order or injunction or modification or termination thereof, granted under this section, by the close of the business day on which such order was granted, to such law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency may make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment.

(h) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(i) Any willful disobedience of any temporary restraining order or injunction granted under this section shall be a misdemeanor pursuant to Section 166 of the Penal Code.

(j) This section shall not apply to any action covered by subdivision

(b) of Section 527 of this code, or by Title 1.6C (commencing with Section 1788) of the Civil Code. Nothing in this section shall preclude a plaintiff's right to utilize other existing civil remedies.

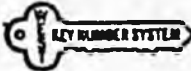
(k) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

SEC. 3. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency or school district for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

could properly conclude, however, that such destruction of records should not in itself automatically defeat the maintenance of a class action. (Cf., e. g., *Appleton Electric Co. v. Advance-United Expressways* (7th Cir. 1974) 494 F.2d 126, 139.) Defendants may, of course, raise specific objections to any remedial mechanism which the court may hereafter fashion to cope with the problems posed by the absence of such records. Given the trial court's considerable flexibility in the management of a class action (see, e. g., *Vasquez v. Superior Court*, supra; 4 Cal.3d at pp. 820-821, 94 Cal.Rptr. 796, 484 P.2d 964), and—as we explained in our recent decision in *Green v. Obledo*, supra, 29 Cal.3d at pp. 142-143, 127 Cal.Rptr. 206, 624 P.2d 256—its discretion in fixing an appropriate "starting date for the payment of retroactive benefits to class members," our intervention at this stage of the proceedings is clearly unwarranted.

The alternative writ is discharged and the peremptory writ is denied.

BIRD, C. J., and TOBRINER, MOSK, RICHARDSON, NEWMAN and BROUSARD, JJ., concur.



Alice BARELA, Petitioner,

v.

The SUPERIOR COURT OF ORANGE COUNTY, Respondent;

Leonardo VALDEZ, Real Party
in Interest.

L.A. 31444.

Supreme Court of California.

Nov. 27, 1981.

Tenant filed petition for writ of mandate requesting that the Superior Court,

Orange County, Harmon G. Scoville, J., be ordered to vacate order granting landlord restitution of premises and back rent in unlawful detainer action. The Supreme Court, Bird, C. J., held that: (1) record demonstrated that tenant was evicted by landlord in retaliation for her complaint to the police that landlord had sexually molested her nine-year-old daughter, and (2) such eviction violated statutory prohibition against evictions in retaliation for the exercise of any rights under the law, and also the common-law defense of retaliatory eviction.

Writ of mandate issued with directions to vacate judgment and enter judgment for tenant.

1. Landlord and Tenant — 298(3)

Record in unlawful detainer action demonstrated that tenant was evicted by landlord in retaliation for her complaint to the police that landlord had sexually molested her nine-year-old daughter. West's Ann.Penal Code § 647(a).

2. Landlord and Tenant — 298(1, 2)

Unlawful detainer actions are summary proceedings, and only issues directly relevant to the ultimate question of possession may be raised in defense of unlawful detainer action; generally, counterclaims, cross complaints and affirmative defenses cannot be considered.

3. Landlord and Tenant — 298(1)

Eviction by landlord of tenant in retaliation for tenant's complaint to the police that the landlord had committed a crime in sexually molesting her nine-year-old daughter violated the statutory prohibition against evictions in retaliation for the exercise of any rights under the law, and also the common-law defense of retaliatory eviction. West's Ann.Civ.Code, § 1942.5(c); West's Ann.Penal Code § 647(a).

Katherine R. Wolff, Encino, for petitioner.

Ronald S. Javor, Long Beach, Los Angeles, Ronald Robert Klotz, Santa Ana, petitioner.

No appearance for respondent.
Paul G. Mast, Santa Ana, in interest.

BIRD, Chief Justice.

In an unlawful detainer action, a renter raises as an affirmative claim that a landlord seeks action for the tenant's crime. Does the landlord incur liability for the crime?

I.

On April 12, 1980, petitioner, called the Santa Ana Police to complain that her landlord, Valdez (real party in interest), sexually molested her nine-year-old daughter.

Seven days later, on April 19, 1980, Valdez served Barela with a "Pay Rent or Quit" notice. He demanded \$650 per month, rather than the \$450 per month she had been paying. She filed a complaint to the police, and he removed her from his house for four years.

In May of 1980, Valdez filed a detainer action against Barela for failure to pay \$650 per month. That action was dismissed, because Valdez had never served notice of rent increase on Barela. However, in late May he served a 30-day notice of termination on Barela, and she moved. On July 21, 1980, Valdez filed a new unlawful detainer action against Barela. Barela responded with an answer:

1. The record indicates that on July 21, 1980, Valdez pleaded guilty to a violation of Penal Code section 647, subdivision (a) (sexual conduct in public).

2. Unless otherwise noted, all references are to the Civil Code.

Ronald S. Javor, Long Beach, Fred Okrand, Los Angeles, Ronald R. Talmo and Robert Klotz, Santa Ana, amici curiae for petitioner.

No appearance for respondent.

Paul G. Mast, Santa Ana, for real party in interest.

BIRD, Chief Justice.

In an unlawful detainer action, may a renter raise as an affirmative defense the claim that a landlord seeks to evict in retaliation for the tenant's complaint to the police that the landlord has committed a crime?

I.

On April 12, 1980, petitioner, Alice Barela, called the Santa Ana Police Department to complain that her landlord, Leonardo Valdez (real party in interest), had sexually molested her nine-year-old daughter.¹

Seven days later, on April 19, 1980, Valdez served Barela with a three-day notice to "Pay Rent or Quit." He demanded rent of \$650 per month, rather than the \$200 per month she had been paying. Prior to her complaint to the police, she had rented the house from him for four years without any problem.

In May of 1980, Valdez filed an unlawful detainer action against Barela, based on her failure to pay \$650 per month rent in May. That action was dismissed, apparently because Valdez had never served the 30-day notice of rent increase required by law. However, in late May he served Barela with a 30-day notice of termination of her month-to-month tenancy. Barela did not move. On July 21, 1980, while criminal charges were pending against him, Valdez filed a new unlawful detainer action, based on the 30-day notice of termination. Barela responded with an answer alleging as an

affirmative defense that she was being evicted in retaliation for her exercise of constitutionally protected rights.

After trial, the court issued the following findings of fact: (1) "[t]his eviction of the defendant by the plaintiff was caused by the complaint of the defendant against the plaintiff to the police," and (2) "[t]he pending criminal trial against the plaintiff which was the result of defendant's complaint to the police led to a breakdown of the parties' ability to live peacefully in the same community."

In addition, the court issued conclusions of law, holding that the eviction was not protected by section 1942.5 of the Civil Code² or by the standards of *S.P. Growers Assn. v. Rodrigues* (1976) 17 Cal.3d 719, 181 Cal.Rptr. 761, 582 P.2d 721. The court granted Valdez the relief sought, including restitution of the premises and back rent. This result was held to be equitable.

The appellate department of the superior court upheld the trial court's decision, without issuing an opinion, and refused to certify the case to the Court of Appeal. (Code Civ.Proc., § 911.) Barela filed a petition for a writ of mandate in the Court of Appeal. She requested that the superior court be ordered to vacate its order and to either enter judgment for petitioner or rehear the case, giving proper consideration to the defense of retaliatory eviction.³ The Court of Appeal summarily denied her petition. Barela then filed a petition for a writ of mandate before this court and an alternative writ of mandate was issued.

II.

[1] This case involves one basic issue—whether an affirmative defense is available in an unlawful detainer action if it is based on the allegation that the landlord seeks to evict in retaliation for the tenant's report to

1. The record indicates that on August 25, 1980, Valdez pleaded guilty to a violation of Penal Code section 647, subdivision (a) (lewd or disoluate conduct in public).

2. Unless otherwise noted, all statutory references are to the Civil Code.

3. Relief by means of writ of mandate is appropriate under these circumstances. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 622, fn.5, 111 Cal.Rptr. 704, 517 P.2d 1166; *Schweiger v. Superior Court* (1970) 3 Cal.3d 507, 517-518, 90 Cal.Rptr. 729, 476 P.2d 97.)

the police that the landlord has committed a crime.⁴

[2] Unlawful detainer actions are summary proceedings. Only "issues directly relevant to the ultimate question of possession" may be raised in defense of an unlawful detainer action. (*Green v. Superior Court*, supra, 10 Cal.3d 616, 634, 111 Cal. Rptr. 704, 517 P.2d 1168.) Generally counterclaims, cross-complaints and affirmative defenses cannot be considered. (*Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 721, 84 Cal.Rptr. 756.)

The defense of "retaliatory eviction" has been firmly enshrined in this state's statutory law and judicial decisions for many years. (See, e. g., § 1942.5; *S.P. Growers Assn. v. Rodriguez*, supra, 17 Cal.3d 719, 724, 181 Cal.Rptr. 761, 552 P.2d 721; *Schweiger v. Superior Court*, supra, 8 Cal.3d 507, 517, 90 Cal.Rptr. 729, 476 P.2d 97.) "It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding. [Citations.]" (*S.P. Growers*, supra, 17 Cal.3d at p. 724, 181 Cal.Rptr. 761, 552 P.2d 721.) The retaliatory eviction doctrine is founded on the premise that "[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason . . ."

4. Real party in interest argues that the trial court did consider the defense of retaliatory eviction and rejected it. He claims petitioner failed to show that the eviction was actually retaliatory.

Since neither party has supplied a complete transcript of the proceedings below, this court must rely on the trial court's findings of fact. The trial court made two key factual findings: (1) petitioner's eviction was caused by her complaint to the police; and (2) the complaint to the police also caused "a breakdown of the parties' ability to live peacefully in the same community."

Relying on the second of these two findings, real party in interest asserts that the trial court decision was based solely on the factual determination that the landlord and tenant were unable to live in the same community. He argues that this is a legally permissible, nonre-

(*Id.*, at p. 780, 181 Cal.Rptr. 761, 552 P.2d 721.)

The affirmative defense of retaliatory eviction was first recognized by this court in *Schweiger v. Superior Court*, supra, 8 Cal.3d 507, 90 Cal.Rptr. 729, 476 P.2d 97. There, the statutory "repair and deduct" provision (§ 1942) was construed so as to include protection against eviction for those tenants who exercised their statutory rights. The same year, the Legislature codified this protection in section 1942.5. The statute prohibited landlords from evicting a tenant in retaliation for the tenant's exercise of the right to repair and deduct or the tenant's complaint to the authorities about housing code violations.

In 1976, this court extended the scope of the common law retaliatory eviction defense beyond mere complaints about conditions of tenancy. (*S.P. Growers Assn. v. Rodriguez*, supra, 17 Cal.3d 719, 728, 181 Cal.Rptr. 761, 552 P.2d 721.) In *S.P. Growers*, this court held that an eviction in retaliation for the filing of a federal lawsuit charging violations of a federal farm labor statute was improper. The test set down in *S.P. Growers*, supra, is quite simple. A valid defense of retaliatory eviction may be advanced if, on balance, the public policies furthered by protecting a tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings are truly summary. (*Id.*, at pp. 728-729, 181 Cal.Rptr. 761, 552 P.2d 721.)

tallatory ground for evicting a tenant. However, he conveniently ignores the crucial link between the two findings of fact. The trial court found that the tenant's allegedly protected activity, her complaint to the police, caused the breakdown in relations. If real party in interest's argument were accepted, the defense of retaliatory eviction would be precluded, since in every case a landlord could assert that a tenant's exercise of protected rights was so infuriating that they could no longer live or work together. As a result, the statutory and common law protections against retaliatory evictions would be rendered nullities.

The facts of this case clearly demonstrate that petitioner was evicted in retaliation for her complaint to the police. Therefore, this court must assume that the trial court found such a factual showing insufficient as a matter of law to support a retaliatory eviction defense.

The Legislature rep 1979 and reenacted i (Stats. 1979, ch. 652, statutory retaliatory greatly expanded. Tl which a tenant is pr and the grounds for prohibited were enlar. (a) and (c.) In addi ments added a specif statutory remedies 1942.5 are in addition

8. Section 1942.5 curru

"(a) If the lessor rei because of the exerc rights under this ch. complaint to an appr antability of a dwelli dwelling is not in defi his rent, the lessor m of a dwelling in any at the lessee to quit in rent, or decrease any

"(1) After the date good faith, has given 1 1942, or has made 1 lessor regarding tena

"(2) After the date good faith, has filed 1 oral complaint which recorded in writing, 1 cy, of which the lesa pose of obtaining cor lating to tenability

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"(5) After entry of of an arbitration an judicial proceeding c tenability is deten sor.

"In each instance, run from the latest 1 in paragraphs (1) to

"(b) A lessee may of subdivision (a) n month period.

"(c) It shall be u crease rent, decrease quit involuntarily, t possession, or threa for the purpose of r because he or she participated in a les ganization advocat lawfully and peace

Cite as, Sup., 179 Cal.Rptr. 618

The Legislature repealed section 1942.5 in 1979 and reenacted it with amendments.⁹ (Stats. 1979, ch. 652, § 2, p. 2006.) The statutory retaliatory eviction defense was greatly expanded. The time period during which a tenant is protected was extended, and the grounds for which retaliation is prohibited were enlarged. (§ 1942.5, subd. (a) and (c).) In addition, the 1979 amendments added a specific statement that the statutory remedies provided by section 1942.5 are in addition to any other remedies

provided by statutory or decisional law. (*Id.*, subd. (b).)

(3) Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine.

Section 1942.5 is a remedial statute aimed at protecting tenants from certain types of abuses. It is to be "liberally construed to

II. Section 1942.5 currently provides as follows:

"(a) If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days:

"(1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenability; or

"(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenability; or

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

"(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenability; or

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

"In each instance, the 180-day period shall run from the latest applicable date referred to in paragraphs (1) to (5), inclusive.

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

"(c) It shall be unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of such acts, for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights

under the law. In an action brought by or against the lessee pursuant to this subdivision, the lessee shall bear the burden of producing evidence that the lessor's conduct was, in fact, retaliatory.

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

"(e) Notwithstanding the provisions of subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If such statement be controverted, the lessor shall establish its truth at the trial or other hearing.

"(f) Any lessor or agent of a lessor who violates this section shall be liable to the lessee in a civil action for all of the following:

"(1) The actual damages sustained by the lessee.

"(2) Punitive damages in an amount of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each retaliatory act where the lessor or agent has been guilty of fraud, oppression, or malice with respect to such act.

"(g) In any action brought for damages for retaliatory eviction, the court shall award reasonable attorney's fees to the prevailing party if either party requests attorney's fees upon the institution of the action.

"(h) The remedies provided by this section shall be in addition to any other remedies provided by statutory or decisional law."

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effect its objectives and to suppress, not encourage, the mischief at which it was directed. [Citation.] (*Kris v. Taylor* (1979) 92 Cal.App.3d 802, 811, 154 Cal.Rptr. 824.)

Subdivision (c) of section 1942.5 provides that it is unlawful "for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of such acts, for the purpose of retaliating against the lessee because he or she has . . . lawfully and peaceably exercised any rights under the law." (Emphasis added.) This subdivision was added to the statute in 1979. (Stats. 1979, ch. 652, § 2, pp. 2006-2006.) It has been denominated a "boilerplate" provision because of its broad prohibition against retaliation by a landlord when a tenant has exercised valid legal rights under the law. (See *Review of Selected 1979 California Legislation* (1979) 11 Pacific L.J. 601, 602.)

Petitioner argues that in reporting a crime to the police, she was exercising a legal right protected by section 1942.5, subdivision (c). She notes that, "It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." (*In re Quarles and Butler* (1896) 158 U.S. 532, 535, 15 S.Ct. 959, 1860, 39 L.Ed. 3180.)

California has a long history of protecting those citizens who report violations of the criminal laws. "It is for the best interests of society that those who offend against the

laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender." (*Bail v. Rawles* (1892) 83 Cal. 222, 228, 28 P. 987.)

Implicit in the passage of any remedial legislation is a general intent to protect from intimidation those who report violations of the law. (*Edwards v. Habib* (D.C. Cir.1968) 397 F.2d 687, 701-702; see also *Schweiger v. Superior Court*, supra, 8 Cal.3d 507, 518, 90 Cal.Rptr. 729, 476 P.2d 97.) Laws which define certain acts as criminal would be meaningless if citizens who reported crime were not protected from vindictive retaliation. This fundamental principle is embodied in Penal Code section 186.1, which declares that it is a misdemeanor to dissuade or attempt to dissuade any victim of crime from reporting the crime to the police. (Pen. Code, § 186.1, subd. (b)(1).)⁶

Thus, every citizen has a right protected by state law to report criminal violations to the police. Since petitioner merely engaged in a peaceful and lawful exercise of this basic right when she reported her landlord's crime to the police, her eviction violated the statutory prohibition against evictions in retaliation for the exercise of any rights under the law. (§ 1942.5, subd. (c).)⁷

An analysis of the common law defense of retaliatory eviction leads to a similar conclusion. "In evaluating whether defendants have raised a valid defense of retaliatory eviction, we must engage in a balance-

right to petition the government for redress of grievances "is an attribute of national citizenship," arising from "[t]he very idea of government, republican in form." (*United States v. Cruikshank* (1875) 92 U.S. (2 Otto) 542, 552, 23 L.Ed. 588.) This right has been considered "among the most precious of the liberties safeguarded by the Bill of Rights." (*Miss Workers v. Illinois Bar Assn.* (1967) 389 U.S. 317, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426; see also *Strom v. United States Gypsum, Inc.* (7th Cir. 1977) 547 F.2d 1329, 1342.) However, the right to report violations of criminal statutes to the police is protected by state law. Therefore, it is not necessary to reach petitioner's constitutional claims.

6. Under subdivision (a) of Penal Code section 136.1, it is a misdemeanor to attempt to dissuade a witness or victim from testifying at any trial or other proceeding. At the time of respondent's repeated attempts to evict appellant, criminal charges were still pending against him.

7. Petitioner also argues that her right to complain to the police about a violation of the criminal law is protected by section 1942.5, subdivision (c) because it is a right included within the provisions of the state and federal Constitutions governing free speech and the right to petition the government for the redress of grievances. (U.S. Const., 1st Amend.; Cal. Const., art. I, §§ 2 and 3.) She notes that the

ing process. We must deter the public policies furthered defendants from eviction out interests in preserving the sur of unlawful detainer proced tion.] (S.P. Growers Assn. supra, 17 Cal.3d 719, 724, 181 552 P.2d 721.)

The important public poli petitioner is clear. Citizen: and a duty to report violatio: the authorities. The effecti of this state's criminal law: the willingness of victims a report crime and to participi nal justice process.

The Legislature has rep: strated its concern for vict adopting programs designe victims (Gov. Code, §§ 189(29636) and to render their c criminal justice system le Code, §§ 18835-18846). On these programs is to enco report crime. "Unreported more than twice the rate o and the reasons people giv ing indicate that they i with the criminal justice Code, § 18835, subd. (e)."

In light of the strong i .encouraging the reportin inconceivable that the l have countenanced the us ly created summary evicti punish a tenant who repor police. To hold otherwis ate a special class of crit also happen to be landlord

8. In an analogous area of held that an employer can: ployee in retaliation for the of a legally protected right *Richfield Co.* (1980) 27 Rptr. 839, 610 P.2d 1330 employer's "generally un charge an employee" (*National Brotherhood of T Cal.App.2d 184, 189, 344 l could not discharge an e refused to commit a c Cal.3d at pp. 172-178, 1 P.2d 1330. See also *Glen**

ing process. We must determine whether the public policies furthered by protecting defendants from eviction outweigh the interests in preserving the summary nature of unlawful detainer proceedings. [Citation.] (*S.P. Growers Assn. v. Rodriguez, supra*, 17 Cal.3d 719, 724, 181 Cal.Rptr. 761, 552 P.2d 721.)

The important public policy asserted by petitioner is clear. Citizens have a right and a duty to report violations of the law to the authorities. The effective enforcement of this state's criminal laws depends upon the willingness of victims and witnesses to report crime and to participate in the criminal justice process.

The Legislature has repeatedly demonstrated its concern for victims of crime by adopting programs designed to compensate victims (Gov. Code, §§ 13959-13969, 29631-29636) and to render their contacts with the criminal justice system less painful (Pen. Code, §§ 13833-13846). One of the goals of these programs is to encourage victims to report crime. "Unreported crimes occur at more than twice the rate of reported crimes and the reasons people give for not reporting indicate that they are disenchanted with the criminal justice system." (Pen. Code, § 13835, subd. (e).)

In light of the strong policy reasons for encouraging the reporting of crime, it is inconceivable that the Legislature could have countenanced the use of the statutorily created summary eviction proceedings to punish a tenant who reported a crime to the police. To hold otherwise would be to create a special class of criminals—those who also happen to be landlords—with a legally

6. In an analogous area of law, this court has held that an employer cannot discharge an employee in retaliation for the employee's exercise of a legally protected right. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 held that despite the employer's "generally unlimited right to discharge an employee" (*Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 189, 346 P.2d 25), the employer could not discharge an employee because he refused to commit a crime. (*Tameny*, 27 Cal.3d at pp. 172-178, 164 Cal.Rptr. 839, 610 P.2d 1330. See also *Glenn v. Clearman's Gold-*

sanctioned means of punishing the victims or witnesses of their crime.⁶

This case is an even stronger one than *S.P. Growers, supra*, wherein this court stressed the importance of preventing retaliatory evictions where a remedial scheme depends upon private initiative for enforcement. (17 Cal.3d at pp. 725, 728, 181 Cal. Rptr. 761; 552 P.2d 721.) In that case, a landlord was prohibited from evicting a tenant in retaliation for the tenant's filing of a lawsuit alleging violations of the federal farm labor statute, since that law depended for its enforcement on the willingness of individual workers to initiate litigation to vindicate their rights. This court held that to allow evictions in retaliation for such lawsuits would "frustrate the purposes of that act." (*Id.*, at p. 724, 181 Cal.Rptr. 761, 552 P.2d 721.)

The public policy served in this case is clear and even more compelling. The landlord here was accused of a sexual assault on a child. This state has repeatedly emphasized that its citizens have a duty to protect children from sexual abuse. (See, e. g., Pen. Code, § 11166 [adults who work with children must report suspected cases of child abuse to the police, the sheriff, the probation department or the welfare department].)

