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Retaliatory Eviction—Statute Prescribing Criminal Penalties for Landlord Reprisals Against Tenants Who Report Violations of Housing or Health Laws Held Constitutional

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junction, in the instant case, should not have been denied, either upon the showing of public benefit or upon a comparison of the injuries. As a result of *Boomer,* in an effort to further weigh the hardships in their favor, future litigants may have to commence an action before the defendant suffers a large investment in the construction of the facility which threatens to be a nuisance or employs persons from the community.[36] An action to enjoin an anticipatory nuisance, in those cases where a subsequent action to enjoin the actual nuisance would propose a "drastic remedy,"[37] would prevent the defendant's injuries and inconveniences and, therefore, preclude the resulting inequities of an injunction. The court will have to take cognizance of the inequities raised by the overruling of *Whalen* and provide more affirmative protection for the small property owner than *Boomer* seems to allow.

BRUCE V. WEITZEN

RETALIATORY EVICTION—STATUTE PRESCRIBING CRIMINAL PENALTIES FOR LANDLORD REPRISALS AGAINST TENANTS WHO REPORT VIOLATIONS OF HOUSING OR HEALTH LAWS HELD CONSTITUTIONAL

A tenant in a seven-family house registered several complaints with the board of health relating to the condition of her premises. Subsequently, the owner increased the complaining tenant's rent from $117.50 to $175.00 per month. Pursuant to the provisions of the New Jersey retaliatory eviction statute, the State brought criminal charges against the landlord. The statute stipulates that any person who takes or threatens to take a reprisal against a tenant who makes reports of violations of the health or housing code[1] is to be adjudged disorderly, and may be subject to the maximum penalty of six months imprisonment and a $250.00 fine.[2] The tenant testified that

36. *See* Spater, *Noise and the Law,* 63 MICH. L. REV. 1377 (1965).
37. *See* 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

1. Although the statute mentions "health or building codes," not specifically housing codes, the term is included as a "law or regulation which has as its objective the regulation of rental premises." N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

2. The New Jersey retaliatory eviction statute in full provides:

> Any person, firm or corporation or agent, officer or employee thereof who threatens to or takes reprisals against any tenant for reporting or complaining of the existence or belief of the existence of any health or building code violation, or a violation of any other municipal ordinance or State law or regulation which has as its objective the regulation of rental premises, to a public agency, is a disorderly person and shall be punished by a fine of not more than $250.00, or by imprisonment for not more than 6 months or both.
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> In any action brought under this section the receipt of a notice to quit the rented premises or any substantial alteration of the terms of tenancy without cause within 90 days after making a report or complaint or within 90 days after any proceeding resulting from such report or complaint shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such report or complaint.

N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

the defendant had acknowledged to her that his action was an attempt to force her to move because she had made reports of violations to the board of health. Defendant contended that his conduct was not in retaliation for the tenant's complaints, but instead was predicated upon his feeling that she was an undesirable tenant. The defendant was convicted in the Newark Municipal Court, and on appeal, was granted a trial *de novo* in the Essex County Court. The County Court also adjudged the defendant a disorderly person and fined him $50.00. He appealed to the Appellate Division of the Superior Court on the constitutional grounds that application of the statute deprived him of both property and the right of freedom of contract without due process of law, and that the statute was void for overbreadth and vagueness. The defendant further contended that the rebuttable presumption created by the statute was invalid because the inference drawn from the facts was strained and not rationally connected in common experience.[3] The Appellate Division unanimously affirmed his conviction. *Held,* the statute, prescribing penalties for a landlord taking or threatening to take reprisals against a tenant who reports the existence of any health or housing code violation, is a constitutionally reasonable exercise of police power. *State v. Field,* 107 N.J. Super. 107, 257 A.2d 127 (App. Div. 1969).

Landlords renting in the low-income market rarely give a written lease to their tenants; instead, they prefer to rent from month to month and at will.[4] Common law allows a landlord to terminate either of these tenancies for any purpose upon reasonable notice to the tenant.[5] As a result, low-income tenants who seek enforcement of health and housing code regulations by reporting alleged violations to a government agency find that the landlord may respond by giving a notice to terminate[6] or by raising the rent to a prohibitive level.[7] Eviction is an acute problem to low-income

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3. Brief for Defendant at 27, State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (App. Div. 1969).

4. *See* Salsick, *Housing and the States,* 2 THE URBAN LAWYER 40, 46 (1970); McElhaney, *Retaliatory Evictions: Landlords, Tenants and Law Reform,* 29 MD. L. REV. 193, 195 (1969); Wright, *The Courts Have Failed The Poor,* N.Y. Times, Mar. 9, 1969, § 6 (Magazine), at 108, col. 2.

