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Landlord-Tenant: Proving Motive in Retaliatory Eviction--Minnesota's Solution

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Landlord-Tenant: Proving Motive in Retaliatory Eviction —Minnesota's Solution

In 1971 the Minnesota legislature enacted a statute designed to protect tenants who have pursued their legal rights from retaliatory eviction.[1] The statute, in accord with the national trend in landlord-tenant law toward enhancing the rights of low-income tenants,[2] prohibited any eviction intended as a penalty for a tenant's good faith attempts to invoke a wide range of rights and remedies[3] and demonstrated the legislature's preference for a statutory rather than case-by-case approach to

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1. 1971 Minn. Laws ch. 240, § 1 (codified at MINN. STAT. § 566.03 (1974)) (amended by 1976 Minn. Laws ch. 17, § 1). The text of the 1971 statute was identical to the version set out below, with the exception of the italicized phrases which were added by the amendment of 1976, *see* text accompanying notes 6-8 *infra*.

> Subd. 1. [Describes the circumstances under which the landlord can recover possession.]
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> Subd. 2. It shall be a defense to an action for recovery of premises following the alleged termination of a tenancy by notice to quit for the defendant to prove by a fair preponderance of the evidence that:
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> (1) The alleged termination was intended *in whole or part* as a penalty for the defendant's good faith attempt to secure or enforce rights under a lease or contract, oral or written, or under the laws of the state, any of its governmental subdivisions, or of the United States, or
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> (2) The alleged termination was intended *in whole or part* as a penalty for the defendant's good faith report to a governmental authority of the plaintiff's violation of any health, safety, housing or building codes or ordinances.
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> If the notice to quit was served within 90 days of the date of any act of the tenant coming within the terms of clauses (1) or (2) the burden of proving that the notice to quit was not served *in whole or part* for a retaliatory purpose shall rest with the plaintiff.
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> Subd. 3. In any proceeding for the restitution of premises upon the ground of nonpayment of rent, it shall be a defense thereto if the tenant establishes by a preponderance of the evidence that the plaintiff increased the tenant's rent or decreased the services as a penalty *in whole or part* for any lawful act of the tenant as described in subdivision 2, providing that the tenant tender to the court or to the plaintiff the amount of rent due and payable under his original obligation.
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> Subd. 4. Nothing contained herein shall limit the right of the lessor *pursuant to the provisions of subdivision 1* to terminate a tenancy for a violation by the tenant of a lawful, material provision of a lease or contract, whether written or oral, or to hold the tenant liable for damage to the premises caused by the tenant or a person acting under his direction or control.

2. *See* text accompanying notes 12-24 *infra*.

3. MINN. STAT. §§ 566.03(2)(1)-(2) (1974); *see* note 1 *supra*.

retaliatory eviction.[4] Most significant was the provision that notice to quit served within 90 days of activity protected by the statute placed the burden of showing lack of retaliatory motive on the landlord.[5]

The statute provided no standard for determining the precise role retaliation had to play in the landlord's decision in order for a retaliatory eviction defense to succeed. Trial courts tended to construe the statute narrowly, permitting evictions even where retaliatory motive was established.[6] This spurred tenants' rights groups to lobby for an amendment that would clarify and strengthen the statutory standard.[7] In 1976 they succeeded: the legislature amended Minnesota Statutes § 566.03 to prohibit evictions intended *in whole or part* as a penalty for engaging in statutorily protected activity.[8] The language of the amendment, a clear directive to courts to bring life and meaning to the retaliatory eviction defense, implies that evidence of even the slightest desire to retaliate against tenants will prevent a landlord from evicting even if he has other, entirely valid, nonretaliatory reasons. The history of this statute and related litigation involving the retaliatory eviction

4. Interview with Professor Robert Stein, University of Minnesota Law School, in Minneapolis (Dec. 6, 1976) [hereinafter cited as Stein Interview]; Interview with Bruce Beneke, Staff Attorney of the Ramsey County Legal Assistance Center, in St. Paul (Oct. 26, 1976) [hereinafter cited as Beneke Interview]. Although representatives of Minneapolis and St. Paul tenant unions at first proposed that a landlord be allowed to evict only for just cause, determined political opposition forced them to abandon this position. They then turned to protection from retaliatory eviction to enhance tenants' rights. After extensive research on other states' retaliatory eviction statutes, focusing primarily on those of Michigan, Washington, Ohio, and Oregon, the tenants' representatives chose Michigan's statute as the best model for the Minnesota law. The final legislation, reflecting the need for responsible management of urban housing, resulted from a rare cooperative effort by tenant unions and representatives of large professional landlords.