The strong public policy interests in preserving the summary nature of the unlawful detainer proceeding will not be significantly impaired if the affirmative defense of retaliatory eviction is allowed here. (*S.P. Growers, supra*, 17 Cal.3d 719, 729-729, 181 Cal.Rptr. 761, 552 P.2d 721.) Deciding whether an eviction is in retaliation for a tenant's exercise of basic legal rights

in *Cock Inn* (1961) 182 Cal.App.2d 783, 13 Cal. Rptr. 769 [no right to fire an employee because he had joined a union].) Although no statute specifically prohibited employers from discharging employees for these reasons, the courts found the prohibition implicit in the policies underlying the protected rights. "*Glenn* [and *Petermann* and *Tameny*] persuasively instruct us that one may not exercise normally unrestricted power if his reasons for its exercise contravene public policy." (*Schweiger v. Superior Court, supra*, 3 Cal.3d 507, 516, 90 Cal. Rptr. 729, 476 P.2d 87.)

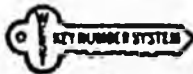
presents no great burden for the trial court. This issue involves none of the "complex and protracted" questions of law that have previously moved the courts to reject certain defenses in unlawful detainer actions. (See *Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 726, 84 Cal.Rptr. 756; *S.P. Growers, supra*, 17 Cal.3d 719, 729, 131 Cal.Rptr. 761, 552 P.2d 721.)

Some delay may occur if the defense is raised. However, any additional time spent is surely justified by the important public policy furthered by this defense. "[A]s the Supreme Court has noted, 'Some delay, of course, is inherent in any fair-minded system of justice. . . . Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man [or woman] is evicted from his [or her] home.'" (*S.P. Growers, supra*, 17 Cal.3d 719, 730, 131 Cal.Rptr. 761, 522 P.2d 721, quoting *Pernell v. Southall Realty* (1974) 416 U.S. 363, 385, 94 S.Ct. 1723, 1734, 40 L.Ed.2d 198.)⁹

III.

Let a peremptory writ of mandate issue directing the superior court to vacate the Orange County Superior Court judgment entered in the case of *Valdez v. Barcia*, No. AP-8097, and instructing the court to enter judgment for petitioner.

TOBRINER, MOSK, RICHARDSON,
- NEWMAN, KAUS and BROUSSARD, JJ.,
concur.



9. In light of this disposition of the case, this court need not reach petitioner's claim that her eviction constituted state action in violation of her constitutional right to free speech and to petition the government for redress of griev-

Richard L. GILARDI, et al., Plaintiffs
and Respondents,

v.

Gary L. HALLAM, et al., Defendants
and Appellants.

S. F. 24325.

Supreme Court of California,
In Bank.

Dec. 3, 1981.

Defendants appealed from judgment of the Superior Court, Nevada County, Harold F. Wolters, J., which quieted plaintiffs' title to certain lot, rejecting defendants' prescription and adverse possession claims to a portion of the lot. The Supreme Court, Broussard, J., held that: (1) possession of defendants, who took possession of the disputed land mistakenly believing they were the owners and who did not expressly or implicitly show that they recognized potential claim of the record owners or that they intended to renounce their claim if they did not have record title, was hostile and adverse for purposes of establishing prescriptive easement or title by adverse possession, and (2) defendants, adjoining landowners who were assessed taxes by lot number, were not entitled to title of portion of adjoining lot by adverse possession despite fact that their use of such property was hostile and adverse where they failed to pay taxes on the property.

Reversed.

— Opinion of Court of Appeal, 120 Cal. App.3d 647, 174 Cal.Rptr. 651, vacated.

1. Adverse Possession § 822

Title to property by adverse possession may be established either under color of title or by claim of right. West's Ann.C. P. §§ 822-825.

anona. (See *Edwards v. Habib, supra*, 397 F.2d 687, 690-698; *S.P. Growers, supra*, 17 Cal.3d 719, 730-731, fn. 5, 131 Cal.Rptr. 761, 522 P.2d 721.)

2. Adverse Possession

Elements necessary to establish adverse possession: open and notorious, continuous and unitary, true owner and under Ann.C.C.P. § 825.

3. Easements § 821

A prescriptive easement is established if the use is necessary to establish a claim of title. Payment of taxes is not necessary. *Ann.Civ.Code* § 1007.

4. Adverse Possession

Requisite hostile possession or use of land may be established by hostile possession or use of land.

5. Adverse Possession

To show that possession was not hostile, established by hostile possession recognized by record owner and reflected intent not to claim title if record title.

6. Adverse Possession

When enacting statutes, legislature substantially modify the law of adverse possession. §§ 822-825, 871.1 et seq.

7. Adverse Possession

When it appears the land mistaken owner, possession is established by hostile possession recognized by record owner and expressed intent to claim title. *Berry v. Sbraiga*, Cal.Rptr. 318, disapp.

1. In the superior court, but the prescriptive period is 10 years. 178 Cal.Rptr.—14

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May 7, 1982

Tom Stanton
5410 Lambeth Road
Bethesda, MD 20014

Dear Tom:

Due to our tight budget, I am enclosing a rough draft of the Introduction to the report for your review prior to its being retyped. I would like to discuss this Introduction with you next week. It incorporates the suggested changes of the reviewers.

My understanding of the revised format for this final version is that Janine Wedel's revised draft will be Part II and the remainder of my draft (as revised) will be Part III. Our combined drafts will comprise Volume I. Footnotes will be consolidated at the end of this volume. The appendices will be placed in a separate Volume II.

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I will omit our survey from the appendices. Unlike the prior report dealing with landlord-tenant law, I prefer to include the suggested sample criminal and civil complaints, rather than prepare model complaints.

Assuming that we agree on the format and the revised Introduction is acceptable, the final report can be completed and submitted by the end of this month.

Sincerely yours,


Dennis Keating

WDK:kc
cc: Richard Blumberg
Enclosure

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Enclosure

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Condominiums Can't Bar Minors, California Rules

By a WALL STREET JOURNAL Staff Reporter

SAN FRANCISCO — The California Supreme Court ruled that children can't be prohibited from living in condominiums. The 5-2 decision extends a similar ruling last year that barred landlords from refusing to rent to families with children under 18.

The suit was filed by John and Denise O'Connor, who bought a unit in a Los Angeles condominium in 1975. Four years later, when their son was born, the complex's owners' association told the O'Connors that they had violated a rule prohibiting anyone under 18 from living in the complex. The O'Connors were told to move, and Mr. O'Connor filed suit.

In the earlier case involving rentals, the court found that a "landlord's blanket exclusion of children from residency was prohibited" by the state's Civil Rights Act. The act bans housing discrimination by "all business establishments of every kind whatsoever."

The condominium owners' association, a nonprofit organization, contended that it isn't a "business establishment," and that it therefore shouldn't be included under the act. The court rejected that argument, saying nothing in the act "calls for excluding an organization from its scope simply because it is nonprofit."

May 11, 1983 Wall St. Journal

Rep. Malone

[2] It is a denial of due process to commit a person to prison for contempt who has no personal notice or knowledge of the show cause hearing at which he was held in contempt. *Ex Parte Herring*, 438 S.W.2d 801 (Tex.1969). This is true even though substituted service is accomplished through compliance with Tex.R.Civ.P. 106. The issue is not whether relator was served in compliance with the rules, but rather whether he was afforded due process. We are not faced with deciding if one who deliberately avoids process is charged with constructive notice of the contents of the process because there is no evidence or suggestion that relator deliberately avoided the service of process.

[3, 4] A recitation in the order adjudging relator in contempt to the effect that relator was duly cited and notified to appear is not controlling on the due process issue even though it is the general rule in this State in civil cases that a recitation of due service in a judgment cannot ordinarily be impeached by collateral attack. *Ex Parte Cardwell*, 416 S.W.2d 382 (Tex.1967). It is the duty of this Court to consider the entire record to determine whether due process has been accorded relator and it would be unconscionable for us to hold that a trial court could order the seizure and incarceration of a citizen with no notice and then deprive him of a right to relief in a habeas corpus proceeding by reciting in its judgment that the person had been duly served. *Ex Parte Cardwell*, supra.

[5] It is the duty of this Court to order the release of persons illegally restrained upon an order of commitment for the violation of a court order. Tex.Rev.Civ.Stat. Ann. art. 1824a (Supp.1978). The pendency of a motion to purge in the district court does not relieve us of this duty and Gail Moore's suggestion that this Court lacks jurisdiction in the premises because of the pendency of such a motion is not well taken.

It is ordered that relator be discharged.

Willie SIMS

v.

CENTURY KIEST APARTMENTS.

No. 19368.

Court of Civil Appeals of Texas,
Dallas.

May 5, 1978.

Rehearing Denied May 31, 1978.

Suit was brought against former landlord for damages for retaliatory eviction. The 14th District Court, Dallas County, Fred S. Harless, J., rendered summary judgment for landlord on the pleadings, and tenant appealed. The Court of Civil Appeals, Guittard, C. J., held that former tenant had cause of action for alleged termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for his reporting of code violations to city authorities.

Reversed and remanded.

Akin, J., filed a dissenting opinion.

1. Landlord and Tenant \ominus 292

Former tenant had cause of action for alleged termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for tenant's reporting of code violations to city authorities.

2. Constitutional Law \ominus 90.1(1)

Citizen has right to be free to report violations of law without intimidation or coercion; such right need not be expressly provided by statute but is implied from very existence of remedial legislation.

3. Appeal and Error \ominus 918(1)

Although terms of municipal housing, building and health codes were not before the court on appeal from summary judg-

ment on pleadings in suit against former landlord for damages for retaliatory eviction, court had to presume that petition could have been amended to include specific allegations of ordinances alleged to have been violated and that these allegations could have been supported by proof.

4. Judgment \approx 185(2)

In order to prevail on motion for summary judgment, defendant landlord had burden to meet tenant's case as pleaded; tenant had no burden to produce ordinances relied on in response to motion but rather landlord had burden as moving party to produce them if it contended that they did not support allegations of petition seeking damages for retaliatory eviction.

5. Health and Environment \approx 32

Statute expressly authorizing enactment of ordinances that require demolition or repair of dilapidated, substandard or unfit buildings constitutes recognition by Legislature that public welfare may require that dwellings offered for rental be safe and fit for habitation. Vernon's Ann. Civ.St. art. 1175, subd. 35.

6. Landlord and Tenant \approx 180(1)

Fact that municipal housing, building and health codes, presumably enacted under authority of city's home-rule charter, were effective only within city, rather than throughout state, did not preclude such ordinances from providing basis for cause of action against landlord for interference with tenant's reporting of code violations. Const. art. 11, § 5; Vernon's Ann.Civ.St. arts. 1175, 1175, subd. 35.

7. Landlord and Tenant \approx 116(1)

Recognition of landlord's power to terminate periodic tenancy, whether common law or statutory, does not establish that landlord has legal right to do so for purpose of retaliation against tenants for reporting landlord's violations of the law. Vernon's Ann.Civ.St. art. 5216a.

8. Landlord and Tenant \approx 116(1)

Tenant has legal right to be free of interference with his reporting of violations of laws enacted for his benefit and landlord

has correlative duty not to interfere with tenant's exercise of that right, and, accordingly, although landlord may have legal power to terminate tenancy, law recognizes no legal right to do so for sole purpose of retaliation when otherwise landlord would have permitted tenant to continue tenancy.

9. Landlord and Tenant \approx 180(1)

Tenant who probably would not have been evicted had he not reported violations of regulations enacted for his benefit has action for damages against landlord for such eviction.

Michael M. Daniel, Dallas, for appellant.

Dan W. Shieder, Jr., Dallas, for appellee.

GUITTARD, Chief Justice.

[1] Willie Sims brought this suit against Century Kiest Apartments, his former landlord, for damages for a retaliatory eviction. The principal question is whether a former tenant has a cause of action for termination of his periodic tenancy and eviction by forcible detainer proceedings in retaliation for the tenant's reporting of code violations to city authorities. We hold that such a cause of action, if established by evidence, does exist, and, consequently, that the trial court erred in rendering summary judgment for the landlord on the pleadings.

Sims alleged that he had been a tenant at Century Kiest Apartments for approximately nine years under an oral tenancy from week to week; that during his occupancy the condition of the premises had steadily deteriorated; that he had repeatedly complained to the management about the problem and had helped organize a tenants' council; that acting on his own and as officer of the council, he had reported to city authorities violations of various housing, building and health codes; that although his rent was fully paid, he had received from the landlord a written notice to vacate the apartment within ten days; that his tender of the full rent due on the next rent-payment date was refused; that the landlord had filed a forcible detainer suit

against him and recovered judgment for possession of the premises in the justice court and also, on appeal, in the county court at law; that the landlord's termination of the tenancy was done with specific intent to retaliate against him for organizing and belonging to the tenants' council, complaining to the management about needed repairs and maintenance, and reporting code violations to various departments of the city; and that as a result of the termination of the tenancy, he was injured by being forced to move out of his home and "has suffered a chilling effect of his exercise of his First Amendment rights." He seeks recovery of his moving expenses, the additional rent he had to pay for a comparable apartment, damages for "deprivation of his First Amendment rights," punitive damages, and his attorney's fee.

The landlord filed a motion for summary judgment on the sole ground that plaintiff was a tenant from week to week, that the landlord had "an absolute right to terminate a tenancy at will when proper notice is given to the tenant of such termination," and that it was undisputed that such a notice had been given. Although the motion was not accompanied by affidavits or any other summary-judgment proof, the tenant filed an opposing affidavit tending to support the allegations of his petition.

The landlord attempts to justify the summary judgment in its favor on the ground that it has an absolute right to terminate the tenancy on proper notice at the end of any week, and then to recover possession of the premises, and that its motive in doing so does not give rise to an action for damages. The tenant recognizes the rule that ordinarily a landlord may terminate a periodic tenancy without cause, but contends that if it does so for the purpose of interfering with the tenant in the exercise of his constitutional rights of free speech and free assembly, or in retaliation for his exercise of those rights, a legal wrong has been done for which an action for damages will lie.

We agree with the tenant that the petition is sufficient to state a cause of action

for damages. Although no reported decision in Texas has dealt with the question, the legal consequences of a retaliatory eviction have been considered in a number of other jurisdictions. A crucial consideration is whether the tenant's rights are infringed. The leading case holding that the tenant's rights are infringed is *Edwards v. Habib*, 130 U.S.App.D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969), in which the United States Court of Appeals for the District of Columbia Circuit allowed a defense of retaliation in a summary-possession proceeding on the ground that the policy of Congress in directing the promulgation of housing regulations in the District of Columbia for the benefit of tenants would be contravened by allowing evictions for reporting violations of such regulations. By resting its decision on the public policy implicit in the statute, the court avoided a decision based solely on constitutional grounds. Acknowledging that the summary-possession statute made no provision for such a defense, the court said:

"It is true that in making his affirmative case for possession, the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any reason for evicting a tenant who does not occupy the premises under a lease. But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted." 130 U.S.App.D.C. at 409, 397 F.2d at 699

Concerning the practical effect of permitting eviction in retaliation for reporting code violations, the court observed:

"There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant

for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid." [*Id.* 130 U.S.App.D.C. at 412, 397 F.2d at 701]

This decision has been followed in a number of cases in the state courts.¹

Relief against retaliatory eviction has also been granted in the federal courts. There, the main consideration has been whether "state action" was involved so as to provide a right of action under the Fourteenth Amendment of the United States Constitution and under the Civil Rights Act, 42 U.S.C. § 1983. In at least one case, it has been held that invocation of a state remedy for summary possession, such as our forcible detainer procedure, is in itself sufficient state action to establish a violation of federal constitutional rights if the landlord is motivated solely by retaliation against the tenant for reporting violations of housing regulations. *Hosey v. Club Van Cortlandt*, 299 F.Supp. 501, 506 (S.D.N.Y.1969). Other federal courts have required some kind of special state support of the landlord's position other than merely providing a "neutral" remedy available to all landlords before state action has been recognized. *McQueen v. Druker*, 438 F.2d 781, 785 (1st Cir. 1971); *LaVoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972); *Walton v. Darby*

Town Houses, Inc., 395 F.Supp. 553, 559 (E.D.Pa.1975). In all of the federal cases cited, the courts recognized that an eviction in retaliation for the tenants' complaints to public officials had a seriously adverse effect on the tenant's rights because of the practical problem posed to the tenant in requiring him either to forego his constitutional rights of free speech and free association or to vacate his rented home and seek other accommodations.

We need not, however, determine whether a retaliatory eviction without state action is an actionable violation of the tenant's constitutional rights if any other ground exists to hold it to be a legal wrong. In *Edwards v. Habib*, *supra*, the court found such a ground to exist in the policy of the housing regulations to protect tenants from unsanitary and unsafe housing conditions. Such regulations cannot be effectively enforced, the court said, if tenants, who are the principal persons interested in reporting violations, are intimidated by threats of eviction; consequently, eviction for the sole purpose of retaliation for reporting such violations cannot be permitted and must be considered wrongful.

The public policy recognized in *Edwards v. Habib* is a particular application of the general policy to encourage, rather than discourage, the reporting of violations of law to proper authorities. The leading case on this point is *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 106 (1895). There the petitioner was charged with conspiracy to injure or intimidate a citizen in the free exercise of a right under the Constitution

1. *Schweiger v. Superior Court of Alameda County*, 3 Cal 3d 507, 90 Cal Rptr. 729, 476 P.2d 97 (1970) (tenant exercising statutory repair-and-deduct remedy is protected against retaliatory rent increase and eviction); *E & E Newman, Inc. v. Hallock*, 116 N.J.Super. 220, 281 A.2d 544, 546 (1971) (retaliatory eviction allowed as defense to dispossession action under statute making such reprisal a misdemeanor); *Markese v. Cooper*, 70 Misc.2d 478, 333 N.Y.S.2d 63, 73 (Monroe County Ct. 1972) (defense of retaliatory eviction allowed in summary possession action); *Dickhut v. Norton*, 45 Wis.2d 389, 173 N.W.2d 297 (retaliatory eviction allowed as defense to unlawful detainer action in view of urban renewal statute compa-

table to Tex.Rev.Civ.Stat. Ann. art. 1269I-3 (Vernon 1965). See also *Robinson v. Diamond Housing Corp.*, 150 U.S.App.D.C. 17, 463 F.2d 853 (1972) (extending holding in *Edwards v. Habib* to protect from retaliatory eviction a tenant who had successfully interposed housing code violations as defense in previous eviction proceeding). See generally *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 Vanderbilt L.Rev. 689, 708-709 (1973), Annot., 40 A.L.R.3d 753 (1971). A contrary decision, *Aluli v. Trusdell*, 54 Haw. 417, 508 P.2d 1217, 1220 (1973), has been overruled by statute. Haw.Rev.Stat. § 521-74 (1976).

or laws of the United States by interfering with the reporting of violations of the federal internal revenue laws. The Supreme Court rejected the contention that a private citizen had no federally protected right to report such violations and quoted the principle stated in the earlier case of *Ex parte Yarborough*, 110 U.S. 651, 662, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884), as follows:

[I]t is the duty of [the] government to see that he may exercise this right freely, and to protect him from violence while so doing or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself

The court observed that this right does not depend on any particular amendment to the Constitution but "arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." We recognize that the interference in *Quarles* was violent, and, therefore, in itself a violation of local law. It was held to be a violation of federal law, however, not because of any express enactment, but only because of the essential public policy to protect persons who report violations.

The same public policy exists in all states. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972). It has been expressly recognized in Texas and has been found more compelling than a competing policy favoring the use of grievance procedure in labor-management disputes. Thus, it had been held to invalidate a provision in a collective-bargaining agreement tending to deter prompt reports of criminal offenses by the persons immediately affected. *Goodyear Tire & Rubber Company v. Sanford*, 540 S.W.2d 478, 484 (Tex.Civ.App.—Houston [14th Dist.] 1976, no writ). In that case, the court said:

For the orderly functioning of our society, people must be completely free from all forms of coercion against reporting violations of the law. Indeed, it is their duty to do so.

[2] Under these authorities, a citizen has a right to be free to report violation of

the law without intimidation or coercion. This right need not be expressly provided by statute because it is implied from the very existence of the remedial legislation. This principle was stated in *Edwards v. Habib, supra*, as follows:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation, even if it is not expressed in the statute itself. [Emphasis added.] 397 F.2d at 701.

We need not consider whether a cause of action exists generally in favor of any informant who suffers reprisals for reporting violations of the law. The question here is whether a member of the class for whose benefit remedial legislation has been enacted has such a cause of action. In this situation, the public policy against interference with reports of violations is particularly strong. Effective enforcement of such legislation depends largely on reports of violations by the persons most directly affected, and if those persons are so intimidated or coerced by fear of retaliation as to prevent their reporting of violations, the violator is enabled to persist in his violations without suffering whatever civil or criminal penalties may be provided.

[3,4] In the present case, we have no statute before us comparable in all respects to that found in *Edwards v. Habib* to imply a prohibition against retaliatory eviction. Plaintiff alleges only that his tenancy was terminated with the specific intent to retaliate against him for reporting violations of "various housing, building and health codes of the city of Dallas." Although the terms of these codes are not before us, we must presume on this appeal from a summary judgment on the pleadings that the petition could have been amended to include specific allegations of the ordinances alleged to have been violated and that these allegations could have been supported by proof. See *Texas Department of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex.1974). In

order to prevail on its motion for summary judgment, defendant had the burden to meet plaintiff's case as pleaded. *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751 (Tex.1976). Plaintiff had no burden to produce the ordinances in response to the motion; rather, defendant had the burden, as a moving party, to produce them if it contended that they did not support the allegations of the petition. *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). See also *Cook v. Brundidge, Fountain, Elliott & Churchill, supra*. The only ground alleged in the motion for summary judgment is that the landlord had an absolute right to terminate the tenancy at will when proper notice is given. Thus, our question on this appeal is not whether there are such ordinances, but whether such ordinances, if proved, would establish that a tenant is within the class of persons for whose benefit such ordinances were enacted, so as to provide a basis for a cause of action against the landlord for interference with his reporting of violations.