5. *See* De Wolfe v. McAllister, 229 Mass. 410, 118 N.E. 885 (1918); Radigan v. Hughes, 86 Conn. 536, 86 A. 220 (1913); Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Mun. Ct. App. 1947).

6. *See* 1 CCH POVERTY L. REP. ¶ 2210 (1969); Comment, *Tenant's Remedies in District of Columbia: New Hope for Reform,* 18 CATHOLIC U.L. REV. 80, 93-94 (1968).

"With the poor service of process which is prevalent in urban areas, often the first notice that a tenant receives of the eviction is when the sheriff arrives to dispossess." Note, *Eviction Procedure in Public Housing,* 52 MARQ. L. REV. 310, 317 (1968).

7. *See* Note, *Landlord and Tenant-Eviction,* 82 HARV. L. REV. 932, 935 (1969); Moskovitz, *Retaliatory Evictions—The Law and the Facts,* 3 CLEARINGHOUSE REV. 4, 5 (1969); Note, *Retaliatory Evictions—Is California Lagging Behind?,* 18 HASTINGS L.J. 700, 705 (1967).

families because of the difficulty of finding alternate housing in their low-vacancy market[8] and because of the great expense of moving.[9] Consequently, fear of retaliation by their landlord often deters tenants from reporting health and housing violations and thereby hampers the attempts of regulating agencies to improve the quality of housing.[10] While most states have codified the common law regarding termination of tenancy from month to month and tenancy at will, the major modification has usually been that a thirty day notice to terminate may be given to either party.[11] Only recently have some courts and legislatures begun to recognize the retaliatory motive of landlords as a defense to an eviction.[12]

In 1964, the retaliation defense was first given judicial recognition in New York when it was held in *Tarver v. G. & C. Construction Corp.*,[13] that legal enforcement of a retaliatory eviction violates a citizen's constitutional right to petition the government for a redress of grievances.[14] The

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In addition to reporting housing or health code violations, a number of other activities by tenants which have resulted in retaliatory evictions have been: tenant organizing activity, such as forming tenant unions (*see* 1 CCH POVERTY L. REP. ¶ 2210.80 (1969); Davis & Schwartz, *Tenants Unions: An Experiment in Private Law-Making*, 2 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 237 (1967)); rent withholding and threats to withhold rent until building code violations are remedied (*see* McElhaney, *supra* note 4, at 194; Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 310 (1965)); tenant complaints to the landlord (*see* Salsich, *supra* note 4, at 47); participating in a rent strike (*see* Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 391-92 (1970)). "The eviction procedure may also be utilized to render moot an appeal on a novel defense by the tenant in an action for possession or rent, or perhaps on a cause of action of first impression." Note, *Habitability in Slum Leases*, 20 S.C.L. REV. 282, 295 (1968).

8. For information on the shortages of low-income housing, *see* Freidick & Seidel, *Recent Trends in Housing Law: Prologue to the 70's*, 2 THE URBAN LAWYER 1 (1970); Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970); Keith, *An Assessment of National Housing Needs*, 32 LAW & CONTEMP. PROB. 209 (1967).

9. "[T]he availability of other housing may be further reduced because the tenant may be marked as a troublemaker and landlords may therefore exclude him." Comment, *Protection for Citizen Complaints to Public Authorities—Prohibition of Retaliatory Evictions*, 48 NEB. L. REV. 1101, 1106 (1969).

10. *See* 2 LAW IN ACTION 1, 6 (1968); Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

11. *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-42 (1966). *See also* N.J. STAT. ANN. §§ 21A:18-53, 21A:18-56 (1952); N.Y. REAL PROP. LAW §§ 228, 232-a, 232-b (McKinney 1968).

12. *See* 1 CCH POVERTY L. REP. ¶ 2210 (1969). Retaliatory eviction "is new only because in the past such evictions were not challenged." *Id.*

13. Civil No. 64-2945 (S.D.N.Y., Nov. 9, 1964).

14. *Id.* Mr. and Mrs. Tarver made a complaint to the County Health Department and the same day received a notice from the landlord that their rent would be increased from $35 to $150 per week. After finding "that the Tarvers have made a clear showing that they will probably be able to prove upon the trial that they are threatened with eviction solely because they exercised their Constitutional right to petition for a redress of their grievances," a preliminary injunction was granted to enjoin the defendants from evicting or in any way "retaliating against" the Tarvers.