5. MINN. STAT. § 566.03(2)(2) (1974) (amended by 1976 Minn. Laws ch. 17, § 1); *see* note 1 *supra*.

6. Even after the enactment of the statute, some trial courts, despite evidence that the notice to quit was given in retaliation for protected acts, allowed evictions where landlords claimed their reasons for evicting were that the tenants owned a dog or occasionally had loud parties. *See* Memorandum from Senator Ralph Doty to All Legislators and Other Interested Persons Regarding S.F. 1362 (H.F. 1145), Minn. Legis., 69th Sess. 1 (1976) (on file at MINNESOTA LAW REVIEW).

7. *See* Stein Interview, *supra* note 4; Beneke Interview, *supra* note 4.

8. 1976 Minn. Laws ch. 17, § 1 (codified at MINN. STAT. § 566.03 (1976)); *see* note 1 *supra*.

defense[9] highlight some of the difficulties that courts and legislatures have faced in their search for a rule that would balance equitably the needs of tenants for decent, affordable shelter and the needs of landlords to realize a return from their investment.

Retaliatory eviction law developed from a conviction that in a tightly restricted housing market the balance of bargaining power was unfairly weighted in favor of landlords. Consistently enforced housing codes can mitigate the adverse effects of this disparity in bargaining power, but they depend for their effectiveness on private reporting of violations. Enforcement would be seriously jeopardized if landlords could evict tenants who report violations to the housing authorities.[10] Furthermore, a tenant who is evicted after obtaining an order compelling his landlord to perform repairs is denied the benefit of his efforts. Although he could bring an action for damages following such an eviction, he could not be fully compensated for the delay, dislocation, and hardship of finding a new home.[11]

In *Edwards v. Habib*,[12] the original and highly influential retaliatory eviction case, Judge Skelly Wright concluded that public policy and congressional intent to alleviate housing problems in the District of Columbia compelled recognition of retaliatory eviction as a defense to an unlawful detainer action.[13]

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9. Parkin v. Fitzgerald, 240 N.W.2d 828 (Minn. 1976). The *Parkin* interpretation of Minnesota's 1971 retaliatory eviction statute occurred after passage of the 1976 amendment. *See* note 43 *infra*.

10. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). *See also* Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-42 (1966); Note, *Retaliatory Eviction and the Reporting of Housing Code Violations in the District of Columbia*, 36 GEO. WASH. L. REV. 190 (1967).

11. *See* note 23 *infra*.

12. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

13. *Id.* at 699-703. The *Edwards* decision gave an energetic stimulus to the trend toward counteracting the traditionally pro-landlord bias of the common law. Previously, the doctrine of caveat emptor applied to transactions in real property, since in pre-industrial society most important defects in land and buildings were easily discernible. *See* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966). The landlord had no duty to deliver tenantable dwellings. The common law implied no guarantees of habitability or repair, and if the landlord covenanted to repair the property and failed to do so, the tenant was not relieved of his obligation to pay rent. *See, e.g.*, Stewart v. Childs Co., 86 N.J.L. 648, 92 A. 392 (1914).

Although Judge Wright's improvisation was greeted with disdain in some quarters,[14] the overall reaction to the decision was highly favorable.[15] Many courts, however, have been unwilling to base the defense on implied statutory intent or general policy grounds. The New York court in *Toms Point Apartments v. Goudzward*[16] declared that the retaliatory eviction defense has constitutional foundations. The tenant's freedom to discuss building conditions with other tenants, hold meetings, form tenant associations, and inform public officials of complaints was characterized as a first amendment right.[17] The court nonetheless imposed on tenants the burden of proving four other elements in addition to infringement of a constitutional right in order to prevail in a summary possession action.[18] The *Toms Point* case is a curious twist on *Edwards*, for although the court in *Toms Point* brought a wide range of tenant activities under the protective umbrella of the constitution, it set up additional barriers to the assertion of the defense and thereby frustrated the expansion of tenant rights that the statutory and policy arguments in *Edwards* were designed to achieve.