[5,6] The ordinances alleged presumably were enacted under the authority of the city's home-rule charter, which is authorized by article XI, § 5, of the Texas Constitution. Moreover, article 1175, § 35, Tex. Rev. Civ. Stat. Ann. (Vernon Supp.1977) expressly authorizes enactment of ordinances which require "the demolition or repair of buildings which are dilapidated, substandard, or unfit for human habitation and which constitute a hazard to the health, safety, or welfare of the citizens." This statute is a recognition by the legislature that the public welfare may require that dwellings offered for rental be safe and fit for habitation. *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex., 1978). Although article 1175 does not in itself provide a comprehensive system of housing regulations like the statute under consideration in *Edwards v. Habib*, we must presume that the ordinances alleged in the petition, enacted under the

authority of this statute or otherwise, did provide such a system and did impose various duties on the owners of rental property, as well as others, for the health, safety and welfare of occupants of such property, including tenants and their families. Thus, there is the same reason here to imply a prohibition against retaliation against a tenant for reporting violations as in *Edwards v. Habib*. The fact that the codes in question are effective only within the city of Dallas, rather than throughout the state, as in the case of a general statute, does not affect the problem. The controlling principle is the policy against intimidation or coercion that would discourage or inhibit reports of violations of the law by persons for whose benefit the law has been enacted.

[7] Defendant contends that regardless of any public policy against interference with reporting of violations of the law, he has an absolute right to terminate a periodic tenancy by giving the notice prescribed by article 5236a, Tex. Rev. Civ. Stat. Ann. (Vernon Supp.1978), which provides that a monthly tenancy may be terminated on one month's notice, and, if the rent is payable at periods of less than a month, the period of notice is sufficient if it is equal to the interval between the times of payment. This statute is consistent with the common-law rule that the landlord has the power to terminate a periodic tenancy on reasonable notice, as recognized in cases such as *Holcombe v. Lorino*, 121 Tex. 446, 79 S.W.2d 307 (1935), but it defines more particularly the period of the notice and provides that the tenancy may be terminated on such notice before the end of a rent-paying period, with a proportionate abatement of the rent. Recognition of the landlord's power to terminate the tenancy, whether common-law or statutory, does not establish that he has a legal right to do so for the purpose of retaliation against the tenant for reporting the landlord's violation of the law.² Our

2. This distinction between a "right" and a "power" is consistent with the classical analysis of legal relations by Professor Hohfeld in his well known article, *Some Fundamental Legal*

Conceptions as Applied in Legal Reasoning, 23 Yale L. J. 16 (1913). The same analysis is adopted in Restatement of Property §§ 1, 3 (1936). These authorities recognize that a

question is whether his termination for that purpose is a legal wrong for which an action for damages will lie.

[8] We conclude that the tenant has a legal right to be free of interference with his reporting of violations of laws enacted for his benefit and that the landlord has a correlative duty not to interfere with the tenant's exercise of that right. If the tenant had no such right, the public policy to encourage reports of violation of the law would be substantially frustrated. Accordingly, although the landlord may have the legal power to terminate the tenancy, in our opinion the law recognizes no legal right to do so for the sole purpose of retaliation when otherwise he would have permitted the tenant to continue his tenancy. On this basis, we hold that retaliatory eviction is a legal wrong for which an action for damages will lie.

Defendant insists that to recognize such a cause of action would create a defense of retaliatory eviction in a forcible detainer case and thus, in effect, would extend the tenancy indefinitely, contrary to law and contrary to the agreement of the parties. Although we rely on *Edwards v. Habib* and the other eviction cases cited as authority for the view that retaliatory eviction is wrongful, our present holding does not go so far as to hold that it would constitute a defense in forcible detainer. An argument can be made to the effect that the power to terminate exists, notwithstanding violation of the tenant's right to be free of interference in reporting violations, since the tenant has no privilege to continue his occupancy if the tenancy on which that privilege depends has terminated. There is force also to the argument that whether such termination is wrongful cannot properly be decided in a forcible detainer proceeding, which determines only who shall have the immediate possession and cannot be appealed beyond the county court. The rule is settled that a judgment for the landlord in forcible detainer does not bar a later action

power may be exercised effectively, but nonetheless wrongfully, if exercised in violation of a duty. Hohfeld, *op. cit.*, at 52, 53; Restatement

for damages for wrongful eviction. *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493, 494 (Tex.Civ.App.—Dallas 1977, writ ref'd n. r. e.); *McCloud v. Knapp*, 507 S.W.2d 644, 647 (Tex.Civ.App.—Dallas 1974, no writ). Since forcible detainer is a summary remedy, the issues should be narrow and uncomplicated. Thus we do not decide the question of whether retaliatory eviction would be a defense in a forcible detainer case.

[9] Since our holding is based on the public policy of the state implicit in its statutes and in ordinances, we need not confront the question of whether a cause of action for retaliatory eviction exists based on public policy against interference with the exercise of the constitutional rights of freedom of speech, freedom of assembly, and freedom to petition for redress of grievances. Tex.Const., art. 1, §§ 8, 27; U.S.Const., Amends. I, XIV. Neither do we hold that this kind of wrong is a "prima facie tort," based simply on harm intentionally caused without justification or excuse. See Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Corn.L.Q. 465 (1957); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 Geo.L.J. 519, 548 (1966). In deciding such an eviction to be wrongful, we hold only that if the evidence shows that the tenant probably would not have been evicted had he not reported violations of regulations enacted for his benefit, then such an eviction is an affirmative wrong for which an action for damages will lie in favor of the aggrieved tenant.

The scope of this holding is quite narrow. It would not extend, for example, to a case in which the evidence shows that the tenant's complaints were not made in good faith, or to a case in which the landlord had affirmative grounds for eviction, such as nonpayment of rent. The question of damages may also be difficult, but it is not now before us. Consequently, we do not pass on whether any of the elements of damages

of Property § 3, Comment a, Illustrations 2, 3 (1936).

alleged in the tenant's petition are recoverable, even if the elements of a retaliatory eviction are shown.

The objection is made that this court is engaging in judicial legislation by creating a cause of action for retaliatory eviction, and that such a course should be left to the legislature, which can strike a more delicate balance of the competing interests and can impose precise limitations appropriate to those interests. We agree that a well-drawn statute would be a superior solution to this problem for future cases. Such a solution, however, is not available in this case. The legislature cannot determine whether this particular plaintiff has stated in his petition a cause of action for damages on which he is entitled to present his evidence at a trial. That is a question which we have the responsibility to decide, subject to review by the Supreme Court of Texas.

Of course, we must consider the effect of our decision as a precedent until the supreme court rules, but we do not regard it as a legislative decision except in the sense that the decision in any case of first impression sets a precedent. In that sense, a decision denying relief would be no less legislative. We cannot accept the view that if the question before us has never been decided before, our decision must always be to deny relief. That view is opposed to the whole development of the common law. Our decision overrules no precedents and disregards no established rules. If legislation is needed to govern future cases of this sort, it may be enacted, regardless of this decision.

Our former opinion is withdrawn and this opinion is substituted. Otherwise, defendant's motion for rehearing is overruled. The judgment of the trial court is reversed and the cause is remanded.

AKIN, Justice, dissenting.

I cannot agree that a cause of action for retaliatory eviction exists based upon public policy as advanced by the majority. Those of us in the judiciary may think that we perceive that which is in the public interest better than the elected legislators of the

people; nevertheless, it is the function of our legislature, rather than the courts, to declare the public policy of this state. *Carpenter v. Sheppard*, 135 Tex. 413, 145 S.W.2d 562, 565 (1940); *Scarborough v. Payne*, 198 S.W.2d 917, 919 (Tex.Civ.App.—San Antonio 1947, writ ref'd); *Houston-American Life Insurance Co. v. Tate*, 358 S.W.2d 645 (Tex.Civ.App.—Waco 1962, no writ). In my view, the holding of the majority usurps the function of the legislature by the judiciary, and contradicts the basic concepts of our form of government embodied in the Constitution of the United States and of the State of Texas, both of which sharply delineate the functions of the legislature, the executive, and the judiciary. The function of the legislature is to enunciate the public policy, the duty of the executive to execute that policy, and the duty of the judiciary to construe those statutes passed by the legislature and to determine whether they contravene the constitutions of the State of Texas or of the United States. It is not the function of the judiciary to usurp the legislative function under the guise of public policy. As Mr. Justice Jackson stated in *Collins v. Hardyman*, 341 U.S. 651, 663, 71 S.Ct. 937, 942, 95 L.Ed.2d 1253 (1951), "It is not for this Court to compete with Congress or attempt to replace it as the nation's law-making body." If, as some think, the landlord-tenant relationship need be changed, the legislature is the place to obtain that change, rather than in the courts.

The judiciary should not act where the legislative branch has apparently chosen not to do so. The legislature in both 1973 and 1975 revised substantially the landlord-tenant statutes in this state, giving tenants far more rights than they had under prior law. Nevertheless, the legislature apparently chose not to grant tenants a cause of action based on retaliatory eviction. Thus, the majority has chosen to ignore the legislature's obvious will as well as the historic distinction in the functions of the legislature and the judiciary. It is never the judiciary's function to declare that public policy it thinks desirable or just; rather it

is our duty to apply those policies clearly expressed by the legislature through statutes. The majority opinion establishes a dangerously oligarchic precedent.

The opinion of the majority reflects the Platonic view that philosopher kings know that which is best for the people, rather than the people themselves. Hopefully our judiciary is blessed with such philosophers, but I cannot accept this contravention of the traditional functions of the legislature and the judiciary.

The sound logic behind the sharp delineation between the function of the legislature and that of the judiciary is best illustrated by the very question decided by the majority of this court. If a bill granting a tenant a cause of action for retaliatory eviction was introduced into the legislature for consideration, interested people in the State of Texas would have an opportunity to express their wishes to their legislators, who, in turn, could fully debate all aspects of the question. The legislature could then determine by vote whether the proposed bill would become law, thus expressing the public policy. Such an opportunity for input is not afforded the people of this state when the majority of an appellate court, composed of three members, makes the determination of what is in the interest of the public and effectively legislates through judicial decree a remedy for an assumed wrong. In granting a cause of action in tort for retaliatory eviction, the majority of this court has gone further than any court, state or federal.

The public policy apparently relied on by the majority to justify its novel holding is the particular application of the general policy to encourage, rather than discourage, the reporting of violations of the law to proper authorities. They rely primarily on the Supreme Court's decision in *In Re Quarles*, 158 U.S. 532 (1895). I cannot agree that that case is applicable to the facts presented here. *Quarles* was an original writ of habeas corpus where the relators sought release from prison, having been convicted of conspiracy for injuring and intimidating a person because the victim

had reported violations of the internal revenue laws. The actions of relators violated a federal statute prohibiting anyone from conspiring "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." In holding that relators violated this statute, the Court found that the threatened right of the victim was the right of every citizen to assist in prosecuting and in securing punishment of any breach of the peace of the United States. *Quarles* is not authority to support the majority's public policy predicate. In the first place, the right of a citizen in reporting violations of the laws is to secure punishment for a breach of peace. Here, no breach of the peace exists. Second, the actions of the relators in *Quarles* violated a statute which provided punishment of conspiracies to oppress citizens from reporting violations of federal law; no such statute exists here. Thus, it was from this statute that the court in *Quarles* found a public policy, whereas here we have no such declaration of public policy by our legislature. Public policy of the state cannot be found in city ordinances. It would be specious to state that the public policy of the City of Dallas is the public policy of the State of Texas. Thus, in the absence of a clear declaration of public policy by the state legislature, I do not regard *Quarles* as authority to find the public policy to support the majority's holding.

The majority also states that this public policy has been expressly recognized in Texas in the case of *Goodyear Tire and Rubber Co. v. Sanford*, 540 S.W.2d 478 (Tex.Civ. App.—Houston [14th Dist.] 1976, no writ). However, *Goodyear Tire*, also is distinguishable. In *Goodyear Tire, supra*, an employee successfully sued to set aside an arbitrator's award under a union contract affirming the employee's discharge by the company because the employee had filed criminal assault charges against his supervisor. In affirming the trial court's judgment vacating the arbitrator's decision, that court held that a labor agreement which provided that

court action could not be taken until all grievance procedures had been exhausted was inapplicable where the employee had filed both a grievance and criminal assault charges against his supervisor. The rationale of the court was that it would be a violation of public policy to enforce the labor contract in that it would obstruct the enforcement of the laws of the state. Although I agree that this is the law, the case does not apply to our facts. Here the only contract was an oral one providing for a week to week tenancy and there was no prohibition in the contract against reporting housing code violations. Consequently, unless there is a contractual prohibition against reporting of these housing code violations there is no violation of public policy. Additionally, since the allegations here are reported violations of city ordinances, not state statutes, there can be no violation of the public policy of the State of Texas.

The majority apparently rests its holding on the rationale of *Edwards v. Habib*, 130 U.S.App.D.C. 120, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1018, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969). That case is distinguishable from the case here in that Congress had enacted extensive housing codes for the District of Columbia, thus expressing the public policy of the Congress with respect to the question before that court. In fact, even the quotations from *Edwards* in the majority opinion establish that statutory construction was a ground for that decision. *Id.* 130 U.S.App.D.C. 138, 140-141, 397 F.2d 699, 701-702. No such extensive and specific codes have been enacted by our legislature. This distinction is poignantly enunciated by the concurring opinion in *Edwards* which notes that a Congress which enacts a housing code together with its enforcement cannot be taken to have excluded retaliatory eviction as a defense to a routine statutory eviction statute also promulgated by Congress. *Edwards v. Habib, supra*, rested its decision on the ground that Congress by enacting the housing code with enforcement provisions implicitly intended to permit retaliatory eviction as a defense to a forcible detainer action to effectuate that legislation.

Nevertheless, I do not agree with the rationale of either the majority opinion or the concurring opinion in that case, instead, I agree with the view, expressed by the dissent, that a specific act of Congress was required to legislate retaliatory eviction as a defense to a forcible detainer action. The dissent also poses the question, unanswered by the majority, that such judicial legislation permits the landlord to be deprived of his property without due process of law. In *Edwards*, the majority opinion's basis of divining the congressional intent with respect to enforcement of the housing codes by permitting retaliatory eviction as a defense is weakened, if not indeed contradicted, by footnote 52 which notes that three bills had been introduced in Congress dealing specifically with retaliatory eviction, but none were reported out of committee. *Edwards*, 130 U.S.App.D.C. at 141, 397 F.2d at 702. In my view, this shows a congressional intent contrary to that intent derived in the majority's opinion. Consequently, I do not regard *Edwards v. Habib, supra*, as persuasive authority to hold that a suit may be maintained in tort for an alleged retaliatory eviction.

The majority opinion observes that the ordinances in question were presumably enacted under the authority of the city's home rule charter and they specifically point to Article 1175 § 35, Tex.Rev.Civ.Stat. Ann. (Vernon Supp.1978) which gives home rule cities the authority to enact ordinances requiring the demolition or repair of buildings. They state that this shows that the legislature has recognized that the public welfare may require that dwellings offered for rental must be safe and fit for habitation. In my view, reliance on this article is misplaced in that it in no way establishes a particular public policy. Indeed, in no way can it be read as adopting a public policy for the entire state when Article 1175 itself applies only to home rule cities. Is the majority holding that only home rule cities have this policy to encourage the reporting of violations? Even under Article 1175, home rule cities may adopt conflicting ordinances to deal with identical subjects.

Thus, it is absurd to maintain that diverse local ordinances express a single legislative policy.

In nearly all jurisdictions, where either a cause of action for retaliatory eviction exists or where such may be asserted defensively, a specific statute so stating was enacted by the legislature. Texas has no such statute. Accordingly, in my view, the rights of the parties here are controlled by Article 5236a, Tex.Rev.Civ.Stat. Ann. (Vernon Supp.1978), which is the only provision concerning termination of tenancies in Texas. It provides:

[W]hen the rent reserved in a lease is payable at periods of less than a month, the time of the notice of termination is sufficient if it is equal to the interval between the times of payment

The notice here was timely since it gave Sims ten days when the pay period was weekly. Since the landlord-tenant relationship is one of contract, the tenant may remain in the premises only until such time as the landlord terminates the lease. The landlord's right to possession is an incident of ownership, while the tenant's right of possession is dependent upon the agreement with the landlord. Thus, Sims merely had an expectancy that his lease would be extended for only another week. *Holcombe v. Lorino*, 124 Tex. 440, 19 S.W.2d 307 (1935). To hold, as the majority does, that there is a limitation of the landlord's right to terminate, not only alters the contract between landlord and tenant, but is also in conflict with this explicit statute. Consequently, I would hold, as did the trial court, that the landlord's motive in evicting Sims was immaterial.



Ex parte Shelley McBRIDE, Relator.

No. 19602.

Court of Civil Appeals of Texas,
Dallas.

May 10, 1978.

Upon former wife's motion for contempt based upon former husband's disobedience of Oklahoma support decree, former husband was held in contempt with commitment suspended upon certain conditions, and, after former husband failed to comply with conditions, suspension was revoked and he was imprisoned. Former husband brought habeas corpus proceeding challenging his detention. The Court of Civil Appeals, Robertson, J., held that where Oklahoma had enacted Uniform Reciprocal Enforcement of Support Act, Oklahoma child support decree could not be enforced by contempt proceedings in Texas without compliance with procedures set forth in Act.

Former husband discharged.

Divorce ⇐ 403(9)

Where support decree is rendered in state which has enacted Uniform Reciprocal Enforcement of Support Act, that decree cannot be enforced by contempt proceedings in Texas without first complying with procedures set forth in Act. V.T.C.A., Family Code §§ 21.01, 21.61-21.66, 21.64.

Stephen F. Hefner, Sherman, for appellant.

Richard A. Danna, Dallas, for appellee.

ROBERTSON, Justice.

This is a habeas corpus proceeding under Article 1824a of the Texas Revised Civil Statutes. Shelley McBride, relator, seeks discharge from the custody of the Sheriff of Dallas County. He was detained pursuant to a commitment order issued by the judge of the 302nd District Court, who found rela-

HB

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Richard S. Hodes
Majority Leader
House of Representatives

Executive Director
Earl S. Mackey

February 18, 1981

Mr. Paul Quesnel
Pouch V, State Capitol
Juneau, Alaska

Dear Mr. Quesnel:

In response to your request for information on landlord-tenant laws in the states, I have enclosed several legislative reports which discuss this issue. With regard to discrimination against families with children in rental housing, the Children's Defense Fund is sending a list to me of the eight states which have laws prohibiting discrimination against families with children. I will send that list to you when received.

For any additional information, I suggest you contact the National Housing Law Project in Berkeley, California (415-548-9400).

I hope that this information will be helpful.

Sincerely,

Mindy Gaynes
Mindy Gaynes
Research Analyst

Enclosures

TITLE: MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY.

AUTHOR: KAKANS, R.

PUBLISHER: U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

LOCATION: WASHINGTON, D.C.

PUBLISHED: 01/01/80

SCOPE

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ABSTRACT

THIS STUDY EXPLORES THE EXTENT TO WHICH FAMILIES HAVE EXPERIENCED DISCRIMINATION IN FINDING RENTAL HOUSING BECAUSE THEY HAVE CHILDREN. IT EXAMINES: (1)FACTORS ASSOCIATED WITH DIFFERENT LANDLORD POLICIES; (2) ATTITUDES AND PREFERENCES OF TENANTS AND MANAGERS; (3)THE EXTENT TO WHICH RENTERS WITHOUT CHILDREN DEMAND HOUSING THAT EXCLUDES CHILDREN; (4)HOW RESTRICTIVE POLICIES ARE JUSTIFIED; AND (5)THE DEGREE TO WHICH HOUSING OPPORTUNITIES ARE LIMITED FOR FAMILIES WITH CHILDREN. (THIS PUBLICATION IS AVAILABLE FROM: SUPERINTENDENT OF DOCUMENTS, U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON, D.C. 20402. REFER TO PUBLICATION NUMBER HUD-0001627.) BIBL., CONT., ILL. INCLUDED.

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**BEYOND URLTA: A PROGRAM FOR
ACHIEVING REAL TENANT GOALS**

Richard E. Blumberg and Brian Quinn Robbins

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BEYOND URLTA: A PROGRAM FOR ACHIEVING REAL TENANT GOALS

Richard E. Blumberg* and Brian Quinn Robbins**

The once well-entrenched notion of the unique character of the landlord-tenant relationship has steadily eroded in the decade of reform symbolized by *Javins v. First National Realty Corp.*¹ *Javins* and its successors recognized the anachronism of applying feudal property law in the modern urban context and replaced the traditional land conveyance view of residential tenancy with the contractual doctrine of an implied warranty of habitability. Growing legislative and judicial concern has led to the rapid spread of the implied warranty doctrine and to the development of a panoply of related reforms.

A portion of this Article addresses the content of the increasingly popular Uniform Residential Landlord-Tenant Act (URLTA) and discusses various state adoptions of it. The URLTA has provoked much recent comment adequately summarizing its content.² For the most part, while recognizing that URLTA will not by itself achieve decent housing and fair treatment of tenants,³ virtually none of the commentators has dealt with the question of further reform. In addition to reviewing URLTA and surveying the adoption of URLTA and its component measures by state legislatures, this Article looks beyond the Uniform Act and proposes further reforms necessary to attain the goals of decent housing and fair treatment.

Part I examines each of the URLTA component reforms, its contribution to the achievement of the above-mentioned goals and

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¹ 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

² A summary of the issues surrounding the drafting of URLTA is contained in Note, *Uniform Residential Landlord and Tenant Act: Facilitation of or Impediment to Reforms Favorable to the Tenant?*, 15 WM. & MARY L. REV. 815 (1974).

³ Criticisms of URLTA and suggestions for further reform can be found in Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495 (1973); *The Uniform Residential Landlord and Tenant Act: Some Suggestions for Improvement*, 9 REAL PROP. PROB. & TR. J. 402 (1974); and Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572 (1974).

the Act's status in each American jurisdiction. The authors seek to provide the reader with a ready guide, through the citations included, to the status of each examined reform in each American jurisdiction. However, it must be recognized that landlord-tenant law is extremely dynamic. In any dynamic area of the law, the "correct rule of law" at any given time may be difficult to identify. Lower courts, for example, may be granting certain remedies as a matter of course although older appellate opinions addressing the issue in the same jurisdiction are unfavorable and have not yet been reversed. For purposes of this survey, the most recent opinion on the topic of the highest appellate court is assumed to be definitive. Nevertheless, the practitioner should not assume, given the rapidity of change, that the present lack of favorable precedent in the jurisdiction will mean an automatic denial of any generally recognized tenant remedy.