court reasoned that the first and fourteenth amendments protected this right from government infringement.[15] Actual government infringement was shown by reliance upon the "state action" principle; a state court, in effecting such an eviction, would be aiding one citizen to infringe upon the rights of another.[16] In what has become a landmark case for tenants' rights, the United States Court of Appeals in 1968, in *Edwards v. Habib*,[17] declared that a landlord cannot evict in retaliation for his tenant's report of housing code violations to the authorities.[18] The majority reasoned that Congress had evinced a strong policy of enforcement of the housing code for the District of Columbia which was largely dependent upon a tenant's ability to report infractions of the code.[19] Allowing retaliatory evictions, the court concluded, would defeat this policy. Judicial recognition of the de-

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15. The due process clause of the fourteenth amendment to the U.S. Constitution makes the first amendment right to petition the government for a redress of grievances applicable to the states. De Jonge v. Oregon, 299 U.S. 353 (1937).

The Bill of Rights of many states also contain provisions asserting this right to petition. *See e.g.*, N.J. CONST. art. I, ¶ 18; N.Y. CONST. art. I, § 9.

16. Shelly v. Kraemer, 334 U.S. 1 (1948), declared "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment. . . ." *Id.* at 14.

In *Shelly*, judicial enforcement of a racially restrictive covenant that applied to private dwellings was held to be "state action" and thereby in contravention of the equal protection clause of the fourteenth amendment.

See Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242, 250, 22 Cal. Rptr. 309, 317 (1962), where it was held that judicial enforcement of an eviction solely because of race is "state action."

For further explanation of the "state action" doctrine, *see* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Comment, *The Fourteenth Amendment and the State Action Doctrine*, 24 WASH. & LEE L. REV. 133 (1967).

17. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

18. *Id.* at 699. For additional information on the significance of the *Habib* case, *see* Comment, *supra* note 9; Note, *Landlord and Tenant-Eviction*, 82 HARV. L. REV. 932 (1969); Note, *Landlord and Tenant—Retaliatory Evictions*, 44 N.Y.U.L. REV. 410 (1969).

19. 397 F.2d 687, 700 (D.C. Cir. 1968), *cert. denied*, 393 N.S. 1016 (1969).

> The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live. Effective implementation and enforcement of the codes obviously depends in part on private initiative in the reporting of violations. . . . To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington.

397 F.2d at 700-01.

The court cited John Hancock Mutual Life Ins. Co. v. NLRB, 89 U.S. App. D.C. 26, 191 F.2d 483 (1951), in explaining its position 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." 397 F.2d 687, 701-02 & n.48 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

fense in other jurisdictions has come slowly.[20] In 1969, in spite of *Tarver,* the question was still not settled in New York State.[21] In January of 1970, the Supreme Court of Wisconsin concluded that the public policy of the state, as espoused in its housing statutes, permits the tenant to utilize a defense of improper retaliatory motive in an eviction proceeding.[22] As in

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20. A reason why judicial recognition of the defense of retaliatory eviction has been slow is that many judges believe that such a change in landlord-tenant law should be made by legislative action and not by judicial decision. *See* Weinberg v. Scheper, No. 24453-68 (Baltimore People's Ct., Nov. 30, 1968); La Chance v. Hoyt, No. CV 14-685-35 851 (Conn. Cir. Ct. 14th Cir., Sept. 6, 1968); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970) (dissenting opinion); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) (dissenting opinion), *cert. denied,* 393 U.S. 1016 (1969).

Also, other than in New York City and Washington, D.C., few retaliatory eviction cases seem to have come to the courts.

21. *See* Hosey v. Club Van Cortlandt, 299 F. Supp. 501, 507 (S.D.N.Y. 1969). In Club Van Cortlandt v. Hosey, 2 CCH POVERTY L. REP. ¶ 11,644 (N.Y. App. Div., June 11, 1970), the court ruled that a tenant could properly raise the defense of retaliatory eviction in a summary holdover proceeding.

At least one author believes that retaliatory eviction is a recognized defense in New York State courts. Gibbons, *supra* note 7, at 395 & n.147. *Compare* Hubbard v. Alexandria Hotel Co., Civil No. 69-2945 (S.D.N.Y., Apr. 29, 1969), where the U.S. District Court said that a tenant facing summary eviction because of her tenant-organizing activities was not entitled to an injunction in a federal court action, even though she may have established a deprivation of her right to free speech, because she had an adequate remedy at law in state courts, *with* Lawrence v. Benaminer Realty Corp., Civil No. 69-3405 (S.D.N.Y., Aug. 22, 1969), where a tenant, who alleged that complaints to city authorities about housing code violations resulted in her being denied a larger apartment in the same building where she resided, was entitled to a preliminary injunction prohibiting the landlord from renting the larger apartment to anyone other than the tenant.