14. *See, e.g.*, 82 HARV. L. REV. 932 (1969); 44 NOTRE DAME LAW 286 (1968).

15. *See, e.g.*, Note, *Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies*, 37 BROOKLYN L. REV. 387 (1971); Comment, *Tenant's Remedies in the District of Columbia: New Hope for Reform*, 18 CATH. U. L. REV. 80 (1968).

16. 72 Misc. 2d 629, 339 N.Y.S.2d 281 (Nassau County Ct. 1972).

17. *Id.* at 633, 339 N.Y.S.2d at 286. One problem of treating retaliatory eviction as a matter of constitutional law is the need to find state action in violation of the fourteenth amendment. The *Toms Point* court did not articulate the rationale on which it believed it could reach the acts of private landlords, but it quoted with approval Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969), which had held that use of the summary possession proceeding to effectuate an eviction in retaliation for the tenants' exercise of their constitutional rights was state action. *Id.* at 630, 339 N.Y.S.2d at 284. *Cf.* McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (state control of the operation of a housing project, along with the resulting financial benefit to the state, was state action under the theory of Burton v. Wilmington Park Authority, 365 U.S. 715 (1961)). *But see* Aluli v. Trusdell, 54 Hawaii 417, 508 P.2d 1215, *cert. denied*, 414 U.S. 1040 (1973) (no state action in similar circumstances) (noted in Comment, *Aluli v. Trusdell: A Backward Step in the Fight Against Retaliatory Eviction*, 1973 UTAH L. REV. 503).

18. In addition to proving that his constitutional rights are being abused, the tenant must prove that: (1) the grievance that had prompted his complaint was serious, reasonable, and factual; (2) he did not create the condition of which he complains; (3) the grievance existed at the time the landlord brought his action for possession; and (4) the landlord's overriding reason for the eviction was retaliation for the tenant's exercise of his constitutional rights. 72 Misc. 2d at 632-33, 339 N.Y.S.2d at 286.

State legislatures have not been content to ground retaliatory eviction law in the intricacies of constitutional theory,[19] and have broadened protection of tenants beyond the minimum constitutional guarantees.[20] All statutes protect from eviction tenants who report housing code violations,[21] but some states have refused to extend the protection any further.[22] The Minnesota

19. Reliance on constitutional arguments for the retaliatory eviction defense might even prove to be counterproductive: the expansion of tenants' rights would be inhibited if it were necessary to establish a constitutional basis for every right sought to be enforced. Although one might expect that the enactment of a statute specifying remedies for attempted unlawful evictions would supercede prior case law, this has not always been true. For an argument that statutory and judicial remedies may be complementary rather than mutually exclusive, see Comment, *California's Common Law Defense Against Landlord Retaliatory Conduct*, 22 U.C.L.A. L. REV. 1161, 1169-73 (1975).

20. Currently, 24 states and the District of Columbia have retaliatory eviction statutes. They vary significantly in their efficacy as a means of protecting tenants from retaliation. The Illinois statute, enacted in 1963, was the first in the nation, ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1971), and, compared to some of the more recent additions to the list, *see, e.g.*, ALASKA STAT. § 34.03.310 (1975); FLA. STAT. ANN. §§ 83.56-.60 (West Supp. 1976); KY. REV. STAT. § 383.705 (Supp. 1976); WASH. REV. CODE ANN. § 59.18.240 (Supp. 1975), is one of the most rudimentary. For a table comparing the features of some of these laws, see Comment, *Retaliatory Eviction—The Unsolved Problem—Clore v. Fredman*, 25 DEPAUL L. REV. 522, 532 (1976). *See also* the comprehensive but somewhat outdated list found in Note, *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, 26 VAND. L. REV. 689, 710 (1973).

A recent California case suggests that, despite the presence of statutory protection, tenant interests may not always be properly safeguarded. In S.P. Growers Ass'n v. Rodriguez, 54 Cal. App. 3d 868, 126 Cal. Rptr. 842 (1976), several migrant workers decided to strike pursuant to their rights under a federal migrant labor act. They were evicted from their grower-owned dwellings within a few days of stopping work. Through a strange twist of logic the court held that they were not pursuing rights related to the right to possession of the dwelling; rather, their legal action focused on rights to improved wages and working conditions as guaranteed by federal law, and complete relief could be obtained in a federal forum. The dissent wisely pointed out the difficulty of distinguishing a person's status as a migrant worker from his status as a tenant; migrant workers' rights as tenants were being infringed by their exercise of their rights as workers under federal law.