Part II discusses landlord-tenant reforms going beyond the Uniform Act and tenant tactics useful in achieving decent housing. Included are the remedies of receivership, retroactive rent abatement, specific performance of the warranty of habitability, a proposed landlord security deposit act, and a tenant-mortgagee negotiating strategy. Part III looks beyond the Uniform Act provisions for fair treatment of tenants, proposing a system of security of tenure/just cause eviction. An epilogue focuses on tenant organizing activities and their relationship to realization of the goals of decent housing and fair treatment.

No claim is made that the reform of rights and duties of landlords and tenants will, by itself, solve all the problems of the modern tenant. The enactment of a housing code does not, by itself, solve the problem of dilapidated housing. Much of the unfair treatment of tenants and of the paucity of decent housing available for low and moderate income tenants stems from the tenants' lack of bargaining power in today's housing markets. Ultimate and complete resolution of this plight may await the eradication of poverty itself. However, affluence alone will not eliminate all landlord-tenant conflicts.⁴ Legal reform is a necessary, though not sufficient, precondition of the achievement of these dual objectives. The reforms herein proposed offer promise of significant advancement towards fair treatment and decent housing for rich and poor alike.

⁴ Boston Globe, Mar. 3, 1975, at 3, col. 4 (tenant militancy in a Boston luxury apartment building).

I. THE UNIFORM RESIDENTIAL LANDLORD-TENANT ACT

The Uniform Residential Landlord-Tenant Act¹ incorporates most of the recent legal reforms in the area of landlord-tenant relations. This legislative package of reform measures has been adopted with variation in 13 states² and has been introduced in the legislatures

¹In 1969, the National Conference of Commissioners on Uniform State Laws established a subcommittee to study landlord-tenant relations. The conference approved a revised proposal of the subcommittee in August 1972. The American Bar Association endorsed the Act in February 1974. See generally J. Levi, *Uniform Residential Landlord and Tenant Act: A Brief History*, 1972 (available from Conf. of Comm'rs); Blumberg & Robbins, *The Uniform Residential Landlord-Tenant Act: The National Experience*, 4 HOUSING DIV. REP. NO. 15, P. 28 (Nov. 28, 1973) [hereinafter cited as *National Experience*]; Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495 (1973); Note, *Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 ISTD. L. REV. 471 (1973).

²Alaska, Arizona, Delaware, Florida, Hawaii, Kansas, Kentucky, Nebraska, New Mexico, Ohio, Oregon, Virginia, and Washington. The respective statutes and commentary are as follows: Alaska—ALASKA STAT. §§ 34.03.010-34.03.380 (1974). See Note, *Landlord-Tenant Reform: Habitability and Repair under the Uniform Residential Landlord and Tenant Act*, 3 U.C.L.A.-ALAS. L. REV. 123 (1973); Arizona—ARIZ. REV. STAT. ANN. §§ 33-1301 to 33-1381 (1974). See Clark & Hutchinson, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974); Blumberg & Robbins, *Analysis of Recently Enacted Arizona and Washington State Landlord-Tenant Bills*, 7 CLEARINGHOUSE REV. 134 (1973) [hereinafter cited as *Arizona and Washington*]; Delaware—DEL. CODE ANN. tit. 25, § 5100 et seq. (1974); Florida—FLA. STAT. ANN. §§ 83.40-83.73 (Supp. 1975-76). See Williams & Phillips, *Florida Residential Landlord and Tenant Act*, 11 FLA. ST. U. L. REV. 555 (1973). The Florida Act excluded the protection against retaliatory actions. This protection was subsequently provided by action of the State Attorney General under Florida's Deceptive and Unfair Trade Practices Act, Rules of Dep't of Legal Affairs, Rental Housing and Mobile Home Parks, ch. 2-11.07. Hawaii—HAWAII REV. STAT. §§ 521-1 to 521-76 (Supp. 1974). The Hawaii Act was adopted prior to approval of the final URLTA model and therefore deviates substantially from URLTA. Rent abatement and rent withholding are excluded and retaliatory actions are based on the more limited protections afforded in § 2-407 of the Model Residential Landlord-Tenant Act. Kentucky—KY. REV. STAT. ANN. §§ 383-505 to 383-715 (Supp. 1974). See Comment, *Forcible Detainer in Kentucky Under the Uniform Residential Landlord and Tenant Act*, 63 KY. L.J. 1046 (1975); Nebraska—NEB. REV. STAT. §§ 76-1401 to 76-1449 (Cum. Supp. 1974). See Kalish, *The Nebraska Residential Landlord and Tenant Act*, 54 NEB. L. REV. 603 (1975); Lonnquist & Healey, *A Prospectus on the Uniform Residential Landlord and Tenant Act in Nebraska*, 8 CLEARINGHOUSE REV. 336 (1975); New Mexico—N.M. STAT. ANN. § 70-7-1 to 70-7-51 (Supp. 1975); Ohio—OHIO REV. CODE ANN. §§ 5321.01 to 5321.19 (Page 1974). See Note, *The Ohio Landlord and Tenant Reform Act of 1974*, 25 CASE W. RES. L. REV. 876 (1975); Note, *Covenant of Habitability and the Ohio Landlord-Tenant Legislation*, 23 CLEV. ST. L. REV. 539 (1974); Oregon—ORE. REV. STAT. §§ 91.700 to 91.865 (1974). See Robbins, *The New Oregon Landlord-Tenant Act and the Uniform Residential Landlord and Tenant Act—A Comparison*, 7 CLEARINGHOUSE REV. 327 (1973); Virginia—VA. CODE ANN.

of ten others.³

The initial 1971 draft of URLTA contained several basic fair treatment and decent housing protections including the warranty of habitability⁴ and protection against retaliatory actions by landlords.⁵ While this draft provided more satisfactory protection than that previously proposed as the ABA-ALI Model Residential Landlord-Tenant Act (MRLTA),⁶ the National Tenant Organization (NTO) and other organized tenants' rights groups remained critical of parts of the draft. Provisions for just cause eviction and for protection from retaliation for tenant organizing were foremost among the additions demanded by these groups.

At subsequent public hearings, detailed statements from real estate and tenant groups were received⁷ and URLTA tenant protections were subsequently strengthened. The most significant change was the addition of protection against landlord retaliation for tenant organizing or membership in a tenant union.⁸ Other changes included a provision for injunctive relief for tenants whose landlords have breached URLTA-imposed obligations⁹ and a provision forming a basis for granting specific performance of the warranty of habitability.¹⁰ The maximum security deposit which could be required by landlords was reduced from two to one month's rent,¹¹ and

§§ 55-248.2 to 248.40 (Supp. 1975). Washington—WASH. REV. CODE ANN., §§ 59.18.010 to 59.18.900 (Supp. 1974). The Washington legislature reworded the act but retained most of the URLTA substance. See Stoebuck, *The Law Between Landlord and Tenant in Washington: Part I*, 49 WASH. L. REV. 291 (1974); *Arizona and Washington, supra*.

³California—A.B. 1202 (1973-74 Reg. Sess.); Connecticut—Com. B. 1808 (1973); Idaho—S.B. 1352 (1974) (tenant proposal) and S.B. 1391 (1974) (realtor's proposal); Illinois—H.B. 1345 (78th Gen. Ass. 1973); Indiana—H.B. 1042 (1975); North Carolina—H.B. 673 (1974); Pennsylvania—H.B. 1570, 1571 (1975); Rhode Island—73-S. 892 (1973); Vermont—S. 112 (1973); Wisconsin—A.B. 492 (1973).

⁴See pp. 7-9 *infra*.

⁵See pp. 13-17 *infra*.

⁶MRLTA § 2-203 provided for the warranty of habitability but remedies were limited to termination of the tenancy and minor repair and deduct. MRLTA omitted both the remedy of rent withholding and the defense of breach warranty in an eviction action. These vital tenant remedies were included in initial drafts of the URLTA and in §§ 2.104 and 4.105 of the final version.

The MRLTA retaliatory action provision (§ 2-407) omits a protective period of presumption of retaliation and protection for tenant organizing, both of which are provided for in URLTA § 5.101.

⁷See J. Levi, *supra* note 5, at 3.

⁸URLTA § 5.101(a)(3).

⁹*Id.* § 4.101(b).

¹⁰*Id.* § 4.101(b). See pp. 26-30 *infra*.

¹¹URLTA § 2.101(a). The period after termination of the tenancy within which a landlord is required to account for or return tenant security deposits was reduced from 30 days to 14 days. URLTA § 2.101(b).

tenants were afforded the remedy of rent abatement if essential services were not provided.¹⁶

Following the incorporation of these changes, the NTO and numerous state and local tenant organizations urged states to adopt URLTA.¹⁷ This tenant approval has not been unqualified, however, and attempts have been made to amend the URLTA model in order to strengthen tenant protections and to tailor the Act to local requirements.¹⁸

A. Decent Housing Provisions

URLTA included provisions aimed at both fair treatment and decent housing. Reforms designed to promote decent housing provide an array of tools for tenants' use in rehabilitating and maintaining housing stock. To the already widely extant housing codes, URLTA adds the warranty of habitability and the remedy of "repair and deduct."¹⁹

1. Housing Codes

A housing code is a legislative enactment containing minimum standards for human occupancy and establishing some form of legal obligation on the landlord to comply with these standards. Housing codes generally address space requirements, facilities, and other habitability-related characteristics as opposed to building codes, which address structural standards such as the specification of building materials. A jurisdiction's first recognition of the need for regulation of housing conditions and the landlord-tenant relationship has generally taken the form of a housing code. The first such provision in this country was the New York Tenement Act of 1867.²⁰

By 1910, over one-fourth of the states had adopted housing codes, similar to the New York City Act of 1901, covering urban multifamily dwellings.²¹ When the availability of federal urban renewal funds was linked to the existence of local housing codes in

¹⁶ *Id.* § 4.104(a)(2).

¹⁷ See *National Experience*, *supra* note 5.

¹⁸ An early Ohio URLTA reform proposal included innovations such as mandatory collective bargaining, mortgagee liability, and protection against retaliation for tenant complaints. Blumberg, *The Ohio Struggle with the Uniform Residential Landlord and Tenant Act*, 7 *COLUMBIANA REV.* 265 (1973). See also National Housing and Economic Development Law Project, *Bulletin*, Vol. III, No. 11 (Nov. 15, 1973) (proposed Pennsylvania landlord-tenant reform act).

¹⁹ N.Y. Laws ch. 908, 90th Sess., Vol. II (1867).

²⁰ See E. Mood, *The Development, Objective, and Adequacy of Current Housing Code Standards*, in *HOUSING CODE STANDARDS: THREE CRITICAL STUDIES* (Nat'l

1954,²¹ adoption of codes in almost every urban area in the country was assured.²²

However, the codes alone have done little to avert the problems of dilapidation and deterioration of the local housing stock. The failure has generally been one not of the content of the codes but rather of their enforcement.²³ One study revealed that 60 percent of the municipalities surveyed "did not require full compliance with the minimum standards of the housing code in the worst areas of the city even when the areas had not been scheduled for clearance and redevelopment."²⁴

Many proposals have been made for more effective enforcement of housing codes²⁵ and for broader-based reforms, acknowledging

Comm'n on Urban Problems Research Rpt. No. 19, 1969) [hereinafter cited as *HOUSING CODE STANDARDS*].

²¹ HUD Handbook, MPD 7100.1a *et seq.*, RHM 7204.1, promulgated pursuant to 42 U.S.C. § 1441 *et seq.* (1970), *repealed*, 42 U.S.C. § 5301 *et seq.* (Supp. IV, 1974).

²² Certain provisions of the Federal Housing Act of 1954 and the amendments of the 1964 Housing Act required "adequate housing codes as a prerequisite of a 'workable program.'" See 42 U.S.C. § 1451 (1970). Under this impetus the number of housing codes nationwide rose from 56 to at least 4,900. F. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS* 112 (Nat'l Comm'n on Urban Problems Research Rpt. No. 14, 1968) [hereinafter cited as *LEGAL REMEDIES*].

²³ See Grubetz & Grad, *Housing Code Enforcement: Sanction and Remedies*, 60 *COLUM. L. REV.* 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 *HARV. L. REV.* 801 (1965); Note, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 *U. CHICAGO REV.* 180 (1967); Note, *Administration and Enforcement of the Philadelphia Housing Code*, 106 *U. PA. L. REV.* 437 (1958). See also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Samuelson v. Quinones*, 119 N.J. Super. 338, 343, 291 A.2d 580, 583 (1972). See generally B. Lieberman, *Administrative Provisions of Housing Codes*, in *HOUSING CODE STANDARDS*, *supra* note 20, at 60, 61-69; B. LIEBERMAN, *LOCAL ADMINISTRATION AND ENFORCEMENT OF HOUSING CODES: A SURVEY OF 39 CITIES* (NAHRO Pub. No. 8531, 1969).

²⁴ B. Lieberman, *Administrative Provisions of Housing Codes*, *supra* note 23, at 63.

²⁵ Foremost among these are the Federally Assisted Code Enforcement Program (FACE) and Certificate of Occupancy programs. FACE was created by the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 481, which was replaced by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (Supp. IV, 1974). The FACE program was designed to provide cities and individual homeowners with direct grants and loans to bring residential property into code compliance. It also provided funds for municipal code enforcement.

The Certificate of Occupancy programs are created by municipal ordinance and mandate inspection and certification of vacant units before they can be legally occupied and rented. See, e.g., *City of East Orange, New Jersey, Ordinance No. 15* (1971); *Washington, D.C., Zoning Regulations § 8104.1 et seq.* (July 1958). The constitutionality of these Certificate of Occupancy ordinances appears to be questionable in light of the fourth amendment prohibition against unreasonable search and seizure. See *Camara v. Municipal Court*, 387 U.S. 523 (1967). *But see* *Currier v. City*

that housing codes alone have not been, and perhaps cannot be, successful in maintaining or upgrading urban housing.¹⁸ However, even with their failings, housing codes do constitute a legislative statement of the community's minimum standards of health and safety in residential property. These codes form the basis for an implied warranty of habitability by imposing on landlords an obligation to maintain their property in a livable condition. Although URLTA does not itself contain a housing code, the duties of repair and maintenance it imposes on landlords incorporate the requirements of applicable local housing codes.¹⁹

2. Warranty of Habitability

The warranty of habitability, effective in some form in 28 states and the District of Columbia,²⁰ is a term of implied contract obligat-

of Pasadena, 48 Cal. App. 3d 810, 121 Cal. Rptr. 913 (1975), cert. denied, 44 U.S.L.W. 3331 (U.S. Dec. 1, 1975).

¹⁸ See the Ackerman-Komesar debate: Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971). In connection with this debate, see W. Hirsch, J. Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098 (1975); Hartman, Kessler and LeGates, *Municipal Housing Code Enforcement and Low Income Tenants*, 40 AMER. INSTITUTE OF PLANNERS J. 90 (1974).

¹⁹ URLTA § 2.104(a)(1). Local housing codes are similarly referred to in other sections of the Act. See *id.* §§ 1.301(2), 2.104(b), 2.104(d)(2), and 3.101(1).

²⁰ Both legislatures and courts have responded to the modern landlord-tenant crisis by establishing warranties of habitability. The jurisdictions and their respective authority, legislative or judicial, are as follows: Alaska—ALASKA STAT. §§ 34.03.100, 34.03.160, 34.03.180 (1974); Arizona—ARIZ. STAT. ANN. §§ 33-1324 and 33-1361 (1974); California—CAL. CIV. CODE §§ 1941, 1942 (West 1974) (warranty of habitability and repair and deduct remedy), and *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (common law warranty of habitability eviction defense complementary to statutory remedies); Connecticut—CONN. GEN. STAT. ANN. §§ 47-24 *et seq.*, (1960) and *Todd v. May*, 6 Conn. Cir. Ct. 731, 316 A.2d 793 (1973); Delaware—DEL. CODE ANN. tit. 25, § 5303 (1974); District of Columbia—*Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Florida—FLA. STAT. ANN. §§ 83.51, 83.56 (1973); Hawaii—HAWAII REV. STAT. § 521-52 (Supp. 1974); Illinois—*Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Iowa—*Meuse v. Fox*, 200 N.W.2d 791 (Iowa 1972); Kansas—*Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); Kentucky—KY. REV. STAT. ANN. §§ 383.595, 383.625 (Supp. 1974); Maine—ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1974) (allows cancellation of lease); Maryland—MD. REAL PROP. CODE ANN. § 8-211 (Cum. Supp. 1975), superceded in their respective jurisdictions by Baltimore City Public Local Laws, § 9-9, 9-10, 9-14.1

ing residential landlords to supply housing units which are in substantial compliance with basic standards of habitability²¹ expressed in local housing codes.²² Breach of the warranty has been variously held

(*eff.* July 1, 1971), and Montgomery County code, Fair Landlord-Tenant Relations, ch. 93A (Nov. 21, 1972); Massachusetts—MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1974) (rent withholding and eviction defense available where unit is in violation of code, and tenant while not in arrears gave landlord written notice of violations and intent to withhold), and *Boston Housing Authority v. Hemmingway*, 293 N.E.2d 831 (Mass. 1973) (tenant failing to give statutorily required notice of code violations and intent to withhold rent is subject without defense to eviction for nonpayment; however, common law implied warranty of habitability is a defense to claim for rent); Michigan—MICH. COMP. LAWS ANN. § 554.139 (Supp. 1974), and *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Minnesota—MINN. STAT. § 504.18 (1974), applied in *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973); Missouri—*King v. Moorehead*, 495 S.W.2d 65 (1973); Nebraska—NEB. REV. STAT. §§ 76-1419, 76-1425 *et seq.* (Cum. Supp. 1974); New Hampshire—*Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); New Jersey—*Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); New York—N.Y. REAL PROP. LAW § 235-b (1975), as adopted in ch. 597, [1975] N.Y. ACIS 875; Ohio—OHIO REV. CODE ANN. §§ 5321.04, 5321.07 (Page Supp. 1974); Oregon—ORE. REV. STAT. §§ 91.770, 91.800, 815 (1974); Pennsylvania—*Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974); Virginia—VA. CODE ANN. §§ 55-248.13, 55-248.25 (Cum. Supp. 1975); Washington—WASH. REV. CODE ANN. § 59.18.060 (Supp. 1974), enacted after judicial implication of warranty of habitability in *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); Wisconsin—*Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). But see *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). In addition, the Colorado Supreme Court has recently adopted the principle of mutuality of lease covenants in a case involving an explicit landlord repair warranty, *Shanahan v. Collins*, 539 P.2d 1201 (Colo. 1975). Certiorari has been granted in a case squarely raising the issue of a warranty of habitability, *Blackwell v. Del Buseo*, Colo. Ct. App. No. 74-286 (March 10, 1975), cert. granted, No. C-728 (Colo. Sup. Ct. July 7, 1975).

²¹ Contract law and contractual remedies are increasingly used by courts in landlord-tenant cases. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075-76 (D.C. Cir. 1970); *Green v. Superior Court*, 10 Cal. 3d 616, 624-30, 111 Cal. Rptr. 704, 708-12 (1974), and cases cited therein. The warranty of habitability developed in part by analogy to consumer cases. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). Creation of the warranty reverses the traditional common law doctrine of independent covenants under which the obligation to pay rent was independent of any landlord obligation to repair or maintain. The substituted doctrine of mutually dependent covenants is a traditional contract concept, while the independent covenant doctrine is based on property law concepts. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082-83 (D.C. Cir. 1970). See also Note, *Landlord-Tenant Law—Dependency of Lease Covenants*, 2 FORD. URBAN. L.J. 333 (1974).

²² Almost all state courts adopting the warranty of habitability have defined it in terms of applicable housing codes. See e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080-81 (D.C. Cir. 1970). At least one state court has impliedly chosen to rely upon judicial discretion in defining the content of the warranty rather than refer to codes. See *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). In any event, code violations are always admissible evidence of breach of the warranty. See, e.g., *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

to give rise to an affirmative action by the tenant for damages,³¹ a defense to an eviction action for nonpayment of rent,³² or both.³³ Following the enactment of housing codes, the warranty of habitability has often been the first judicial or legislative recognition of tenants' rights.³⁴ Adoption of the warranty manifests a fundamental change in the state's view of the landlord-tenant relationship.

The basic warranty provision of URLTA obligates the landlord to "comply with the requirements of applicable housing codes materially affecting health and safety."³⁵ Landlords must maintain the unit at all times in a safe and habitable condition and provide appropriate and necessary services, such as water, heat, electricity, and garbage removal.³⁶ Tenant remedies for breach of the warranty provision include the right to terminate the tenancy for landlord breaches which materially affect health and safety.³⁷ Tenants may also recover actual damages caused by the breach or seek injunctive relief.³⁸ In addition, in an action by the landlord for rent or possession based on nonpayment of rent, tenants may counterclaim for damages arising from the landlord's breach.³⁹

³¹ See, e.g., *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (counterclaim in suit for rent).

³² See, e.g., *Jack Spring Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

³³ URLTA and most warranty of habitability statutes allow use of the warranty as the basis for an affirmative action or as a defense to eviction for nonpayment of rent. Successful use of warranty as a defense to an eviction is a good indicator that use in an affirmative action will be permitted. However, precedent allowing use as an affirmative action may not be as readily transferrable to use as a defense in summary eviction proceedings, as statutory provisions or rules of court may prohibit the assertion of defenses in a summary eviction court. See *Green v. Superior Court*, 10 Cal. 3d 616, 631-35, 111 Cal. Rptr. 704, 714-16, 517 P.2d 1168, 1176-80 (1974), which rejected the assertion that the warranty of habitability should be restricted to an affirmative action only. *But see Lindsey v. Normet*, 405 U.S. 56, 65-69 (1972) (due process not violated by disallowance of all affirmative defenses in summary eviction proceeding).

³⁴ Protection against retaliation is the other major remedy usually recognized at the initial stage of reform.

³⁵ URLTA § 2.104.

³⁶ *Id.* § 2.104 Subsection (c) allows landlords and tenants of single family dwellings to agree to their own maintenance arrangements so long as these agreements are entered into in good faith. Subsection (d) allows similar agreements between landlords and tenants in multi-unit dwellings, subject to the following restrictions: (1) the agreement must be entered into in good faith and must be set forth in a separate writing; (2) the maintenance must not be necessary to achieve code compliance; (3) the rights of other tenants must not be affected; and (4) such an agreement may not be treated as a condition to performance of any part of the rental agreement.