In New York state and municipal courts, *see* McDonnell v. Sir Prize Contracting Corp., 32 App. Div. 2d 660, 300 N.Y.S.2d 696 (2d Dep't 1969) (mem.) where the court held that N.Y.C. RENT, EVICTION AND REHABILITATION REGS. § 51(b) prohibits an attempt to remove a tenant because he has taken action authorized by the Rent Law or the Regulations; *In re* Seril, 2 CCH POVERTY L. REP. ¶ 11,237 (N.Y. Sup. Ct., Mar. 10, 1970) where a landlord was denied an eviction certificate because he failed to establish an immediate and compelling necessity and good faith, as required by N.Y.C. RENT, EVICTION AND REHABILITATION REGS. § 55(a). *But cf.* Lincoln Square Apts. v. Davis, 58 Misc. 2d 292, 295 N.Y.S.2d 358 (N.Y.C. Civ. Ct. 1968) in which the court ruled that it had no jurisdiction to determine the constitutional issue raised in the affirmative defense. *See also* Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968), where it was held that the defense of retaliation for reporting housing violations is included under N.Y. REAL PROP. ACTIONS LAW § 743 (McKinney Supp. 1968), which permits any legal or equitable defense in a summary proceeding; 703 Realty Corp. v. Greenbaum, Civil No. 83930/69 (N.Y.C. Civ. Ct., Dec. 19, 1969) which held that New York public policy prohibits the eviction of a tenant in retaliation for making complaints about the building to governmental agencies; a stipulation that sought to restrict the tenant from resorting to the authorities to protect himself was held unenforceable.

22. Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). The court relied upon statutory interpretation, stating: "It is our opinion that public policy as espoused in Ch. 66, Stats. clearly indicates that the legislature intended that housing code violations should be reported. If a landlord could terminate a tenancy solely because his tenant had reported a violation the intention of the legislature would be frustrated." *Id.* at 392, 173 N.W.2d at 301.

Habib, the Wisconsin court reasoned that a landlord is permitted to terminate a tenancy at will or a periodic tenancy for any legitimate reason or for no reason at all, but he cannot terminate the tenancy in retaliation for a tenant's report of code violations.[23] The elements required for a successful defense of retaliation in Wisconsin were specifically set out; there must be clear and convincing evidence that: (1) an actual violation of the housing code existed; (2) the landlord must have had knowledge that the tenant made a complaint to a government agency; and (3) the retaliation must have been the landlord's sole reason for seeking to terminate the tenancy.[24]

In 1963, the Illinois legislature enacted the first statute recognizing the retaliation defense without making provisions for specific action or penalties.[25] It simply declared that evictions or refusal to renew a tenancy in response to complaints regarding housing and health code violations was against the state's public policy. Since then, five additional states have enacted retaliatory eviction statutes; four of these statutes provide civil remedies.[26] The statutes of Connecticut,[27] Massachusetts,[28]

23. *Id.* at 392, 173 N.W.2d at 301-02. *See also* Terrace v. Sylvester, 2 CCH POVERTY L. REP. ¶ 10,371 (D.C. Ct. of Gen. Sess., July 30, 1969), where an eviction of a tenant in retaliation for making complaints of violations of the housing code was upheld, because the landlord had proved that there was another, more dominant, reason for the tenant's eviction.

24. 45 Wis. 2d at 393, 173 N.W.2d at 302.

25. The Illinois retaliatory eviction statute provides:

> It is declared to be against the public policy of the State for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation. Any provision in any lease, or any agreement or understanding, purporting to permit the landlord to terminate or refuse to renew a lease or tenancy for such reason is void.

ILL. REV. STAT. ch. 80, § 71 (1963).

26. Connecticut (Pub. Act No. 315, 3 Conn. Leg. Serv. 339 (1969)); Massachusetts (MASS. GEN. LAWS ANN. ch. 186, § 18, ch. 239, § 2A (Supp. 1970)); Michigan (MICH. STAT. ANN. § 27A.5646 (Supp. 1969)); Rhode Island (R.I. GEN. LAWS ANN. § 34-20-10 (Spec. Supp. 1968)); New Jersey (N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969)).

At least three other states provide a limited defense to retaliatory eviction in connections with state rent withholding laws. Maryland (ch. 233, [1969] Md. Laws 680); Missouri (Pub. Act No. 315, § 13, 3 Mo. Leg. Serv. 483 (1969)); Pennsylvania (PA. STAT. ANN. tit. 35, § 1700-01 (Supp. 1969)).