Statutes themselves may not shield the tenant from retaliation sufficiently to stimulate his legal activism. While the Minnesota legislature has taken an expansive and innovative view of tenants' rights, *see* note 1 *supra*, some states protect only reports of violations of local housing codes or applicable health and safety statutes. *See* notes 21-22 *infra* and accompany text.

21. *See, e.g.*, CONN. GEN. STAT. ANN. § 47a-33 (West Supp. 1977); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1971); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon Supp. 1976); VA. CODE § 55-248.39 (Supp. 1975).

22. In some states such reports must be made to a specific enforce-

statute is particularly favorable to tenants, shielding not only reports of code violations, but also attempts to enforce rights under the lease or under state or federal law.[23] The judicial ap-

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ment agency. *See, e.g.*, HAWAII REV. STAT. § 521-74 (Supp. 1975); ME. REV. STAT. tit. 14, § 6001 (Supp. 1975). In at least one state the tenant's defense will fail unless the landlord was officially notified of the violations by the housing authorities prior to the time the notice to quit was sent. *See* N.H. REV. STAT. ANN. §§ 540:13a-:13b (Supp. 1973). Other statutes demand that violations be serious or materially endanger the health and safety of tenants. *See, e.g.*, PA. STAT. ANN., tit. 35, § 1700-1 (Purdon Supp. 1973); VA. CODE § 55-248.39(a) (Supp. 1975).

23. A Minnesota tenant may safely invoke all or part of the whole statutory apparatus of tenants' rights and remedies at any level of government, including the institution of the special proceeding by which to compel the landlord to perform repairs. *See* MINN. STAT. §§ 566.20-.33 (1976). A landlord is protected from harassment by the requirement that the tenant exercise good faith in the pursuit of his rights. *See* note 1 *supra*.

Unlike some statutes, *see, e.g.*, ARIZ. REV. STAT. § 33-1491(C)(2) (Supp. 1976); CAL. CIV. CODE § 1942.5(a) (West Supp. 1976); N.M. STAT. ANN. § 70-7-40(A)(2) (Supp. 1975), Minnesota's statute allows the tenant to assert the retaliatory eviction defense even when the tenant has withheld rent, providing the rent is paid into court. *See* Parkin v. Fitzgerald, 240 N.W.2d 828, 830 (Minn. 1976); Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973). Two additional significant matters relating to needed protection for tenants are not covered by the statute. First, large corporate landlords owning multiple dwellings may have considerable influence over rental rates and housing conditions in a locality, and they may also have the ability to harass tenants persistently and in numerous ways. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972). The statute should therefore specifically prohibit retaliation against a tenant of such a landlord who joins with other tenants in a tenant union or organization. *See, e.g.*, ALASKA STAT. § 34.03.310(a)(3) (1975); ARIZ. REV. STAT. § 33-1491(A)(3) (Supp. 1976); MD. REAL PROP. CODE ANN. § 8-208.1(a)(2)(3) (Supp. 1975); N.Y. REAL PROP. LAW § 230 (McKinney Supp. 1976).

University Community Properties, Inc. v. Norton, 246 N.W.2d 858 (Minn. 1976), a recent decision denying collective bargaining rights to tenant unions, need not be construed to limit the possibilities for such groups in the future. Indeed the court narrowed its holding by stating that it would refuse to create common law collective bargaining rights and implied that it would accept legislative initiative on the matter.

Collective action by tenants also falls within the ambit of their constitutional rights, but, in view of the obstacles to showing state action in violation of the fourteenth amendment, legislative protection of tenant unions is the preferred solution. *See* note 17 *supra*.

The second issue which neither the statute nor the Minnesota court has addressed is the damages to which a tenant who is unlawfully evicted or who successfully defends a summary possession action is entitled. *See* Parkin v. Fitzgerald, 240 N.W.2d 828, 833 n.6 (Minn. 1976) (expressly declining to consider question of damages). Although the present statute specifically concerns only defenses to unlawful detainer actions and not independent damage actions by tenants who have been unlaw-

proaches exemplified by *Toms Point* and *Edwards*, although providing impetus for protective state legislation, remain important only in states that have not yet enacted retaliatory eviction statutes.[24]

Tenants could not avail themselves of comprehensive statutory protection, however, in the absence of solutions to the conceptually difficult problems of ascertaining the existence and legal significance of a landlord's retaliatory motive. Because the most basic problem confronting the tenant is proving that the landlord had any retaliatory motive at all, the success of the defense depends in general on the ease with which the tenant can establish a prima facie case of retaliation.