³⁷ *Id.* § 4.101. Variable notice periods are specified in this section.

³⁸ *Id.* § 4.101(b).

³⁹ *Id.* § 4.105. This section also allows the court to require tenants to deposit unpaid and accruing rent into court pending determination of the case. However, the practice of rent escrow has not been favored by the courts as it discourages the exercise of remedies for breach of the warranty of habitability. See *Bell v. Tsintolas Realty Co.*,

There are several competing methods for computing the amount of damages to which tenants might be entitled. These methods include the market value theory (difference between the market value of the premises in habitable condition and their market value in deteriorated condition),⁴⁰ the percentage diminution theory (reduction in rent based upon the extent to which use of the premises was lost),⁴¹ and a tort-related theory (damages based on inconvenience and suffering).⁴² Where "affirmative rent abatement" is not available, recovery under the warranty is limited to that amount accruing during the period of rent withholding by the tenant.⁴³

Rent abatement is the judicial reduction of the tenant's periodic rental obligation. It may be prospective, reducing the tenant's future rental obligations in light of a continued substantial breach of the warranty, or retroactive, adjusting the tenant's obligations in periods past to match the landlord's warranty performance. A retroactive rent abatement may take the form of sanctioning the tenant's previous withholding of rent, or a portion thereof, or of allowing an affirmative action to recover rents paid in past periods in excess of the judicially abated rent for those periods. The first form of rent abatement has been granted as a remedial measure in successful warranty of habitability eviction defenses.⁴⁴

The affirmative rent abatement recovery is analogous to a damage action for breach of contract.⁴⁵ Regardless of the theory of damages applied, rent abatement in connection with defects in the premises creates an economic incentive for the landlord to repair and maintain the unit. While repairs are underway or in the event that a

430 F.2d 474 (D.C. Cir. 1970); *Cooks v. Fowler*, 459 F.2d 1269 (D.C. Cir. 1971). *Contra*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970).

⁴⁰ This is currently the most prevalent method for valuation of damages. See *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972); *Boston Housing Authority v. Hemmingway*, 293 N.E.2d 831, 845 (Mass. 1973); *Green v. Superior Court*, 10 Cal. 3d 616, 638-39, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974). Expert testimony may be required to ascertain market value.

⁴¹ This method is probably the easiest to apply because no expert testimony is required, the tenant's own testimony being sufficient. See *Academy Spices, Inc. v. Brown*, 111 N.J. Super. 477, 485-86, 268 A.2d 556, 561-62 (1970).

⁴² This damage theory, although proposed in the literature, has not yet been adopted by any statute or published decision. See *Moskowitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1464-73 (1974).

⁴³ When the warranty is raised as a defense in a summary eviction proceeding, the limited continuing equity jurisdiction of a summary court may preclude the issuance of a prospective order. See, e.g., N.J. STAT. ANN. § 2A:18-54 (1952); N.J. RULES OF COURT 6:3-4 (West 1975).

⁴⁴ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁴⁵ See pp. 24-26 *infra*.

landlord declines to comply, tenants at least enjoy the benefit of reduced rent. Moreover, because the implied warranty of habitability legalizes collective rent withholding, it can provide a strong impetus for tenant organizing.⁴⁶

The major limitation of the warranty of habitability, as generally applied, is its failure either to mandate repair of the premises by the landlord or to enable the tenant to finance such repairs. The economic sanction of prospective rent abatement may or may not induce the landlord to repair; most landlords will not repair where the capitalized cost of such repair is greater than the capitalized cost of continuing rent abatement. This shortcoming is especially acute because it means that the available money damages and savings from rent abatement will be insufficient to finance substantial repairs at the tenant's direction.

Furthermore, the notion that the tenant should finance repairs out of the damage award or rent abatement savings fails to recognize the essentially compensatory character of those awards. As payment for damages already incurred by the tenant, there is no reason why they should be expended on repairs that the landlord is obligated to make. To do so is to shift the obligation to repair from the landlord onto the tenant. These shortcomings prevent reliance upon the warranty of habitability alone to attain the goal of decent housing.

3. Repair and Deduct

The repair and deduct remedy allows a tenant to repair or have repaired minor defects impairing habitability and to finance that repair by deducting its cost from the next rent payment.⁴⁷ Thus, repair and deduct addresses the principal failing of the warranty of habitability and rent abatement by directly providing for landlord-financed repair of the premises. It has been adopted by statute or judicial decision in 20 states.⁴⁸

⁴⁶ David & Callan, *Newark's Public Housing Rent Strike: The High-Rise Ghetto Goes to Court*, 7 CLEARINGHOUSE REV. 581 (1974). See *Dortman v. Booter*, 414 F.2d 1168 (D.C. Cir. 1969).

⁴⁷ The tenant runs a calculated risk in exercising the right to repair and deduct. If the landlord sues for the portion of rent deducted, the tenant will have to justify the deduction and bear the risk that the defect will be adjudged insufficient to justify use of the remedy. See *Academy Spire, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970), for a discussion of "vital facilities" versus "amenities." See also *Marini v. Ireland*, 56 N.J. 130, 146, 765 A.2d 526, 535 (1970), where the New Jersey Supreme Court required "adequate notice to the landlord of the faulty condition" and "a period of time adequate to accomplish such repair and replacements."

⁴⁸ The jurisdictions and their respective legislative or judicial authorities are as follows: Alaska—ALASKA STAT. § 34.03.180 (Cum. Supp. 1974); Arizona—ARIZ. REV. STAT. ANN. § 33-1363 (1974); California—CAL. CIV. CODE § 1941, 1942 (West 1954);

URLTA allows tenants to expend and deduct from periodic rent payments \$100 or an amount equal to one-half the periodic rent, whichever is the greater, to repair defects in the unit arising out of the landlord's noncompliance with the housing code.⁴⁹

Repair and deduct is a logical extension of the warranty of habitability. The warranty expresses the societal commitment to a standard of decent housing. Many serious defects worsen with time and early remedial repair and deduct will frequently limit the damages assessable to the landlord and the economic cost of achieving an acceptable housing standard. Thus, the remedy of repair and deduct can be justified both on the basis of the public policy of promoting economic efficiency and as a benefit to tenants.

As generally applied, repair and deduct has three serious limitations. First, the amount of any given deduction is usually restricted⁵⁰ and the frequency with which any one tenant can employ the remedy is also subject to limits.⁵¹ These restrictions⁵² effectively limit the remedy to relatively low cost repairs, since the tenant can neither

Colorado—*Shanahan v. Collins*, 539 P.2d 1261 (Colo. 1975); Delaware—DEL. CODE ANN. tit. 25, §§ 5306, 5307 (1974); Georgia—*Douglas v. Taylor & Norton Co.*, 5 Ga. App. 773, 63 S.E. 928 (1909). This protection may be waived by express agreement. *Abrams v. Joel*, 108 Ga. App. 662, 134 S.E.2d 480 (1963); Hawaii—HAWAII REV. STAT. § 521-64 (Supp. 1974); Illinois—*Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Kentucky—KY. REV. STAT. ANN. § 383.635 (Supp. 1974); Louisiana—LA. CIV. CODE ANN. arts. 2693-94 (West 1975); Massachusetts—MASS. GEN. LAWS ANN. ch. 111, § 127L (Supp. 1975); Michigan—MICH. COMP. LAWS ANN. § 125.534 (Supp. 1975-76); Montana—MONT. REV. CODE ANN. §§ 42-201, 42-202 (Supp. 1974); Nebraska—NEB. REV. STAT. § 76-1427 (Cum. Supp. 1974) (limited to utilities or essential services); New Jersey—*Marini v. Ireland*, 56 N.J. 130, 146-47, 265 A.2d 526, 535 (1970) (remedy adopted on the theory of partial constructive eviction based on failure to maintain vital facilities); North Dakota—N.D. CENT. CODE § 47-16-12 and -13 (1960); Ohio—OHIO REV. CODE ANN. §§ 1923.061, 5321.07 (Page Supp. 1974); Oklahoma—OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1951); Oregon—ORE. REV. STAT. § 91.805 (1974) (limited to repair of utilities or essential services only); South Dakota—S.D. COMPILED LAWS ANN. § 43-32-9 (1967); Virginia—VA. CODE ANN. § 32-64 (1973) (toilet facilities only); Washington—WASH. REV. CODE ANN. § 59-18-100 (Supp. 1974).

⁴⁹ URLTA § 4.103.

⁵⁰ E.g., ARIZ. REV. STAT. ANN. § 33-1363 (1974) (limiting the deduction to one-half a month's rent or \$150, whichever is greater); CAL. CIV. CODE § 1942 (West 1954) (limit of one month's rent); MASS. GEN. LAWS ANN. ch. 111, § 127 (Supp. 1975) (limit of two months' rent). *But see Marini v. Ireland*, 56 N.J. 130, 765 A.2d 526 (1970), which does not limit deductions under the common law repair and deduct.

⁵¹ E.g., CAL. CIV. CODE § 1942(a) (West Supp. 1975), which restricts use to once in a 12 month period. Similarly, Massachusetts restricts use to two months in 12 month period. MASS. GEN. LAWS ANN. ch. 111, § 127L (Supp. 1975).

⁵² No such restrictions are specified in Louisiana, New Jersey, North Dakota, Oklahoma, or South Dakota.

deduct the total amount of a major repair at once nor finance it through deductions in successive months.

Second, some repair and deduct statutes and judicial decisions require that the tenant notify the landlord and grant him a reasonable time to make the repairs before taking unilateral action. Tenants unaware of the notice requirement may initiate repairs and later learn of the unavailability of a deduction from rent. There would seem to be no reason to require notice if the landlord knows or should know of the breach,³¹ or if the tenant has a reasonable belief, based on past experience or other grounds, that the landlord will not repair. Moreover, there does not seem to be any reason to require the tenant to tolerate serious defects impairing habitability for any time period whatsoever. In these situations no interest is served by the imposition of a requirement of formal notice by the tenant.

Third, and most importantly, the tenant is forced to shoulder the risk that later judicial scrutiny will declare the repair and deduct remedy to have been improperly invoked because the defect is adjudged to have been insufficiently substantial, or because of lack of adequate notice. The tenant would then become liable for the entire month's rent in addition to the cost of repair. Such double liability may be especially disastrous for low income tenants, as failure to pay may bring eviction. The possibility of eviction resulting from a good faith error of judgment by the tenant unnecessarily inhibits utilization of the repair and deduct remedy.

B. Fair Treatment Provisions

1. Retaliatory Action

The problem of retaliation is inherent in any governmental scheme of regulation relying in part on the initiative of the parties. Actions by the tenant deemed by the landlord to be inimical to landlord interests may evoke a retaliatory response. The landlord's motive may be retributive or exemplary, designed to intimidate and prevent other tenants from taking similar actions. The result for the tenant is the same.³² Protection of the tenant from retaliatory action

³¹ Cf. Moskowitz, *supra* note 42, at 1462-63.

³² See 2 NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, HANDBOOK ON HOUSING LAW, ch. 3 (1970); Note, *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches?*, 22 HASTINGS L.J. 1365 (1971); Note, *Retaliatory Eviction: The Tenant's Right to Challenge the Landlord's Motive*, 21 SYRACUSE L. REV. 986 (1970); Note, *Landlord and Tenant—Burden of Proof Required to Establish Defense of Retaliatory Eviction*, 1971 WIS. L. REV. 939.

by the landlord is necessary to secure the free exercise of all other tenant rights, as well as to protect the organizing process through which these rights may be protected or expanded.

Retaliatory action may take the form of eviction, rent increases, utility shut-offs, or other forms of harassment. The URLTA protects tenants from retaliation in the form of increased rents, decreased services, or suits for possession.³³ This protection is extended only where the retaliatory action is in response to certain enumerated tenant activities, such as tenant organizing, tenant union membership,³⁴ or reporting code violations to government authorities³⁵ or to the landlord,³⁶ but does not address itself to nonrenewal of a lease.³⁷ The Act provides a one year presumption of retaliation after exercise by the tenant of any of these protected activities.³⁸ But URLTA denies protection from a retaliatory action for possession where the tenant or tenant's family, due to lack of reasonable care, is responsible for a violation of the building or housing code,³⁹ or where rent is in default.⁴⁰ In addition, the tenant may be forced to vacate the premises if the repairs necessary to bring the unit into compliance with the relevant habitability standard can only be done on an empty apartment.⁴¹ At least 26 jurisdictions have recognized the general problem of retaliation and protect some types of tenant activities from some forms of retaliatory actions.⁴² All of these jurisdictions protect ten-

³³ URLTA § 5.101(a).

³⁴ *Id.* § 5.101(a)(3).

³⁵ *Id.* § 5.101(a)(1).

³⁶ *Id.* § 5.101(a)(2).

³⁷ The presumption of renewability at the end of the lease term is the principal factor distinguishing security of tenure measures from prohibitions against retaliatory eviction. See p. 40 *infra*. Additionally, with the security of tenure the evicting landlord must always establish just cause. To utilize retaliatory eviction protections, on the other hand, it is the tenant who must show retaliatory motive, either directly or with the aid of presumptions.

³⁸ URLTA § 5.101(b).

³⁹ *Id.* § 5.101(c)(1).

⁴⁰ *Id.* § 5.101(c)(2).

⁴¹ *Id.* § 5.101(c)(3).

⁴² The jurisdictions and their relevant statutory or common law authorities are: Alaska—ALASKA STAT. § 34.03.310 (Cum. Supp. 1974); Arizona—ARIZ. REV. STAT. ANN. § 33-1381 (1974); California—CAL. CIV. CODE § 1942.5 (West Supp. 1975), and *Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970); Connecticut—CONN. GEN. STAT. ANN. § 19-375a (Supp. Pamphlet 1975); Delaware—DEL. CODE ANN. tit. 25, § 5516 (1974); District of Columbia—D.C. CODE ANN. § 45-1624 (Supp. 1975-76), and *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Hawaii—HAWAII REV. STAT. § 521-74 (Supp. 1974); Illinois—ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1969); *Clare v. Fredman*, 59 Ill. 2d 20, 319 S.E.2d 18 (1974); Kentucky—KY. REV. STAT. ANN. § 383.705 (Supp. 1974); Maine—ME. REV. STAT. ANN. tit. 14 § 6001 (1974); Maryland—MD. REAL PROP. CODE ANN. § 8-208.1 (Supp. 1974); Massachusetts—

ants who report code violations to state or local governments.⁶⁵ Reporting code violations or substantial defects to the landlord⁶⁶ and joining or promoting a tenants' union⁶⁷ are protected activities in a majority of the 26 jurisdictions. A majority also prohibit retaliatory rent increases and decreases in services⁶⁸ where the tenant activity would have been a valid defense to eviction. New Jersey goes even further and prevents a landlord from denying a lease renewal for a retaliatory purpose.⁶⁹

The Court of Appeals of Washington held in 1969 that a retaliatory eviction defense was unavailable following landlord discovery that the tenant was informing other tenants of their legal rights concerning their tenancies.⁷⁰ Washington subsequently adopted the

MASS. GEN. LAWS ASS. ch. 186, § 18 (Supp. 1975); Michigan—MICH. COMP. LAWS ASS. § 600.5720 (Supp. 1975-76); Minnesota—MINN. STAT. ANN. § 566.03, .28 (Supp. 1975-76); Nebraska—NEB. REV. STAT. § 76-1439 (Cum. Supp. 1974); New Hampshire—N.H. REV. STAT. ASS. § 540:13 (Supp. 1973); New Jersey—N.J. STAT. ASS. § 2A:42-10.10 (Supp. 1975-76), and E. & F. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 844 (1971); New York—N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney, 1974); Ohio—OHIO REV. CODE ASS. § 5321.02 (Page Supp. 1974); Oregon—ORE. REV. STAT. § 91-865 (1974); Oregon Laws of 1973, ch. 559, § 32; Pennsylvania—PA STAT. ASS. tit. 35, § 1700 (Supp. 1975-76); Rhode Island, R.I. GEN. LAWS ASS. § 34-20-10 (1970); Tennessee—TENN. CODE ASS. § 53-5505 (Supp. 1974); Virginia—VA. CODE ASS. § 55-248.39 (Supp. 1975); Washington—WASH. REV. CODE, §§ 59.18.240, 59.18.250 (Supp. 1973); Wisconsin—Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W. 2d 297 (1970).

⁶⁵ Many statutes condition retaliation as an eviction defense upon the tenant being current in rent. See, e.g., ARIZ. REV. STAT. § 33-1381 (1974); ORE. REV. STAT. § 91-865 (1974). See also *Edwards v. Habibi*, 397 F. 2d 687, 701 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969): "There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence."

⁶⁶ See, e.g., HAWAII REV. STAT., § 521-74(a)(1)(2) (Supp. 1974); CAL. CIV. CODE, § 1942.5 (West Supp. 1975).

⁶⁷ See, e.g., *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 504 (S.D. N.Y. 1969): "There can be no doubt of the right of a tenant to discuss the condition of his building with his co-tenants to encourage them to use legal means to remedy improper conditions, to hold meetings, and to inform public officials of the conditions. In short, a tenant can organize the other tenants of his building to improve living conditions." See also *McQueen v. Drucker*, 317 F. Supp. 1122, 1132, *aff'd*, 438 F.2d 781 (1st Cir. 1971).

⁶⁸ This is usually done by use of specific statutory language. See, e.g., ORE. REV. STAT. § 91-865(1) (1974): "Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession . . . if broader language prohibiting substantial alteration of the lease may be utilized toward the same end. See, e.g., N.J. STAT. ASS. § 2A:42-10.10(d) (1975).

⁶⁹ N.J. STAT. ASS. § 2A:42-10.10(d) (1975).

⁷⁰ *Motodav Donohoe*, 1 Wash. App. 174, 459 P. 2d 654 (1969).

URLTA, including the retaliatory eviction section. However, the uniform act provision does not extend protection to tenant organizing.⁷¹ The Supreme Court of Hawaii recently rejected a retaliatory eviction defense based on the first amendment.⁷² Finding no state action in a landlord's utilization of summary judicial processes to repossess against a holdover tenant, the court declined to find an abridgment of tenant rights of speech and association. A strong dissent argued for recognition of protections for tenant organizing and for the reporting of code violations.⁷³

The shortcomings of present protections against retaliation are twofold. First, the coverage of protection is inadequate, both in terms of the tenant activities protected and the forms of landlord retaliation proscribed.⁷⁴ The greatest single defect is the omission of protection for tenant organizing, an omission repeated in URLTA. Several of the attempts at protection are incomplete in that they proscribe only some of the common forms of retaliation and harassment and presumably leave inventive and vindictive landlords to their own devices.

Second, the victimized tenant faces the difficult task of proving retaliatory intent or motive. A majority of the statutes attempt to resolve this problem by presuming retaliatory intent where specified landlord action follows protected tenant activity within a certain time period.⁷⁵ Whereas normally an eviction notice requires no statement of cause, this shift of the burden forces the landlord to present a valid case for eviction. It should be noted, however, that once the period of presumption has run out, the tenant is left to prove retaliatory intent unaided. Considering the difficulties inherent in such proof, the statutory protections may only have the effect of postponing the retaliation. In this regard no period of presumption can be entirely effective. Within the context of one year residential leases, the one year presumptive period can hardly be criticized as too short. Only under a just cause eviction statute⁷⁶ can the presumption be permanently reversed so as to provide long term security of tenure for

⁷¹ See note 59 *supra*.

⁷² *Aluli v. Trusdell*, 508 P.2d 1217 (Hawaii 1973), cert. denied, 414 U.S. 1040 (1973).

⁷³ *Id.* at 1222-26.

⁷⁴ The Hawaii statute is subject to so many statutory exceptions as to render its operation cumbersome and its coverage incomplete. HAWAII REV. STAT. § 521-74 (Supp. 1974).

⁷⁵ The presumption most often remains in force for a six month period. See, e.g., ORE. REV. STAT. § 91-865(2) (1974); ARIZ. REV. STAT. ANN. § 33-1381(B) (Spec. Pamphlet 1974).

⁷⁶ See pp. 40-44 *infra*.

tenants. Additionally, protection should be granted without proof of retaliatory intent where the disciplining action has the effect of creating a reasonable fear of retaliation on the part of other tenants.⁷⁷

2. Distress and Distraint

Under the common law of property, the self-help measures of distress and distraint were available to landlords. Through the seizure of the personal property of a tenant (distress) or the locking of the tenant out of the premises and thereby gaining control over the tenant's property (distraint)⁷⁸ the landlord established a possessory lien on the tenant's property, securing payment of overdue rents.⁷⁹ In their pure common law form,⁸⁰ distress and distraint have not been widely accepted in American jurisdictions due to their obvious utility as tools of tenant abuse and the preferred creditor status they confer on a landlord.⁸¹

Accordingly, some jurisdictions never recognized these remedies as part of their common law;⁸² others have modified or abolished them by statute.⁸³ In several states, however, landlords can still seize tenant property under landlord lien statutes.⁸⁴ While these lien statutes somewhat alleviate the harsher aspects of the common law,⁸⁵ many of them nevertheless function extrajudicially without affording the tenant a prior hearing or court supervision.⁸⁶ Landlord

⁷⁷ Cf. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

⁷⁸ For a detailed discussion of the common law remedies of distress and distraint, see *Klim v. Jones*, 315 F. Supp. 109, 118-21 (N.D. Cal. 1970). See also *Rhyhart, Distress*, 13 MD. L. REV. 185 (1953); Note, *The Landlord and the Tenant's Chattel Mortgage in Pennsylvania*, 13 U. PITT. L. REV. 125 (1951).

⁷⁹ See *Klim v. Jones*, 315 F. Supp. 109, 118-21 (N.D. Cal. 1970).

⁸⁰ Distress and distraint are the product of feudal land tenure, 2 AMERICAN LAW OF PROPERTY § 9.47 (A.J. Casner ed. 1952), and the long abandoned doctrine of an innkeeper's absolute liability, *Klim v. Jones*, 315 F. Supp. 109, 120 (N.D. Cal. 1970).

⁸¹ See 2 AMERICAN LAW OF PROPERTY § 9.47 (A.J. Casner ed. 1952); 2 POWELL ON REAL PROPERTY § 230[2] (P. Rohan ed. 1974).