27. In any action for summary process under chapter 922 of the general statutes it shall be an affirmative defense that the plaintiff brought such action solely because the defendant attempted to remedy, by lawful means, including contacting officials of the state or of any town, city, borough or public agency, any condition constituting a violation of any of the provisions of chapter 352 of the general statutes or of the housing or health ordinances of the municipality wherein the premises which are the subject of the complaint lie. The obligation on the part of the defendant to pay rent or the reasonable value of the use and occupancy of the premises which are the subject of any such action shall not be abrogated or diminished by any provision of this act.

Pub. Act No. 315, 3 Conn. Leg. Serv. 339 (1969).

28. It shall be a defense to an action for summary process that such action was in reprisal for the act of the tenant for reporting a violation or suspected violation of

Michigan, [29] and Rhode Island[30] provide that tenants may use proof of a retaliatory motive by the landlord as a defense to an action for eviction.[31] A second Massachusetts statute also makes provision for monetary damages

law, as provided in section eighteen of chapter one hundred and eighty-six. The commencement of such action against a tenant within six months after the making of such report by said tenant shall create rebuttable presumption that such action is a reprisal against the tenant for making such report.

MASS. GEN. LAWS ANN. ch. 239, § 2A (Supp. 1970).

29. (3) When proceedings are commenced under this chapter to regain possession following the alleged termination of a tenancy for nonpayment of rent, the defendant, in an appropriate pleading, may state such defense as he may have upon the lease or contract, or against the opposing party.

(4) When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges in a responsive pleading and if it appears by a preponderance of the evidence that any of the following situations exist, judgment shall be entered for the defendant:

(a) That the alleged termination was intended as a penalty for the defendant's attempt to secure or enforce rights under a lease or contract, or under the laws of the state or its governmental subdivisions, or of the United States.

(b) That the alleged termination was intended as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of any health or safety code or ordinance.

(c) That the alleged termination was intended as retribution for any other lawful act arising out of the tenancy.

(d) That the alleged termination was of a tenancy in housing operated by a city, village, township or other unit of local government, and was terminated without cause.

(5) When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges and it appears by a preponderance of the evidence that the plaintiff attempted to increase the defendant's obligations under the lease or contract as a penalty for such lawful acts as are described in subsection (4), and that the defendant's failure to perform such additional obligations was a material reason for the alleged termination, judgment shall be entered for the defendant on the claim of possession, and all such additional obligations shall be void.

MICH. STAT. ANN. § 27A.5646 (Supp. 1969).

30. When proceedings commenced under this chapter are to regain possession of the premises following the alleged termination of a tenancy, if the defendant alleges in his answer and if it appears by a preponderance of the evidence that any of the following situations exist, judgment shall be entered for the defendant:

(A) That the alleged termination was intended as a penalty for the defendant's justified attempt to secure or enforce rights under a lease or contract, or under the laws of the state or its governmental subdivisions, or of the United States.

(B) That the alleged termination was intended as a penalty for the defendant's justified complaint to a governmental authority with a report of plaintiff's violation of any health or safety code or ordinance.

(C) That the alleged termination was intended as a penalty for any other justified lawful act of the defendant.

(D) That the alleged termination was a tenancy in housing operated by a city, town, municipal housing authority, or other unit of a local government, and was terminated without cause.

R.I. GEN. LAWS ANN. § 34-20-10 (Spec. Supp. 1968).

31. Connecticut provides protection only: (1) when the landlord brings an action for eviction *solely* because the tenant tried to remedy a violation by "lawful means;" (2) for tenant complaints of housing or health code violations; and (3) when the tenant com-

against any person who takes or threatens reprisals against a tenant.[32] Only New Jersey has chosen a criminal statute to deter retaliatory evictions.[33] The statute extends to tenant complaints regarding both health and building code violations and violations of state and municipal laws or regulations which have as their objective the regulation of rental premises.[34] While the statute contains an evidentiary provision creating a rebuttable presumption of retaliation when there is a reprisal within 90 days of either the tenant's complaint or any proceeding resulting from that complaint, it does not make provision for the tenant to use the landlord's improper motive in a civil case, as a defense in summary proceedings or to enjoin the eviction.[35] The latter questions have been before the New Jersey courts.[36] One such case held that a tenant has the right to a full jury trial on the issue of retaliation, and if the landlord's improper motive is

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plaints produce *actual* violations of the housing and health ordinances. Pub. Act No. 315, 3 Conn. Leg. Serv. 339 (1969).

Both the Michigan and Rhode Island statutes grant a defense to tenants in an eviction proceeding, not only when termination is attempted for securing rights under the rental agreement or for reporting code violations to the authorities, but when "the alleged termination was intended as retribution for any other lawful act arising out of the tenancy," (MICH. STAT. ANN. § 27A.5646 (Supp. 1969)) and when "the alleged termination was intended as a penalty for any other justified lawful act of the defendant." (R.I. GEN. LAWS ANN. § 34-20-10 (Spec. Supp. 1968)). Note the broad language of the Rhode Island statute.

The Massachusetts law goes beyond the other civil statutes in establishing a rebuttable presumption of retaliation if an action for eviction is brought within six months of the report by the tenant. MASS. GEN. LAWS ANN. ch. 186, § 18, ch. 239, § 2A (Supp. 1970).

32. The Massachusetts statute provides:

> Any person or agent thereof who threatens to or takes reprisals against any tenant of residential premises for reporting to the board of health or, in the city of Boston, to the commissioner of housing inspection or to any other board having as its objective the regulation of residential premises a violation or a suspected violation of any health or building code or of any other municipal by-law or ordinance, or state law or regulation which has as its objective the regulation of residential premises shall be liable for damages which shall not be less than one month's rent or more than three month's rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of the suit, including a reasonable attorney's fee.
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> The receipt of any notice of termination of tenancy except for nonpayment of rent or of increase in rent or of any substantial alteration in the terms of tenancy within six months after making a report or complaint of violations or suspected violations of any health or building code, municipal by-law or ordinance, or state law or regulation which has as its objective the regulation of residential premises shall create a rebuttable presumption that such notice is a reprisal against the tenant for making such report or complaint.

MASS. GEN. LAWS ANN. ch. 186, § 18 (Supp. 1970).

33. N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

34. *Id.*

35. *Id.*

36. *E.g.*, Alexander Hamilton Savings & Loan Ass'n v. Whaley, 107 N.J. Super. 89, 257 A.2d 7 (Hudson County Dist. Ct. 1969).

proved, a permanent injunction can be issued.[37] However, the court did not allow the tenant to use the rebuttable presumption of the criminal retaliatory eviction statute; the burden of proof to show improper motive remained on the tenant.[38]

In the instant case, the court unanimously held that it was constitutional for the State of New Jersey to impose criminal penalties upon a landlord who takes reprisals against a tenant because he has reported violations of health code standards in his rented premises. Implicit throughout the decision is the court's belief that this was a situation where the public good of insuring proper housing conditions for the citizens of New Jersey demanded that the state place restrictions on the rental of realty. The court reasoned that government, in the exercise of its police power, may adopt reasonable health and housing regulations.[39] The enforcement of these regulations to eliminate health violations is largely dependent upon tenant complaints and, therefore, it is a legislative concern that tenants not be intimidated.[40] If these tenant reports are stopped, the effectiveness of housing and health legislation will be substantially impaired.[41] Responding succinctly to each of the defendants' claims, the court declared that there was no substance in the due process and overbreadth arguments because the "statute is on its face addressed to a lawful end;" it was not even necessary to invoke the "presumption in favor of the statute's constitutionality."[42] Similarly, the court stated that there was no merit in the argument that the words "reprisals" and "without cause" rendered the statute void for vagueness.[43] Also, the rebuttable presumption was held to be valid because it satisfied the constitutional standard that there be a rational connection in common experience between the fact to be proved and the ultimate fact to be presumed.[44]

Even though the constitutionality of the New Jersey statute has been upheld in the instant case, the position of the tenant is still insecure for two reasons. First, the possibility of a criminal sanction may not be a suf-

37. Kernodle v. Antonette Apartments Corp., Civil No. C-402-79 (Super. Ct., Mar. 25, 1970), *aff'd*, Civil No. A-1270-69 (App. Div., June 8, 1970). The Appellate Division of the Superior Court did not reach the issue of whether the rebuttable presumption of the criminal statute can be used in a civil case.

38. *Id.* Improper retaliatory motive is extremely difficult to prove when the burden of proof is on the tenant. Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 682 (1966); Note, *Retaliatory Evictions—Is California Lagging Behind?*, 18 HASTINGS L.J. 700, 705 & n.34 (1967).

39. State v. Field, 107 N.J. Super. 107, 111, 257 A.2d 127, 129 (1969).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 111-12, 257 A.2d at 129.