⁸² "The common law right to distraint for rent is violative of the conditions and wants of the people of this territory . . . and is not in force here." *Smith v. Wheeler*, 4 O.R. 138, 44 P. 203 (1896). See also *Standish v. Moldawan*, 37 A.2d 788 (N.H. 1944).

⁸³ See, e.g., ARIZ. REV. STAT. § 33-1372 (Spec. Pamphlet 1974); CAL. PEN. CODE § 418 (West 1970); ILL. REV. STAT., ch. 80, § 16 (1973); MASS. GEN. LAWS, ch. 186, § 15B (Supp. 1975). See generally Note, *Real Property: Distress for Rent in the United States*, 2 CORNELL L.Q. 357 (1971).

⁸⁴ See, e.g., ALA. CODE, tit. 31 §§ 29-34 (1959); MISS. CODE ANN. § 89-7-51 (1972).

⁸⁵ See Note, *Real Property: Distress for Rent in the United States*, 2 CORNELL L.Q. 357 (1971).

⁸⁶ For a discussion of one state's statutorily modified right to distraint, see Note, *Pennsylvania Landlord and Tenant Act of 1951*, U. PITT. L. REV. 396 (1951). The

lien statutes have been successfully challenged on constitutional grounds.⁸⁷ Such provisions not requiring notice and a hearing prior to the taking of tenants' property have been held to violate due process guarantees.⁸⁸

The URLTA abolishes distraint for rent and renders landlord liens or security interests in the tenant's household goods unenforceable.⁸⁹ It allows the greater of three months' rent or treble damages plus attorney's fees, if the landlord unlawfully removes the tenant's possessions or excludes the tenant from the premises.⁹⁰ In effect, distress and distraint principles are rendered impotent. Indeed, the URLTA reform would do much to ameliorate the "deep personal hardship [which] can result from the seizure of . . . household goods."⁹¹

3. Security Deposits

While security deposits⁹² may serve legitimate landlord interests, they are also readily abused.⁹³ They can present a major obstacle to low-income tenants' efforts to obtain decent, safe, and

statute discussed was declared unconstitutional in 1972 because it permitted the landlord to levy on tenant's property without prior notice and hearing. *Gross v. Fox*, 349 F. Supp. 116-3 (E.D. Pa. 1972), *vacated and remanded on other grounds*, 496 F.2d 1153 (3d Cir. 1974). See also Note, *Gross v. Fox: Landlord's Distraint Unconstitutional in Pennsylvania*, 35 U. PITT. L. REV. 191 (1973).

⁸⁸ It has been stated that "[m]odern notions of due process leave no room for landlords to be judges in their own causes. Damage actions for trespass by the tenant after the fact do not provide a constitutional substitute for prior notice and hearing." *Gross v. Fox*, 349 F. Supp. 116-4, 1167 (E.D. Pa. 1972), *vacated and remanded on other grounds*, 496 F.2d 1153 (3d Cir. 1974).

⁸⁹ The constitutional infirmities found in the statutory distress statutes are equally present and have been successfully attacked in statutes purporting to give the landlord a lien on the tenant's property. Whether the landlord must get a distress warrant, *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971), or the landlord may summarily seize and hold property under the authority of a "lien" law, *Dielen v. Levine*, 344 F. Supp. 823 (D. Neb. 1972), such actions are unconstitutional because they allow seizure without notice and a hearing. See *Adams v. Joseph F. Sanson Investment Co.*, 376 F. Supp. 61 (D. Nev. 1974); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *State ex rel. Payne v. Walden*, 190 S.E.2d 770 (W. Va. 1972).

⁹⁰ URLTA § 4.205.

⁹¹ *Id.* § 4.107.

⁹² *Hall v. Garson*, 430 F.2d 430, 440-41 (5th Cir. 1970), *quoted in* *MacQueen v. Lambert*, 348 F. Supp. 1334, 1337 (M.D. Fla. 1972).

⁹³ A security deposit is a device to assure the lessor the full benefit of his original agreement by requiring the tenant to pay an amount to the landlord to be held as security against the tenant's failure of payment or other breach of covenant in the lease. 2 POWELL ON REAL PROPERTY § 231(2) (P. Rohan ed. 1974).

⁹⁴ The withholding of security deposits after termination of the lease may be a fruitful landlord strategy due to the inconvenience of bringing an action in small claims

sanitary housing.⁹⁴ In order equitably to protect the interests of both landlord and tenant, restrictions on the amount and use of security deposits are needed. Many states have responded by enacting security deposit legislation.⁹⁵

The New Jersey security deposit statute⁹⁶ presents the most comprehensive regulatory scheme. First, it includes the basic requirement that deductions from the deposit be fairly made and reasonable in amount and that the surplus be returned to the tenant in a timely manner following termination of the tenancy.⁹⁷ All state statutes provide at least this much, and, indeed, the common law has traditionally recognized an equivalent duty.⁹⁸

court. 2 NATIONAL HOUSING AND ECONOMIC DEVELOPMENT LAW PROJECT, HANDBOOK ON HOUSING LAW, *supra* note 54, at 70. In tight housing markets, landlords demand and receive increasingly larger deposits. See Note, *The Rental Security Deposit in California*, 22 HASTINGS L.J. 1373 (1971). Excessive deductions for damages and in some cases no return of deposit are also common. I. K. Flaum & E.C. Salzman, Urban Research Corp. Report: The Tenant's Rights Movement 22 (1969). For a discussion of security deposit problems, see Note, *The Residential Lease: Some Innovations for Improving the Landlord-Tenant Relationship*, 3 U.C. DAVIS L. REV. 31, 38-43 (1971) [hereinafter cited as *The Residential Lease*].

⁹⁴ *The Residential Lease*, *supra* note 93, at 38-43.

⁹⁵ The jurisdictions and their respective enactments are as follows: Alaska—ALASKA STAT. § 34.03.070 (1974); Arizona—ARIZ. REV. STAT. ANN. § 33-1321 (1974); California—CAL. CIV. CODE § 1950.15 (West Supp. 1975); Colorado—COLO. REV. STAT. ANN. § 38-12-101 *et seq.* (1973); Connecticut—CONN. GEN. STAT. REV. § 47-23(a) (Supp. Pamphlet 1975); Delaware—DEL. CODE ANN., tit. 25, § 5511 (Supp. 1974); District of Columbia—Housing Regs. of the District of Columbia, § 103, art. 290, D.C. Law 1-7, D.C. Register, at 291-92, § 2908 (July 17, 1975); Florida—FLA. STAT. ANN. § 83.49 (1973); Hawaii—HAWAII REV. STAT., § 521-44 (Supp. 1974); Illinois—ILL. REV. STAT. ch. 74, §§ 91-93 (1973); Iowa—IOWA CODE ANN. § 562.8 *et seq.* (1974); Kentucky—KY. REV. STAT. § 383.580 (1974); Louisiana—LA. REV. STAT. ANN. § 9:3251 (West 1972); Maryland—MD. ASS. CODE art. 53, §§ 41-43 (1957), *as amended*, Laws of Md., 1973, ch. 2 § 1-4; Massachusetts—MASS. GEN. LAWS ANN. ch. 186, § 15B (Supp. 1975); Michigan—MICH. COMP. LAWS ANN. §§ 554.601-.616 (Supp. 1975-76); Minnesota—MINN. STAT. § 504.20 (Supp. 1975-76); Missouri—MO. ANN. STAT. § 456.040 (Vernon 1956); Montana—MONT. REV. CODES ANN. § 42-301-309 (Supp. 1974); New Jersey—N.J. STAT. ANN. § 46:8-19 (Supp. 1975-76); New York—N.Y. GEN. OBLIG. LAW, §§ 7-103, 7-105 (Supp. 1975-76); Ohio—OHIO REV. CODE ANN. § 5321.16 (Page Supp. 1974); Oklahoma—OKLA. STAT. ANN. tit. 41, § 43 (1973); Oregon—ORE. LAWS OF 1973, ch. 559, § 12; ORE. REV. STAT. § 91.760 (1974); Pennsylvania—PA. STAT. ANN. tit. 68, §§ 250.511a-.512 (Supp. 1975-76); Texas—TEX. REV. CIV. STAT. ANN. tit. 5326e (Supp. 1974-75); Washington—WASH. REV. CODE ANN. § 59.18.270 (1973).

⁹⁶ N.J. STAT. ANN. 46:8-19 (Supp. 1975-76).

⁹⁷ *Id.* See also CAL. CIV. CODE § 1950.5 (West Supp. 1975), which provides only these minimal protections.

⁹⁸ At common law tenants apparently had the right to expect that deductions from the deposit would be made fairly and in a reasonable amount with the surplus refunded in a timely fashion. A tenant could sue in small claims court to effectuate these rights. 2 POWELL ON REAL PROPERTY § 231(2) (H. Rohand, 1974).

New Jersey has gone beyond this basic protection to include limitations on the amount of deposit,⁹⁹ notice as to location of the deposit,¹⁰⁰ a commingling ban,¹⁰¹ payment of interest on the deposit,¹⁰² written itemization of deductions,¹⁰³ double rent recovery plus costs for landlord noncompliance,¹⁰⁴ a time limitation on deposit refund after lease expiration¹⁰⁵ and a prohibition against tenant waiver of the security deposit protections.¹⁰⁶

The URLTA reforms fall short of the New Jersey statute by not requiring interest on the deposit, notice of location, or a restriction on commingling. Like that statute, the Act requires itemization,¹⁰⁷ provides for double rent recovery,¹⁰⁸ and bars tenant waiver.¹⁰⁹ The URLTA, however, restricts the amount of deposit to one month's rent¹¹⁰ and requires the landlord to return the deposit within 14 days, half the time required under the New Jersey provision.¹¹¹ But the absence of a commingling provision threatens to render the stricter URLTA provisions ineffective by exposing the tenant's security deposit to the landlord's creditors. Under URLTA, the landlord still has free use of the tenant's money and is not required to disclose his records. Thus, though URLTA includes security deposit regulations, it does not foreclose all possibility of abuse.

4. Utility Shut-Offs

Uninterrupted utility services are basic necessities essential to a tenant's use and enjoyment of property.¹¹² Termination of such services creates a direct and immediate threat to habitability, whether it

⁹⁹ N.J. STAT. ANN. § 46:8-21.2 (Supp. 1975-76).

¹⁰⁰ *Id.* § 46:8-19.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* § 46:8-21.1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 46:8-24.

¹⁰⁷ URLTA § 2.101(b).

¹⁰⁸ *Id.* § 2.101(c).

¹⁰⁹ *Id.* § 1.303(a)(2).

¹¹⁰ *Id.* § 2.101(a).

¹¹¹ *Id.* § 2.101(b).

¹¹² For a brief discussion of the effects of shut-offs on tenants, see Note, *The Shut Off of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745 (1971). Procedural ramifications of utility shut-offs are discussed in detail in Note, *Fourteenth Amendment Due Process in Termination of Utility Services for Non-Payment*, 86 HARV. L. REV. 1477 (1973).

is the result of utility company practices or landlord actions.¹¹¹ Both fourteenth amendment and statutory protections may be available to the aggrieved tenant.

While the Supreme Court has held that terminations by privately held utilities operating under state-issued certificates of public convenience do not constitute "state action" under the fourteenth amendment,¹¹² tenants serviced by municipal power systems still have access to due process and equal protection remedies.¹¹³ Additionally, several states have enacted protections against unjust terminations in the form of criminal sanctions,¹¹⁴ civil remedies with stated damages,¹¹⁵ or injunctive relief against offending landlords.¹¹⁶

In addition, warranty of habitability actions are available against landlords where the lease agreement services package expressly or implicitly includes utilities.¹¹⁷ The URLTA explicitly prohibits arbitrary landlord shut-offs of essential services.¹¹⁸ Tenants may either procure reasonable alternative services during the period of deprivation and deduct the cost of such services from future rental payments, recover damages based on diminution of the fair rental value of the premises during the period of the noncompliance, or procure substitute housing at the landlord's expense.¹¹⁹ In view of the impracticality of securing either alternative utility services or alternative housing, the damage action provides the only realistic protection. Given the

¹¹¹ Furthermore, each unjust termination imposes certain hardship costs common to all terminations. Lack of utility services needed for heat, light, cooking, easy access to the outside world, and other uses will in many circumstances work severe hardship on a household, and may in many instances lead to "secondary costs," [sic] such as illness and "resentment and demoralization," which will have to be absorbed by society." 86 HARV. L. REV. at 1482 (footnotes omitted).

¹¹² *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

¹¹³ See, e.g., *Davis v. Weir*, 328 F. Supp. 317, 321 (N.D. Ga. 1971) (city water department's termination of services and refusal to contract for services directly with tenant after landlord default was enjoined on equal protection grounds).

¹¹⁴ See, e.g., CONN. GEN. STAT. ANN. § 19-65 (1975); N.Y. REAL PROP. LAW § 235 (Supp. 1974).

¹¹⁵ See, e.g., CAL. CIV. CODE § 789.3 (West Supp. 1975) (\$100 per day); MASS. GEN. LAWS, ch. 186, § 14 (Supp. 1975) (three months' rent or actual damages); ORE. LAWS OF 1973, ch. 559, § 22 (two months' rent or double damages); TEN. REV. CIV. STAT. ANN. art. 5236c, § 4 (Supp. 1974-75) (actual damages plus one month's rent).

¹¹⁶ See, e.g., *Redding v. Wainwright*, 1 CCH Pov. L. REP. ¶ 2320.38 (1972) (indigent tenant granted temporary restraining order preventing landlord from terminating essential services); *Robertson v. Taylor*, [1968-1971 Transfer Binder] CCH Pov. L. REP. ¶ 11,786 (1970) (state supreme court granted injunction restraining landlord from harassment and attempts at illegal eviction by termination of water, sewer, and electrical services).

¹¹⁷ See pp. 7-11 *infra*.

¹¹⁸ URLTA § 4.104.

¹¹⁹ *Id.*

determination that most utility shut-offs will not be subject to due process requirements,¹²² the URLTA deterrent to capricious shut-offs is a substantial protection from unjust terminations.

II. BEYOND THE URLTA—DECENT HOUSING

The URLTA reforms in the decent housing area tend to be limited in nature, clarifying obligations between landlords and their tenants and providing limited sums to be used in the rehabilitation of the rental unit. Still missing are reforms providing larger sums capable of actually effecting the total repair of the unit or the entire building.

Several mechanisms can be utilized to achieve total repair. Court appointment of a receiver for the property may be utilized to effectuate repairs.¹²³ Retroactive rent abatement, granting a rent reduction for breach of the warranty of habitability and allowing the tenant to recover past overpayments, transfers to tenants large sums of money, possibly enough to effectuate a transfer of title by sale or settlement. This transfer increases the tenants' financial capacity, allowing them to rehabilitate the present structure or to reenter the market to secure decent housing. Also, landlord security deposit acts requiring the landlord to make deposits with the city may be used to create funds for repair of emergency conditions in the landlord's buildings. The tenant-mortgagee negotiating strategy attempts to involve the mortgagee in the building's problems and to secure a temporary stay of mortgage payments. If successful, this negotiating strategy substantially increases the portion of rent flow that can be directed to repair of the building. Specific performance of the warranty of habitability is an equitable remedy compelling the landlord to commit greater funds to the rehabilitation of a building. By directly mandating repair rather than imposing an economic sanction for nonrepair, it may achieve decent housing where the legal remedy of rent reduction would be ineffective. Each of these proposed decent housing reforms builds on the foundation provided by housing codes and the warranty of habitability. These and other more effective remedies are essential to the repair and maintenance of residential housing generally.

¹²² *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

¹²³ See generally *Legal Remedies*, *supra* note 22; Gribetz & Grad, *supra* note 23; Gribetz, *New York City's Receivership Law*, 21 J. HOUSING 297 (1964); Note, *Receivership of Problem Buildings in New York City and Its Potential for Decent Housing of the Poor*, 9 COLUM. J. L. & SOC. PROB. 309 (1973).

A. Receivership

At least 13 jurisdictions have enacted statutes authorizing court appointment of a receiver to collect tenant rents from severely dilapidated buildings in order to effect repairs.¹²⁴ After completion of repairs and payment of expenses, control of the building is restored to the landlord. All receivership statutes allow local code enforcement agencies to bring an action for a receiver and some statutes permit tenants to do so as well.¹²⁵

Two problems limit the effectiveness of this remedy. In many cases the rent flow is inadequate to meet repair costs. In addition,

¹²⁴ Connecticut—CONN. GEN. STAT. ASS. § 19-347c (1969); Delaware—DEL. CODE ASS. tit. 25, § 5901 *et seq.* (1953); Illinois—ILL. REV. STAT. ch. 24 § 11-31-2 (1973); Indiana—IND. CODE § 18-5-5 *et seq.* (1971); Massachusetts—MASS. GEN. LAWS ASS. ch. 111, § 1271 *et seq.* (Supp. 1975); Michigan—MICH. COMP. LAWS ASS. § 125.535 (Supp. 1975-76); Minnesota—MINN. STAT. ASS. § 566.29 (Supp. 1975-76); Missouri—MO. REV. STAT. § 441-570 (Supp. 1967); New Jersey—N.J. STAT. ASS. § 2A:42-85 *et seq.* (Supp. 1975-76); § 40-48.2-12(h) (Supp. 1965); New York—N.Y. MULT. DWELL. LAW § 309(f) (McKinney Supp. 1974-75); N.Y. REAL PROP. ACTIONS LAW § 769 *et seq.* (McKinney Supp. 1975-75); Ohio—OHIO REV. CODE ASS. § 5321.07 (Page Supp. 1971); Rhode Island—R.I. GEN. LAWS ASS. §§ 45-24.2-11 (1971), 45-24.3-19 (Supp. 1974); Wisconsin—WIS. STAT. ASS. § 280.22 (Supp. 1975-76).

Receivership statutes have been upheld as a valid exercise of the police power. *In re Department of Buildings of City of New York*, 14 N.Y.2d 291, 293, 200 N.E.2d 432, 436 (1964), *noted in* 63 MICH. L. REV. 1304 (1965); *Community Renewal Foundations, Inc. v. Chicago Title & Trust Co.*, 44 Ill. 2d 284, 255 N.E.2d 908, 912 (1970).

The impact that receivership and other vigorous code enforcement measures may ultimately have upon the housing market is a much debated matter. For a famous theoretical debate, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973).

For a much-needed empirical study of the same questions, see W. Hirsch, J. Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098 (1975). This study found the presence of receivership laws to be significantly associated with higher rents. General rent levels were not, however, significantly related to the availability of the remedies of repair and deduct and rent withholding. The lack of a significant correlation between rent levels and the availability of the latter two remedies may be due to non-use of the remedies. The authors were unable definitively to answer the more important and more difficult question of whether the rent increases possibly associated with habitability laws are offset by commensurate benefits accruing to tenants.

¹²⁵ E.g., MASS. GEN. LAWS ASS. ch. 111, § 1271 *et seq.* (Supp. 1975); MISS. STAT. ASS. § 566.29 (Supp. 1975-76); N.J. STAT. ASS. § 2A:42-85 *et seq.* (Supp. 1975-76); WIS. STAT. ASS. § 280.22 (Supp. 1975-76).

tenants often cannot participate significantly in the receivership process.

The problem of inadequate rent flow is twofold. First, the accumulation of enough money from rent to make necessary repairs may require a considerable period of time. New York City's ordinance attempts to overcome this through the use of a revolving fund for receivership repairs.¹²⁶ The cost of rehabilitation is advanced from the revolving fund and then gradually repaid by future rental income. Unfortunately, this does not overcome the second problem, that of inadequate rent flow. Financing still depends on the long run sufficiency of the building's future rents. Many buildings in receivership are in such bad condition that they simply cannot generate enough rent on the open market in any reasonable period of time to make needed repairs.¹²⁷

The absence of tenant participation in the receivership process poses difficulties because the maintenance of a continuous rent flow and the efficient repair of the building depend upon tenant cooperation. The New Jersey receivership law makes efforts to involve tenants by permitting a single tenant to bring an action for a receivership and by providing that a tenant or tenant organization may be appointed as the receiver.¹²⁸

B. Retroactive Rent Abatement

Retroactive rent abatement is an affirmative action for contract damages¹²⁹ based on breach of the continuing warranty of habitability and enabling the tenant to recover rents paid which could have been justifiably withheld but which were not. Several jurisdictions have developed the principle that a breach of the implied warranty of habitability "gives rise to the usual remedies for breach of contract"¹³⁰ by declaring the availability of retroactive rent abatement.¹³¹

¹²⁶ See *Legal Remedies*, *supra* note 22, at 44; Comment, *The New York City Housing Receivership and Community Management Programs*, 3 FORDHAM URBAN L.J. 637 (1975) [hereinafter cited as *New York City Housing Receivership*].

¹²⁷ In at least one case the revolving loan fund became seriously depleted. *New York City Housing Receivership*, *supra* note 126, at 47.

¹²⁸ N.J. STAT. ASS. § 2A:42-28 (Supp. 1975-76).

¹²⁹ See note 29 *supra*.

¹³⁰ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1073 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

¹³¹ See, e.g., *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Mease v. Fox*, 296 N.W.2d 791 (Iowa 1972); *McKenna v. Begin*, 325 N.E.2d 587 (Mass. App. 1975); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Herzov v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973); *Glycey v. Schultz*, 62 Ohio Op. 2d 459, 289 N.E.2d 919 (Sylvania Mun. Ct. Ohio 1972); *Prins v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

a remedy analogous to contract damages. The affirmative action for retroactive rent abatement is merely an extension of rent withholding¹³² and the jurisdiction's measure of periodic damages should be equally applicable.¹³³ Damages accrue from the time of the initial breach of the warranty coupled with notice to or knowledge of the landlord of the defective condition¹³⁴ and continue during occupancy of the defective premises.¹³⁵ Consistent with contract doctrine, the more well-reasoned opinions have allowed the tenant to recoup the "benefit of his bargain" plus incidental and consequential damages incurred in securing "cover."¹³⁶

The notice or knowledge limitation on damages appears to be a refinement of the warranty of habitability, conditioning the landlord's duties thereunder upon notice or knowledge of the defects. With the warranty thus conditioned, limitation of the damages to that period after notice or knowledge is in accordance with general contract principles. Such a reading of the warranty is consistent with the incompatibility of frequent landlord inspections and residential occupancy by the tenant. In any event, landlord knowledge of the defective conditions may be readily inferred from proof of their existence at the inception of the tenancy.¹³⁷

The warranty of habitability imposes upon landlords the obligation to assure that the housing they provide substantially meets societal standards of safety and sanitation.¹³⁸ This duty and that of the tenant to pay rent are regarded as mutually dependent. The landlord's failure to comply with the warranty of habitability constitutes a failure or partial failure of consideration under the rental contract, giving rise to an action for damages.