44. *Id.* at 112, 257 A.2d at 129.

ficient deterrent to stop retaliatory evictions.[45] Generally, the enforcement of housing regulations by the institution of criminal sanctions has not been successful. In addition to a record of listless enforcement,[46] the courts have been unwilling to recognize housing violations as true crimes.[47] For example, in New York City, where fines up to $1,000 per housing code violation may be imposed for repeated offenders,[48] the average fine per violation in 1965 was about fifty cents.[49] Also, investigations have shown that jail sentences for housing code convictions are rarely imposed.[50] Therefore, if a record of minimal enforcement coupled with small penalties upon infrequent convictions prevails in New Jersey,[51] the retaliatory eviction statute will do little to curtail reprisals.[52] Second, the statute is strictly penal in nature and does not afford protection to a tenant in a civil action for eviction.[53] The tenant must be given the civil defense of being allowed to prove his landlord's improper retaliatory motive. In addition, it is essential for proper protection of tenants that the rebuttable presumption established in the criminal statute be incorporated into this common law civil defense.

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45. *See* Gibbons, *Landlord-Tenant Problems,* in LEGAL REPRESENTATION OF THE POOR—A GUIDE FOR NEW JERSEY LEGAL SERVICES PROJECT ATTORNEYS 275 (E. Jarmel ed. 1968).

Landlords have found retaliatory evictions to be useful in stopping complaints by other tenants and ridding themselves of the leader of a tenant union or some other "trouble-maker." *Id.* at 295-96. *See* Moskovitz, *supra* note 7, at 4.

Also, continuances for landlords in New Jersey have been as long as eighteen months. Goldberg, *Landlord-Tenant Law Entirely Fair? — A Reply,* 93 N.J.L.J. 109, 114 (1970).

46. *See* Goldberg *supra* note 45, at 114.

47. *See* Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254, 1279 (1966); Note, *Enforcement of Municipal Housing Codes,* 78 HARV. L. REV. 801, 820 (1965).

48. N.Y. MULT. DWELL. LAW § 304 (McKinney Supp. 1969-70); N.Y.C. ADMIN. CODE, § D-26-8.0 (1956).

49. Gribetz & Grad, *supra* note 47, at 1276. *See also* Marco & Mancino, *Housing Code Enforcement—A New Approach,* 18 CLEV.—MAR. L. REV. 368, 370-72 (1969).

Some landlords have even attempted to write off housing code fines as business expenses on their income tax returns. Note, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply,* 31 U. CHI. L. REV. 180, 189 n.44 (1963).

The amount collected from fines may be substantially less than the costs in prosecuting the violations. Legislative Drafting Research Fund of Columbia University, LEGAL REMEDIES IN HOUSING CODE ENFORCEMENT IN NEW YORK CITY 42-43 (1965).

50. Gribetz & Grad, *supra* note 47, at 1277; Wright, *supra* note 4, at col. 1.

51. In the opinion of Joseph Wilkins, attorney, Cape-Atlantic Legal Services, New Jersey, it accomplishes little to fine a landlord under the criminal retaliatory eviction statute when the repairs are most frequently more costly than the fine.

What if there were continued prosecution of a landlord until the housing violations were repaired? "The practical realities of small town politics operate as a bar to vigorous prosecution of landlords in these matters," says Mr. Wilkins. Interview by telephone, Sept. 9, 1970.

52. There may be some small consolation for a tenant who is being evicted in New Jersey that judges have discretion to stay the issuance of a warrant for eviction up to six months. N.J. STAT. ANN. § 2A:42-10.6 (1952).

53. *See* Goldberg, *supra* note 45, at 114. *See supra* text at notes 35-38.

It is submitted that if the state legislature does not act,[54] the New Jersey courts should construe the disorderly person's statute as a broad expression of public policy prohibiting retaliatory eviction, and thereby uphold the tenants' civil defense of improper retaliatory motive in eviction proceedings. In states which have no law prohibiting retaliatory evictions, states might enact a civil statute[55] which would: (1) allow the tenant to plead and prove a reprisal[56] for any justified lawful act[57] (or alternatively, for reporting violations or suspected violations[58] of any law dealing with the regulation of rented premises) of the tenant,[59] as a defense to an eviction action;[60] (2) create a rebuttable presumption of retaliation when a reprisal[61] is made within a specific period[62] after either the actions of the tenant, or any legal proceeding that may result from those actions; and (3) provide for the payment of damages if retaliation is proved. A statute is preferable to judicial recognition because it presents exact standards for enforcement,

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54. The General Assembly of New Jersey did introduce (Mar. 19, 1970) and later passed an amended version of the state's criminal retaliatory eviction statute. One of the striking features of the bill was its provision that, "the landlord shall be subject to a civil action by the tenant, for damages and other appropriate relief including injunctive and other equitable remedies . . ." for violation of the provisions of this proposed law (N.J. General Assembly, No. 831). The state Senate also passed the bill and sent it on to the Governor for his signature on June 8, 1970. Governor Cahill did not sign the bill and has returned it to the Assembly.