Where a tenant does not withhold rent as a means of collecting damages but rather sues later on a theory of retroactive rent abatement, the question of waiver has been raised.¹³⁹ While landlords have asserted that continued payment of rent is a waiver by the tenant of rent abatement benefits,¹⁴⁰ it has been held that no such waiver effect can be inferred where a shortage of suitable alternative housing and the reasonable tenant fear of retaliation coerce such payments.¹⁴¹ It is even clearer that continued payments due to ignorance of the

¹³² See pp. 7-11 *supra*.

¹³³ See p. 10 *supra*.

¹³⁴ See, e.g., *McKenna v. Begin*, 325 N.E.2d 587, 591-92 (Mass. App. 1975).

¹³⁵ See, e.g., *Berzito v. Gambino*, 63 N.J. 460, 469, 308 A.2d 17, 22 (1973).

¹³⁶ See, e.g., *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972).

¹³⁷ See, e.g., *id.*; *McKenna v. Begin*, 325 N.E.2d 587, 592 (Mass. App. 1975).

¹³⁸ See pp. 7-8 *supra*.

¹³⁹ *Berzito v. Gambino*, 63 N.J. 460, 470, 308 A.2d 17, 22 (1973).

¹⁴⁰ See, e.g., *id.*; *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972).

¹⁴¹ *Berzito v. Gambino*, 63 N.J. 460, 473, 308 A.2d 17, 24 (1973).

availability of remedies cannot be deemed a knowing and voluntary waiver of the right to retroactive rent abatement.

Consistent with other contract actions, suit on the lease need not be commenced while the tenant is in possession, but may also be initiated after the lease has expired.¹⁴² Similarly, this suit should be subject to the lenient contract statutes of limitation.¹⁴³

Although the primary purpose of retroactive rent abatement is remedial, its availability as a direct remedy may also have important strategic ramifications for the informed tenant. First, it obviates the need for risking retaliation by the landlord. Second, it provides the option of obtaining a lower rent rather than improved premises.¹⁴⁴ Third, allowance of an affirmative action enables the tenant to select the litigating forum and thus avoid the consequences of summary dispossession actions or other results of the landlord's choice of forum.

Thus retroactive rent abatement, like receivership, is a promising remedy. Yet the ultimate effectiveness of both may depend less on their actually being invoked by tenants to remedy existing substandard housing conditions than on their deterrent effects. The possibility of resort to these remedies by tenants may prevent landlords from allowing their premises to deteriorate and may provide additional incentives for the maintenance of an acceptable level of decent housing.

C. Specific Performance of the Warranty of Habitability

The traditional equitable remedy of specific performance should be regarded as a contract¹⁴⁵ remedy potentially¹⁴⁶ applicable to a

¹⁴² The *Berzito* tenant initiated an action for retroactive rent abatement only after vacating the premises. 63 N.J. at 464, 308 A.2d at 19.

¹⁴³ Compare CAL. CIV. PRO. CODE § 337 (West Supp. 1975) (four years; written contract), with CAL. CIV. PRO. CODE § 340(3) (West Supp. 1975) (one year; various torts).

¹⁴⁴ Other remedies, such as receivership and specific performance of the warranty of habitability, may also effectuate repair of the premises. However, the cost of repair and the conditions of the housing market may be such as to require increased rents or removal of the unit from the housing stock. Retroactive rent abatement provides the tenant with the option of a reduced rent appropriate to the quality of the housing unit provided.

¹⁴⁵ See note 29 *supra*.

¹⁴⁶ It must be remembered throughout this discussion that the granting or withholding of specific performance is within the discretion of the court; a party is not "entitled" to such a remedy as a matter of right. See 4 J. POSTNOY, *PROPERTY JURISPRUDENCE* § 1404 (5th ed. 1941) and cases cited therein; 11 S. WILLISTON, *LAW OF CONTRACTS* § 1418A (3d ed. 1968) and cases cited therein.

breach of the warranty of habitability in a residential lease agreement.¹⁴⁷

1. *The Inadequacy of Remedies at Law*

The availability of specific performance is ordinarily conditioned upon a showing of the inadequacy of legal remedies and on a determination of how much supervisory burden the order would place on the court.¹⁴⁸ The inadequacy of legal remedies may be based upon proof that damages are unascertainable and hence impractical, or upon proof that if ascertainable they will not fully compensate the injured party.¹⁴⁹ It is a well known presumption, however, that real property interests are unique and that mere legal remedies are therefore inadequate responses to breaches of contracts conveying such interests. Thus, specific performance is granted as a matter of course to enforce real property contracts.¹⁵⁰ This presumption is fully applicable to residential leases and should clearly be a sufficient basis for a finding of inadequacy of legal remedies.

The increasing emphasis on the analogy of residential leases to consumer contracts¹⁵¹ does not negate the uniqueness of the real property interests made subject to the contract. If anything, the same increased complexity of the landlord-tenant relationship which has made feudal property concepts obsolete has made the rationale of the presumption of uniqueness the more compelling. The modern landlord-tenant contract provides for such a multitude of services and facilities that it would be unrealistic to place the burdens of maintenance and repair upon tenants to the degree required by feudal law. At the same time, that increased complexity has made each residential lease more unique and thus more deserving of specific performance. The assertion that the landlord-tenant relationship is fundamentally contractual in nature is not inconsistent with the assertion that any one such lease contract has special characteristics making it unique and non-fungible with others available on

¹⁴⁷ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970); *Boston Housing Authority v. Hemingway*, 293 N.E. 2d 831, 844 (Mass. 1973). See also *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1057 (D.C. Cir. 1971); *Le Clair v. Woodward*, 30 Conn. Supp. 299, 316 A.2d 791, 792 (Conn. Cir. Ct. 1970); *Steele v. Latimer*, 214 Kan. 329, 336, 521 P.2d 304 (1974); *Morbeth Realty Corp. v. Rosenshine*, 67 Misc. 2d 325, 327, 323 N.Y.S.2d 363, 366 (N.Y. City Civ. Ct. 1973); 6 S. WILLISTON, *supra* note 146, at § 892 and cases cited therein.

¹⁴⁸ J. POMEROY, *supra* note 146, at § 1405b; 11 S. WILLISTON, *supra* note 146, at § 1422A.

¹⁴⁹ See generally 4 J. POMEROY, *supra* note 146, at §§ 1400-03; 11 S. WILLISTON, *supra* note 146, at § 1418.

¹⁵⁰ 11 S. WILLISTON, *supra* note 146, at § 1418A, and cases cited therein.

¹⁵¹ See note 29 *supra*.

the market. The time-honored phrase, "land is different,"¹⁵² remains valid.

Furthermore, an examination of available legal remedies reveals their inadequacy both as compensation for the tenant or as effectuating the social policy of ensuring an adequate stock of habitable housing. Court-sanctioned rent abatement through rent withholding¹⁵³ or repair and deduct¹⁵⁴ are two alternative legal remedies. The measure of damages in each appears sufficiently ascertainable to avoid the impracticability dilemma.¹⁵⁵ However, repair and deduct is subject to the basic deficiency that the cost of major repairs may exceed the amount awardable.¹⁵⁶ Rent withholding, on the other hand, is subject to the criticism that it does not ensure actual repair of the defective housing. Furthermore, in terms of tenant compensation, it is obviously inadequate to "make the tenant whole" in the many instances where the tenant has made rental payments despite the existence of defects justifying rent abatement. While retroactive rent abatement¹⁵⁷ meets this tenant compensation objection, it too is inadequate to effectuate the broader social policy of promoting habitable housing.

To the extent that a tenant must wait several months to accumulate sufficient funds for major repair, rent withholding and repair and deduct fail to further the decent housing policies.¹⁵⁸ Additionally, the tenant utilizing repair and deduct or rent withholding must bear the risk of an unfavorable adjudication¹⁵⁹ as well as the transaction

¹⁵² As indicated in note 150 *supra*, the presumption of specific performance of contracts involving interests in land has much vitality even today. 11 S. WILLISTON, *supra* note 146, at § 1418A. Thus, this argument should be stressed to the court. The remainder of this subsection provides arguments that reinforce, rather than replace, this central theme.

¹⁵³ See p. 10 *supra*.

¹⁵⁴ See pp. 11-13 *supra*.

¹⁵⁵ Although there is a question whether the exact drop in value is determinable, this appears to be no different from the situation presented in the traditional contract breach case, especially where the cost of repair can be ascertained. *Green v. Superior Court*, 10 Cal. 3d 616, 639, 111 Cal. Rptr. 704, 719, 517 P.2d 1168, 1183 (1974).

¹⁵⁶ See, e.g., CAL. CIV. CODE § 1942, *as amended* (West Supp. 1975), which limits repair and deduct remedies to one month's rent and limits its use to once in any 12-month period. Justice Tobriner of the California Supreme Court pointed out the many shortcomings of the California statute in *Green v. Superior Court*, 10 Cal. 3d 616, 629-31, 111 Cal. Rptr. 704, 712-14, 517 P.2d 1168, 1176-78 (1974).

¹⁵⁷ See pp. 24-26 *supra*.

¹⁵⁸ The inadequacy could be cured if the state had a system of landlord security deposits to expedite the cost of more major repairs. See pp. 31-35 *infra*.

¹⁵⁹ Although many courts have moved toward the contract law view that lease terms are interdependent, thus not permitting eviction in cases where the tenant's rent was properly withheld due to the landlord's breach of the warranty of habitability, see p. 7 and note 28 *supra*, the traditional rules permitting eviction and even summary

costs of repair which are properly the responsibility of the landlord. Most fundamentally, however, reliance upon the tenant's utilization of a rent withholding or retroactive rent abatement award to make repairs in accordance with the society's interest in decent housing negates the compensatory character of such awards. The alternative legal remedies are inescapably inadequate in that they cannot simultaneously serve both the tenant compensation and the decent housing policies. To function as compensation for what the tenant has already suffered, the award must be cash the tenant can keep, not money he or she is ordered to sink into the building; but then the building does not get repaired. Conversely, conditioning the award on repair accomplishes that goal but in no sense compensates the tenant for the landlord's breach of warranty. Only specific performance can accomplish both on a major scale.¹⁶⁰

2. Supervision

The extent to which any given decree of specific performance would place a burden of supervision on the court beyond its normal adjudicative function is a principal consideration in determining whether to grant the decree.¹⁶¹ Equitable relief has been denied in several construction contract cases because of the supervisory role such relief would thrust upon the court.¹⁶² However,

a better view, and the one which increasingly is being followed in this country [respecting both construction and other contracts requiring extensive supervision] is that such contracts should be specifically enforced unless the difficulties of supervision outweigh the importance to the plaintiff.¹⁶³

eviction in cases where the tenant fails to pay the rent would presumably apply where the tenant has wrongfully withheld the rent. See, e.g., ORT. REV. STAT. §§ 105.105 to 105.160 (1974) (upheld in *Lindsey v. Normet*, 405 U.S. 56 (1972)).

¹⁶⁰ Repair and deduct directly and fairly expeditiously accomplishes the same end with respect to minor repairs. See p. 12 *supra*.

¹⁶¹ See 4 J. POSENER, *supra* note 146, at § 1405b; 11 S. WHISTON, *supra* note 146, at §§ 1418 n.15, 1418A, and 1422A.

¹⁶² See, e.g., *Pantages v. Grauman*, 191 F. 317 (9th Cir. 1911); *Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431 (Del. Ch. 1968) (specific performance denied in suit to force hiring of 300 additional workmen to complete modernizing of plaintiff's plant); *Carlson v. Len Home Builders, Inc.*, 132 N.J. Eq. 38 26 A.2d 576 (N.J. Ch. 1942) (building contracts not to be specifically enforced). See generally 11 S. WHISTON, *supra* note 146, at § 1422A. But see *City Stores Co. v. Ammerman*, 266 F. Supp. 766 (D.D.C.), *aff'd*, 394 F.2d 950 (D.C. Cir. 1968).

¹⁶³ *City Stores Co. v. Ammerman*, 266 F. Supp. 766, 776-77 (D.D.C. 1967). See also 11 S. WHISTON, *supra* note 146, at § 1418A.

In the warranty of habitability context, this balancing of interests clearly favors the award of specific performance. First, where there is an administrative code enforcement agency, the court itself need not be as directly involved in monitoring compliance with its order to render the building habitable. Thus, the court would not be drawn away from its principal task of adjudication. Second, in most cases the repairs necessary to bring the housing up to standard would not involve the same continuity and longevity of supervision as might be entailed by the actual construction of a building. Third, the tenant's interest in safe and habitable housing is clearly of a higher level than are the subjects of dispute in most contract enforcement situations. Finally, it is clear that unlike the traditional controversy between private parties, warranty of habitability actions implicate serious questions of public policy into which public bodies, including courts, should be drawn not hesitantly but as a matter of course. It is not a waste of public judicial resources to effectuate the declared public legislative policy.

3. Summary

Utilization of the specific performance remedy in warranty of habitability suits can contribute to the equalization of bargaining power in the landlord-tenant relationship. Only a remedy directly accomplishing repair rather than merely taxing the landlord to compensate the tenant can serve both the private and the public policies behind the warranty of habitability.¹⁶⁴ Specific performance realizes the public policy of decent housing while simultaneously obviating the need for tenant compensation. The flexibility of the equitable remedy enables the court to adjust the interests of both landlord and tenant so as to minimize hardships.¹⁶⁵ It should be recognized, however, that this form of equitable relief remains discretionary with the court. Pragmatism thus dictates that alternative relief, such as rent abatement, be pleaded.¹⁶⁶

D. Landlord Security Deposit Act

A landlord security deposit act (LSDA) is a statutory reform which functions as a counterpart to tenant security deposits. Tenants

¹⁶⁴ See pp. 28-29 *supra*.

¹⁶⁵ See W. OF FENIAK, *HANDBOOK OF MODERN EQUITY* § 74 (2d ed. 1956). See also *Gilson v. Gilia*, 45 Tenn. App. 193, 321 S.W.2d 855 (1958) (specific performance will not be ordered where cost of repair of premises would work an undue hardship on landlord); H. MCCINSTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 22 (2d ed. 1948).

¹⁶⁶ It does not seem in any way inconsistent to allow a recovery of retroactive rent

have traditionally been required to deposit sums of money with their landlord to insure compliance with the rental agreement.¹⁶⁷ Under an LSDA landlords are required to deposit with the city a set sum per rental unit to insure compliance with their obligations. Municipalities have long had the authority to obtain injunctions requiring landlords to comply with housing codes and to repair housing defects.¹⁶⁸ In addition, many states have by statute authorized municipalities to make repairs with municipal funds and to collect the cost of repair from the landlord if the housing defect constituted a public nuisance.¹⁶⁹ The novel feature of a landlord security deposit act is not that it provides local government with the authority and mechanisms to repair deteriorated buildings but that it allows them to do so using funds placed on deposit by the offending landlord. Thus, the municipality is spared an expense that may, despite its possibly temporary nature, inhibit comprehensive code enforcement.

The second important feature of current landlord security deposit acts is that they are activated only in emergency situations presenting an immediate threat to tenant health or safety. Under such circumstances, repairs can be made without prior recourse to extended hearings and inspections.¹⁷⁰ The ordinance obligates the city, upon receipt of a tenant complaint, to make an immediate inspection to certify that a specified hazardous defect is present in the building and that the landlord has not initiated repairs. The statute authorizes the city, upon making this determination, to repair the defect with funds from the landlord's security deposit. Unlike other code enforcement proceedings, the entire process from initial notice

abatement for the period preceding compliance with a specific performance order.

¹⁶⁷ See pp. 18-19 *supra*.

¹⁶⁸ Municipalities have been able to secure injunctions to enforce housing codes for at least 70 years. Fenement House Dep't v. Moeschel, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd per curiam*, 203 U.S. 583 (1906).

¹⁶⁹ See, e.g., the following statutes, which allow some form of municipal repair and reequipment: CONN. GEN. STAT. REV. § 19-344 (1975); MASS. GEN. LAWS ANN. ch. 111, § 127B (1974); UTAH CODE ANN. § 10-8-52 (1973).

¹⁷⁰ Apartment House Council v. Mayor and Council of Ridgfield, 123 N.J. Super. 87, 301 A.2d 484 (Law Div. 1973), *aff'd per curiam*, 128 N.J. Super. 192, 319 A.2d 507 (App. Div. 1974). The existence of an emergency is necessary to satisfy constitutional due process standards. See Goss v. Lopez, 419 U.S. 565 (1975) (notice and hearing can follow rather than precede removal of a student from school if persons or property have been endangered); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (extraordinary situation warranted postponement of notice and hearing without violation of due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (only in an extraordinary situation not present here can a hearing be postponed); Bell v. Burson, 402 U.S. 535 (1971) (only in an emergency can an interest be terminated prior to notice and hearing); cf. Arnett v. Kennedy, 416 U.S. 134 (1974); Mitchell v. W.F. Grant Co., 416 U.S. 600 (1974).

to completion of repairs may be accomplished in 96 hours.¹⁷¹ Ridgfield, New Jersey, was the first city in the United States to adopt a landlord security deposit act,¹⁷² and its ordinance has served as a model for other jurisdictions.¹⁷³ The Ridgfield LSDA covers all buildings with four or more rental units.¹⁷⁴ The landlords of such buildings are required to deposit \$100 per unit up to 25 and a decreasing per unit amount for additional units, with a maximum deposit of \$5,000 payable by any one landlord.¹⁷⁵ The landlord is paid interest on the money held by the city.¹⁷⁶ An individual landlord's account can only be used to repair the rental property of that landlord, although deposit money covering a number of units may be used to repair any specific unit.¹⁷⁷

The Ridgfield LSDA ensures the repair of defects posing a threat to health or safety.¹⁷⁸ It does not cover minor housing code violations.¹⁷⁹ This limitation on applicability of the LSDA preserves the emergency nature of the remedy and thereby facilitates its immediate use.¹⁸⁰ Regardless of the severity of the emergency condition, however, the tenant must still provide the landlord with minimal

¹⁷¹ See Ridgfield, N.J. Ordinance No. 930 (June 8, 1972) (landlord allowed 24 hours from notification to commence repairs, and an additional 72 hours to complete repairs, if practicable). See generally Blumberg & Robbins, *The Landlord Security Deposit Act*, 7 CLEARINGHOUSE REV. 411 (1973).

¹⁷² Ridgfield, N.J. Ordinance No. 930, *supra* note 171.

¹⁷³ E.g., Fort Lee, N.J. Ordinance 73-15 (April 4, 1973); Lindenwood, N.J. Ordinance No. 389 (April 12, 1973); Wayne, N.J. Ordinance No. 55 (May 16, 1973). Legislation establishing a LSDA system was introduced in the Massachusetts Legislature. Mass. H.B. 2702 (1974).

¹⁷⁴ Ridgfield, N.J. Ordinance 930, *supra* note 171, § VI-C.

¹⁷⁵ *Id.* § III-A-D.

¹⁷⁶ Under the ordinance the interest earned is paid to the landlord. *Id.* § III-D. Sponsors of future LSDA's might desire to authorize the withholding of a portion of the interest to underwrite the cost of enforcement and administration of the act. See N.J. STAT. ANN. §§ 46:8-19 (1973), which allows landlords to retain one percent per annum of the tenant's security deposit to offset the cost of administration.

¹⁷⁷ Ridgfield, N.J. Ordinance No. 930, § V.

¹⁷⁸ The Ridgfield ordinance applies only to: "Any condition, dangerous or injurious to the health or safety of the occupants of a building, or occupants of neighboring buildings, which arises out of any of the following conditions:

"1. Lack of adequate ventilation or light.

"2. Lack of adequate and properly functioning sanitary facilities.

"3. Lack of adequate and healthful water supply.

"4. Structural, mechanical or electrical defects which increase the hazards of fire, accident or other calamity.

"5. [The failure to provide adequate heat during specified hours of the day and night of specified months of the year.]" *Id.* § VI-B.

¹⁷⁹ E.g., the failure of a single electrical outlet or use of the wrong type or size of pipe would not trigger operation of the ordinance.

¹⁸⁰ See p. 31 *supra*.

notice and opportunity to repair.¹⁴¹ The legislation establishes a Multiple Dwelling Emergency Commission to oversee compliance with the repair requirements.¹⁴² If repairs have not been commenced during the 24 hour period following notice, the Commission is authorized to expend funds from the landlord's deposit to effect repairs.¹⁴³ The Mayor and City Council review determinations of the Commission. Appeals must be taken within ten days; the issues on appeal are limited to the existence of an emergency condition and the reasonableness of the amount expended to repair that condition.¹⁴⁴

The New Jersey Superior Court, Appellate Division, has upheld the Ridgfield ordinance in the face of constitutional challenge.¹⁴⁵ The court first rejected the landlords' assertion that there is no statutory authority permitting the municipality to enact a LSDA, finding authorization in the general grant of municipal powers.¹⁴⁶ The landlords also claimed that the due process clause required a hearing prior to expending deposited funds. The court held that while due process generally required a hearing, where an emergency condition existed such hearing could be deferred, and where a public nuisance existed the Commission could dispense with the hearing.¹⁴⁷ The court also rejected claims that the regulation was invalid as an impermissible delegation¹⁴⁸ and an unreasonable burden on landlords.¹⁴⁹

Landlord security deposit acts contain a number of valuable features promoting decent housing and fair treatment. The Ridgfield ordinance provides a ready fund of at least \$400, and usually much more, which is immediately available to correct dangerous defects. The immediacy and ease with which enforcement takes place can make the statute a most effective tool of code enforcement. Additionally, because the offending landlord bears the cost of repairs, the entire program operates without expenditure of municipal funds. The city can also charge the cost of administration against the interest on the security deposits.¹⁵⁰

¹⁴¹ Ridgfield, N.J. Ordinance 930, *supra* note 171, at § V-C.

¹⁴² *Id.* § I.

¹⁴³ *Id.* § V-D. If it is not reasonable for repairs to be completed in 72 hours, § V-D is inapplicable. *Id.* § V-E.

¹⁴⁴ *Id.* § IV-B, as amended, Ridgfield, N.J. Ordinance No. 947 (Nov. 21, 1972). The landlord's appeal must be heard within 30 days of filing and finally determined within 14 days of hearing. The landlord has a right of further appeal from the administrative determination to a state court of competent jurisdiction.

¹⁴⁵ Apartment House Council v. Mayor and Council of Ridgfield, 123 N.J. Super. 87, 301 A.2d 484 (Law Div. 1973), *aff'd per curiam* 128 N.J. Super. 192, 319 A.2d 507 (App. Div. 1974).

¹⁴⁶ *Id.* at 90-91, 301 A.2d at 485-86.

¹⁴⁷ *Id.* at 95-101, 301 A.2d at 488-91. See generally p. 25 *supra*.

¹⁴⁸ *Id.* at 101-02, 301 A.2d at 491-92.

¹⁴⁹ *Id.* at 102-03, 301 A.2d at 492-93.

¹⁵⁰ See note 176 *supra*.

In practice, landlord security deposit acts have had considerable prophylactic impact. Experience indicates that many landlords engage in maintenance programs designed to forestall resort to the act.¹⁵¹ Further, undermaintenance is discouraged, leading to landlord repair of buildings while the structures are still in sound economic and physical condition.¹⁵² Because of its simplicity in concept and application, the LSDA is easy both for tenants to use and cities to administer. The LSDA has not created any serious administrative problems nor engendered any appreciable expansion of the municipal bureaucracy during its first two years of use in Ridgfield.¹⁵³

However, landlord security deposit acts have a number of implicit limitations. Since they rely on landlord cooperation and money to effect repairs, landlord security deposit acts cannot be expected to rehabilitate massively deteriorated buildings. No legislative or judicial reform is capable of compelling a landlord to invest more in a building than can ever be recouped. Under any program, when the

¹⁵¹ The Ridgfield experience has been one of landlords making repairs on their own faced with the prospect of the city depleting the landlord's security to effect repairs. There is a general feeling among landlords that it is more economical to make repairs themselves than to allow the city to do it. According to Jules Capozzi, Commissioner of Health of Ridgfield: "As of this date, we have never had to use any of the funds deposited. As a matter of fact, the ordinance has acted as a deterrent insofar as the landlord realizes if he fails in his duty to maintain his property and provide basic and essential services, the security money is on hand and can be used to correct the existing problem."

¹⁵² An example of such a situation, involving our largest multiple dwelling landlord, occurred recently in our municipality.

¹⁵³ We were informed by the Haekensack Water Co., who services our residents, that this landlord was in arrears on his payment and was in danger of having the services shut off if payment was not received within 24 hrs. This shutdown would have affected approximately 300 persons, leaving them without potable water supply and sanitary facilities. We contacted the owner requesting that he make proper payment to the water company, further stating that should he fail to do so we would withdraw the money from his security funds for the amount in question. Within approximately 20 minutes after our conversation with him, we received another call wherein he stated that through an error the overdue amount had not been paid when first billed, however he was at that moment dispatching a courier to the water company to bring the payment up to date. As you can see, the LSDA gave us the needed leverage to force payment without a struggle." Statement by Jules Capozzi, Commissioner of Health of the Borough of Ridgfield, Feb. 1975, on file with Nat'l Housing and Economic Devel. Law Project, Berkeley, California, and with the *Harvard Civil Rights-Civil Liberties Law Review*.

¹⁵⁴ The prevention of deterioration will result in fewer buildings becoming prospects for abandonment. However, the factors and motivations leading to abandonment have been shown to be exceedingly complex. See G. STERNBERG & R. BURCHETT, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISED?* (1973); G. STERNBERG, *THE TENEMENT LANDLORD* (1966).

¹⁵⁵ See note 191 *supra*.

danger concretely arises that code enforcement will induce the withdrawal of units from the market, a cost-benefit judgment must be made. While the act does not solve this fundamental dilemma, it does provide a practical means of enforcing codes in those instances where it has been decided by the municipality that the net condition of the housing stock, considering both quality and quantity, would be best served by enforcement.¹⁹⁴ Lastly, to be fully effective the ordinance must be accompanied by tenant protections against retaliatory action in general and retaliatory rent increases in particular.¹⁹⁵

E. Tenant-Mortgagee Negotiating Strategy

Tenant-mortgagee negotiating is a method by which tenants can involve mortgagees in the rehabilitation of deteriorated residential buildings. The strategy is based upon the legal right of tenants pursuant to the warranty of habitability to withhold rent or to seek rent abatement against the landlord-mortgagor when serious housing defects exist.¹⁹⁶ Continued rent withholding or abatement decreases the rent flow available to the landlord, thus placing a financially marginal landlord in serious danger of defaulting on the mortgage payments.¹⁹⁷ Tenants who exercise their right to decent housing may thus be forcing foreclosure by the mortgagee. When foreclosure becomes a real possibility the mortgagee is compelled to become involved with the problems of the building, the tenants, and the landlord-mortgagor, often for the first time.¹⁹⁸

¹⁹⁴ Present L.S.D.A.'s do not allow the municipality discretion to deny repair on the ground that repair is economically unjustified.

¹⁹⁵ The three New Jersey municipalities with the L.S.D.A. have also adopted municipal rent controls. Under these municipal rent controls, the landlord may only "pass through" the cost of those repairs which amount to a capital improvement to the property. At a very minimum, a city without rent controls would need a strong retaliatory protection law to prevent landlords from passing repair costs on to tenants. See pp. 13-15 *supra*.

¹⁹⁶ See pp. 7-11 *supra*.

¹⁹⁷ In the sense used here, a financially marginal landlord is one who relies on rent flow to meet fixed costs such as mortgage payments, taxes, and maintenance and does not have access to outside financial resources to meet those costs should they temporarily exceed rents and associated income.

¹⁹⁸ Facing faltering debt payments, the mortgagee may begin to review the circumstances leading to default and investigate marketability. The existence of a continuing rent strike and the visibility of a strong tenants' union will be a factor in the mortgagee's evaluation of the financial status and market value of the building. Where there is little or no market for the deteriorated building and property values in the area have fallen, foreclosure will be unattractive. Moreover, if there is no immediate market for the building, the mortgagee faces the unappealing prospect of becoming the landlord of slum property already embroiled in tenant litigation.

Where it is against the interests of the mortgagee to foreclose, the landlord and mortgagee will together seek to restore the full rent flow of the building in order to enable the landlord to resume mortgage payments. Tenants can use their leverage in this situation to bargain with the mortgagee and landlord for cooperation in repair of the building.¹⁹⁹

The tenant-mortgagee negotiating strategy had its first test in Orange, New Jersey, in 1970.²⁰⁰ Tenants living in a severely dilapidated building were able to obtain approximately \$5,000 toward repairs through negotiations with the mortgagees and the landlord. Faced with a long list of unrepaired code violations, the tenants organized to press for repair. After the landlord failed to make repairs the tenants initiated collective rent withholding and began paying their monthly rent into a bank escrow account. In August, 1970, following three months of rent withholding, the landlord filed eviction actions against all participating members of the association. The tenants filed an answer and a class action counterclaim for damages, declaratory judgment, and injunctive relief based on breach of the warranty of habitability and moved to join the four mortgagees as party defendants in the affirmative action. The tenant

¹⁹⁹ The tenants may wish to increase their leverage by filing an affirmative damage action against the landlord and joining the mortgagee on the theory of mortgagee liability. The cause of action against mortgagees is derived from the California Supreme Court opinion in *Connor v. Great West Sav. & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), where the court held mortgagees liable to subsequent purchasers for damages arising out of structural defects in new construction on a theory of negligence based on the breach of their duty to exercise reasonable care to prevent such defective construction. See also *Blakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958); *Bradler v. Craig*, 274 Cal. App. 2d 466, 79 Cal. Rptr. 401 (2d Dist. 1969); Comment, *The Expanding Scope of Enterprise Liability*, 69 *COLUM. L. REV.* 1084 (1969); Comment, *Torts-Negligence-Construction Financier Held To Have Duty to Protect Purchasers of Defective Homes Against Loss*, 44 *N.Y.U. L. REV.* 639 (1969); Comment, *New Liability in Construction Lending: Implications of Connor v. Great Western Savings & Loan*, 42 *S. CAL. L. REV.* 353 (1969); Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 *U. CHI. L. REV.* 739 (1968).

Shortly after adoption by the California Supreme Court, this doctrine was limited by the state legislature. CAL. CIV. CODE § 6434 (West 1970). No other jurisdictions have recognized the theory of mortgagee liability. *In re Mortgage of Felton*, 112 N.J. Super. 226, 270 A.2d 739 (Law Div. 1970), in which a New Jersey trial court held that, under the circumstances, the mortgagees were proper parties in an action for damages by tenants, but did not reach the issue of liability. At least one commentator has presented an argument for application of the *Connor* doctrine to tenants. See Note, *A New Tenant Remedy: Lender Liability for Structural Defects*, 3 *U.C. DAVIS L. REV.* 167 (1971).

²⁰⁰ See note 205 *infra*.

motion was granted, along with a motion to consolidate and transfer the pending summary eviction actions and the affirmative action to the Superior Court.²⁰¹ At this point, the parties initiated serious negotiations.

Due to continued rent withholding, the landlord faced difficulty meeting mortgage payments. The mortgagees were aware of a limited market for purchase of the building due to its dilapidated condition, its poor location, and the presence of an aggressive tenants' association involved in multiple court actions. Both the landlord and the mortgagees bore the additional burden of defending the tenants' pending legal action against them. The tenants entered negotiations confident of obtaining a continuing rent abatement from the court but more interested in achieving needed repairs to their building.

After extensive negotiations, an agreement was reached among all parties which provided for the repair of the building, the resumption of full rent payments, and a limited mortgage moratorium.²⁰² In this way the full rent flow after taxes could be used to effect repair of the building. Pursuant to the agreement, the boiler was repaired, the plumbing was replaced or repaired, most walls and ceilings were replastered, and a comprehensive rodent and insect extermination program was completed.²⁰³

A negotiating strategy such as this should begin with a tenant request for a meeting with the landlord, the mortgagee, and their respective counsel, for the purpose of presenting an equitable solution to the problem at hand.²⁰⁴ The following is an outline generalized from the New Jersey tenant proposal:²⁰⁵

(1) Tenants will offer to resume payment of full rent on condition that rent be applied directly to tenant-designated

²⁰¹ *Morrocco v. Felton*, 112 N.J. Super. 226, 270 A.2d 739 (Law Div. 1970).

²⁰² At this point, the case was removed from the trial calendar, but the Superior Court retained continuing jurisdiction to oversee performance of the agreement.

²⁰³ Repairs under the agreement continued for several months. Still disputes arose concerning the extent and nature of further repairs. When the tenants reinstated rent withholding, the mortgage was foreclosed upon. Unable to find a buyer for the building, the mortgagee retained title and repairs were continued by the receiver in foreclosure until the building was sold six months later.

²⁰⁴ It should not be difficult to get all parties to agree to a meeting, since at this point none of the parties will be in an enviable position. The tenants desire needed repairs, the landlord faces foreclosure, and the mortgagee faces economic loss and the prospect of becoming a slum landlord and a civil defendant.

²⁰⁵ The building was located at 284, 288, and 292 North Day Street in Orange, New Jersey. Four mortgagees were joined as defendants. See *Morrocco v. Felton*, 112 N.J. Super. 226, 229-30, 270 A.2d 739, 740 (Law Div. 1970).

repairs on the building owned by the landlord and mortgaged by the lender.²⁰⁶ Tenants should be prepared to submit a list in order of priority of needed repairs along with their estimated cost. The tenants may even agree collectively to assume responsibility for rent collection on behalf of the landlord.

(2) The mortgagee will declare a moratorium on mortgage payments.²⁰⁷ Where the mortgage is old and the bulk of payments go toward principal, the tenants may agree to keep only the interest payments current. Where the interest represents a significant portion of the payment, it too will require at least partial suspension. The moratorium should last as long as it takes to accumulate a fund sufficient to effect the repairs designated by the tenants in the order of priority established by the tenants. The duration of the moratorium may be either a fixed period computed in advance based on the estimated repair costs or an indeterminate period pending completion of repairs. The mortgagee must also agree to extend the remaining term of the mortgage to encompass the full period of the moratorium. The cost of recasting the mortgage or refinancing the loan should be borne by the mortgagee.

(3) The landlord must voluntarily agree to extension of the mortgage by the period of the moratorium and, if interest is to be kept current during the moratorium, to the payment of additional interest during the extension period.²⁰⁸ The landlord must accept the responsibility of supervising all repair work and guaranteeing completion in a timely and competent manner. The tenants should reserve the right to monitor the progress of all repairs.²⁰⁹

The equity of the proposal is self-evident. The landlord retains title to the property, avoiding foreclosure and a possible deficiency judgment. In addition, the landlord's property will be extensively

²⁰⁶ Tenants bear the cost of voluntarily relinquishing their right to rent abatement under the warranty of habitability and paying full rent for at least the period of the agreement. See pp. 7-13 *supra*. If full repairs are achieved, there will be no further basis for rent withholding. If repairs are not achieved, tenants can then exercise their rights under the warranty.

²⁰⁷ This is not an excessive concession for a mortgagee already facing a continuing default in mortgage payments stemming from the tenants' rent withholding or abatement.

²⁰⁸ The interest rate applicable to the extension period should be the same as the rate originally negotiated on the mortgage; however, some concession may be necessary to reflect current high rates of interest.

²⁰⁹ Provision can be made for settlement of disputes as to the sufficiency of repair work by calling in code inspection agencies as final arbitrators.

repaired at no immediate personal cost. The repaired buildings will be enhanced security for the mortgagee's loan. Mortgage payments will be resumed on a continuing basis in the foreseeable future, and the necessity of foreclosure and concomitant risk of economic loss will be removed. Moreover, increased interest may be recouped and favorable community publicity gained for the mortgagee. The tenants, of course, benefit from the repairs by receiving the decent housing guaranteed by the implied warranty. Communications among the three principal parties will be improved, facilitating smoother operation of the building. Once repairs are completed and a maintenance program is established, negotiation can begin concerning future rent increases and term leases.

There are two major strengths to the tenant-mortgagee negotiating strategy. First, since the value of the landlord's property is increased by the procedure, the strategy has a realistic potential of receiving ad hoc landlord support. It is probably the only potentially effective tenant remedy that can make that claim. Second, the new source of funds may be sufficient to accomplish massive repair. The strategy is limited, however, in that it is viable only if foreclosure is extremely unattractive to the mortgagee. The mortgagee cannot be forced to participate in any moratorium program and may, depending on market conditions, be completely disinterested in entering negotiations. The strategy cannot be successful when it is not in the landlord's and the mortgagee's best interests to enter into good faith negotiations.

III. BEYOND URLTA—FAIR TREATMENT: SECURITY OF TENURE JUST CAUSE EVICTION

Security of tenure/just cause eviction statutes guarantee tenants continued possession conditioned upon compliance with all legal obligations of the tenancy, with controlled exceptions, while simultaneously securing the landlord's ability to regain possession upon a showing of cause sufficient to justify the tenant's ouster. "Security of tenure" emphasizes the tenant's presumptive continued possession; "just cause eviction" emphasizes the landlord's right to repossession in certain circumstances. The terms are used interchangeably in this discussion.

Security of tenure statutes address the most egregious and disruptive form of unfair treatment—capricious or vindictive eviction. In an eviction action the landlord is asserting a right to repossess, often with minimal advance notice, a living unit previously placed in the rental market for the landlord's commercial benefit. The tenant is

primarily asserting the right to fair and adequate advance notice. But he is also asserting the right to continuity of basic living arrangements structured around sustained occupation of premises previously held out for such residential use. Where the landlord interest in repossession is deemed controlling, varying advance notice requirements accommodate the relative urgency of the landlord interest and the tenant interest in a fair and adequate opportunity to make other living arrangements.

Just cause eviction differs in two respects from a prohibition on retaliatory evictions.²¹⁰ First, in contrast to retaliatory eviction,²¹¹ the landlord always bears the burden of proof of a valid cause under the just cause scheme. Second, and more importantly, just cause eviction requires the landlord to present justification not only for eviction during the term of a lease but also for refusal to renew a lease agreement.²¹² Traditionally, landlords have had an absolute right²¹³ to deny renewal of a tenancy for a term and to end a tenancy at will upon notice.²¹⁴ The only legal means of effectuating a tenant preference for tenancies of greater duration was through the negotiation of a long term lease. Security of tenure/just cause eviction proposals seek to achieve an equitable resolution of the competing landlord and tenant interests where meaningful equivalence of bargaining power is lacking. Similarly, lack of tenant bargaining power mandates a provision barring waiver of tenant security of tenure rights.²¹⁵

The comprehensiveness and significance of any "just cause" eviction scheme obviously depends in large measure upon the substantive definition of "just cause." Several options, varying in specificity according to the desired degree of reliance upon judicial elaboration, are available to the drafter. Since uncertainty as to their

²¹⁰ See pp. 12-16 *supra*.

²¹¹ A retaliatory eviction defense relies upon a showing of retaliatory motive. The tenant is often aided by presumptions in establishing that motive. See p. 14 *supra*. The tenant, however, still bears the burden of establishing the initial condition of the presumption, e.g., organizing activity. Further, such statutory presumptions are effective only for a fixed and limited period of time. See, e.g., URLTA § 5.101(b).

²¹² In contrast, under a retaliatory eviction law, the landlord need only present a cause in rebuttal of the defense. Further, and more importantly, the protection against retaliatory eviction is said not to last indefinitely, but rather to "dissipate" should that purpose cease to exist. *Edwards v. Habib*, 397 F.2d 687, 702 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

²¹³ This formerly absolute right has already been limited by retaliatory eviction protections, which have been held applicable to termination of a month to month tenancy at will. See *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968).

²¹⁴ In most states month-to-month tenancies may be terminated upon 30 days' notice without cause. See, e.g., CAL. CIV. CODE § 1946 (West 1975).

²¹⁵ See, e.g., N.J. STAT. ANN. § 2A:18.61.4 (1974).

legal standing often deters tenants from enforcing their legal rights.²¹⁶ It is suggested that legislative enumeration of "just" and "unjust" cause be fairly extensive. Drafting decisions of this nature are not inconsequential; they may significantly influence the prospects of adoption as well as the ultimate substantive definition of "just cause" and the likelihood of the tenants' undertaking enforcement of their security of tenure rights.

Currently, security of tenure is guaranteed to private housing tenants only in the state of New Jersey²¹⁷ and in rent-controlled units in Massachusetts²¹⁸ and New York City.²¹⁹ Several states extend security of tenure to mobile home park tenants.²²⁰ Additionally, due process²²¹ and HUD regulations²²² have been interpreted as establishing just cause eviction protections for occupants of public housing nationwide.

The New Jersey statute²²³ is thus the only just cause eviction scheme independent of rent control and applicable to private housing tenants generally. All private residential rental units are covered by the act, with the exception of transient lodging and owner-occupied premises with no more than two rental units.²²⁴ Ten "just causes" for eviction are identified. They are as follows:

- a. The person fails to pay rent due and owing under the lease whether the same be oral or written;
- b. The person has continued, after written notice to cease, to be so disorderly as to destroy the peace and quiet of the

²¹⁶ Individual tenants are less likely to seek judicial clarification or elaboration of the standard than are landlords with a multiple, continuing, and recurring interest in the regulation. Further, unnecessary reliance upon case law to elaborate the standards heightens the confusion and alienation²¹⁷ it may inhibit tenant recourse to the courts and thus the reality of decent housing and fair treatment. For a discussion of the same theme in a slightly different context, see Rose & Scott, "Street Talk" *Nuisances in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967 (1975).

²¹⁷ N.J. STAT. ANN. § 2A:18-61.1 (1952).

²¹⁸ MASS. GEN. LAWS ANN. 40A:1-9(a) (1970).

²¹⁹ New York City Local Law, No. 16-1969, § NY55-5.10(c)(9).

²²⁰ See, e.g., N.Y. REAL PROP. LAW 233 (McKinney Supp. 1974); FLA. STAT. ANN. § 83-69 (1973), upheld in *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974).

²²¹ *Thorp v. Housing Authority of Durham*, 393 U.S. 268 (1969); *Omaha v. United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972), cert. denied, 410 U.S. 927 (1973); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955).

²²² See, e.g., HUD Circular 7467.8-9 (Feb. 22, 1971).

²²³ N.J. STAT. ANN. § 2A:18-61.1 (1974).

²²⁴ *Id.*

occupants or other tenants living in said house or neighborhood;

c. The person has willfully or by reason of gross negligence caused or allowed destruction, damage or injury to the premises;

d. The person has continued, after written notice to cease, to substantially violate or breach any of the landlord's rules and regulations governing said premises, provided such rules and regulations are reasonable and have been accepted in writing by the tenant or made a part of the lease;

e. The person has continued, after written notice to cease, to substantially violate or breach any of the covenants or agreements contained in the lease for the premises where a right of re-entry is reserved to the landlord in the lease for a violation of such covenant or agreement, provided that such covenant or agreement is reasonable;

f. The person has failed to pay rent after a valid notice to quit and notice of increase of said rent, provided the increase in rent is not unconscionable and complies with any and all other laws or municipal ordinances governing rent increases;

g. The landlord or owner seeks to permanently board up or demolish the premises because he has been cited by local or state housing inspectors for substantial violations affecting the health and safety of tenants and it is economically unfeasible for the owner to eliminate the violations. In those cases where the tenant is being removed because of the existence of substantial violations of law affecting health and safety, no warrant for possession shall be issued until [the relocation assistance statutes have] been complied with;

h. The owner seeks to retire permanently the building or the mobile home park from the rental housing market;

i. The landlord or owner proposes, at the termination of a lease, reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof, which the tenant, after written notice, refuses to accept;

j. The person, after written notice to cease, has habitually failed to pay rent.²²⁵

The New Jersey enumeration of just causes appears both to accommodate all legitimate landlord interests in eviction and to bar most capricious or vindictive motives for eviction. The only just causes not relating to tenant conduct, and therefore creating a substantial risk of effective concealment of an illegal motive, require the removal of the entire structure from the rental housing market.²²⁶ Of

²²⁵ *Id.*

²²⁶ *Id.* § 2A:18-61.1(g), (h).