55. Families who want "decent, or at least safe and sanitary, places to live," as Judge Wright called it in Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), have little interest and little to gain in criminal actions that may fine or imprison a landlord. *See* J. LEVI, P. HABLUTZEL, L. ROSENBERG, & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (Tent. Draft, American Bar Foundation 1969), for an example of a retaliatory eviction statute integrated into landlord-tenant law. *See also* Note, *Retaliatory Evictions: A Study of Existing Law and Proposed Model Code*, 11 WM. & MARY L. REV. 537 (1969).

56. "Reprisal" is an inclusive term which should cover all acts of retaliation including terminating the tenancy, increasing the rent, and substantially altering the terms of the tenancy.

57. "Justified lawful act" is more inclusive than some statutes which deal only with tenants who make complaints to housing or health agencies. Such lawful activities as forming tenant unions, making complaints to the landlord, apprising tenants of their rights under the rental laws, etc. should be protected. *See, e.g.*, R.I. GEN. LAWS ANN. § 34-20-10(C) (Spec. Supp. 1968).

58. A policy decision must be made as to whether suspected violations (*i.e.*, complaints which do not turn out to be in violation of the rental laws) will be included in the statutory protection. Including suspected violations may allow a tenant to make frivolous complaints in order to delay an eviction. On the other hand, if a tenant may face eviction when an honest belief of a violation turns out to be wrong, the tenant may be deterred when he must elect to make a complaint at his peril.

59. The statute may choose to include protection for all tenants or just those in residential premises.

60. In the case of a retaliatory rent increase or alteration of the terms of the tenancy, the tenant can refuse to pay the rent, and upon receiving a notice to terminate, submit the increase or alteration as proof of retaliation.

61. *See supra* note 56.

62. The Illinois statute uses six months; New Jersey has chosen a ninety day period.

however, if the legislatures are unwilling to act, then the retaliation defense might be allowed by the courts[63] on any number of grounds.[64] Whether it be by judicial or legislative action, each state must secure legal protection for every tenant who exercises his right to secure safe and sanitary living accommodations.

LARRY SCHAPIRO

SELECTIVE SERVICE LAW—PURELY ETHICAL OR MORAL BELIEFS HELD GROUNDS FOR CONSCIENTIOUS OBJECTOR EXEMPTION

On April 24, 1964, petitioner, Elliott Ashton Welsh, II, applied for a conscientious objector exemption from military service by filing an application with his local draft board. Petitioner claimed that the basis for his conscientious objector beliefs had been formed "by reading in the fields of history and sociology."[1] Upon completion of the application he affixed his signature to the statement, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form," after he had stricken the words, "religious training and."[2] On the same application, petitioner denied that he believed in a Supreme Being, but later amended this, stating that he preferred to leave the issue open. The peti-

63. "[T]he need for judicial action is strongest in the areas of the law where political processes prove inadequate, not from lack of legislative power but because the problem is neglected by politicians." Cox, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 122 (1966).

64. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), raises three theories:

1. the landlord's improper motive deprives the tenant of his first amendment right to petition the government for a redress of grievances;
2. a citizen's right to inform the government of violations of law is constitutionally protected;
3. retaliatory evictions are contrary to public policy as enunciated by the legislature.

A fourth theory would allow retaliatory motive to be raised under state statutes which permit equitable defenses. Portnoy v. Hill, 57 Misc. 2d 1097, 1110, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968).

A fifth theory could be to argue that the use of the judicial process to order evictions, where a landlord's principal reason to evict the tenant is for having reported the violations, constitutes an unconstitutional chilling effect on the exercise of First Amendment rights of the tenants.

Finally, it can be argued: "A normally unrestricted right to sever or refuse to renew a contractual relationship may be restricted where the reason for such severance or refusal is contrary to public policy, usually as expressed by some statute. Such cases tend to occur in labor law. . . ." Moskovitz, *supra* note 7, at 6.

1. Welsh v. United States, 398 U.S. 333, 341 (1970) [hereinafter cited as instant case].

2. To qualify for conscientious objector exemption, the applicant must file Selective Service form SSS 150 with his local draft board. This form, which contains the statement in the text, must be signed by the applicant before he may be considered for conscientious objector exemption.