Even when the tenant establishes retaliatory motive, a landlord will invariably deny retaliation and submit evidence of other justifications for evicting. A court must then determine whether the landlord's nonretaliatory reasons should prevail to permit the eviction, for it may sometimes be desirable to give effect to a landlord's nonretaliatory purposes in spite of his coexisting desire to retaliate.[25] Further, a landlord's motives can be scrutinized with varying degrees of rigor: courts could require the landlord to produce nonretaliatory justification for the eviction and ignore the question of whether his retaliatory motive caused the eviction, attempt to determine which of the two motivations actually brought about the eviction, or bypass the causation question altogether by denying eviction where *any* retaliatory motive was present. The diversity of statutory and

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fully forced to leave, fairness requires that a tenant who, perhaps through ignorance or indigency, did not interpose a retaliatory eviction defense be guaranteed a cause of action for damages. Since the disruptive effects of an eviction may be excessively burdensome for the tenant, many states provide for double or treble damages or two or three times a designated amount of rent. *See, e.g.*, KY. REV. STAT. § 383.705 (Supp. 1976); DEL. CODE tit. 25, § 5516(d) (Supp. 1976). Such exemplary damage awards not only compensate tenants but deter landlords from evicting unlawfully. At the minimum, a tenant who successfully defends an unlawful detainer action could receive reimbursement by the landlord for legal fees; statutes in some states so provide. *See, e.g.*, MD. REAL PROP. CODE ANN. § 8-208.1(c) (Supp. 1975); MICH. COMP. LAWS ANN. § 600.5720 (2) (West Supp. 1976).

24. The *Toms Point-Edwards* approaches might be useful in North Carolina, for example, where the absence of legislation and the restrictive and traditionalist views of trial courts have jeopardized the future of the defense in that state. *See* Note, *Landlord and Tenant—Prohibition of Retaliatory Eviction in Landlord-Tenant Relations: A Study of Practice and Proposals*, 54 N.C.L. REV. 861, 862 (1976).

25. *See* notes 51-52 *infra* and accompanying text.

case-law standards addressing this problem, developed independently but roughly simultaneously in various jurisdictions, reflects the difficulty of assessing motive and purpose and the necessity for balancing the divergent interests of landlord and tenant.

As measured by their effect on a tenant's problems of proof, judge-made standards for determining retaliatory intent range from the extraordinarily stringent to the excessively lenient. In *Dickhut v. Norton*,[26] for example, the Wisconsin court held that a tenant could prevail only by proving through clear and convincing evidence that a housing code violation existed, that the landlord knew of the tenant's report to the housing authorities, and that the landlord's *sole* purpose for evicting was retaliation.[27] The *Dickhut* test is extremely restrictive, since few people act from a single isolated motive, and any landlord can find some nonretaliatory reason for the eviction, no matter how frivolous.[28] The *Toms Point* test[29] treats the tenant with equal harshness, since it requires a defendant to prove, *inter alia*, that infringement of his constitutional rights was the landlord's overriding reason for the eviction.[30] In addition, the test has limited applicability for other jurisdictions because in many cases a tenant's constitutional rights will not be involved; retaliation is most likely to follow a tenant's pursuit of his rights under state law or local housing codes.[31]

At the opposite extreme from *Dickhut* and *Toms Point* are cases such as *Robinson v. Diamond Housing Corp.*[32] and *Silberg*

26. 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

27. *Id.* at 396, 173 N.W.2d at 302.

28. For a thorough discussion and criticism of the *Dickhut* case, see Note, *Landlord and Tenant—Burden of Proof Required to Establish Defense of Retaliatory Eviction*, 1971 WIS. L. REV. 939, 944-50.

29. *See* note 18 *supra*.

30. *Id.*

31. While a tenant's pursuit of his rights under state law or local housing codes probably would be considered an exercise of a constitutional right under the *Toms Point* approach in New York, it is doubtful whether similar tenant action in other states would be held to be within the purview of the Constitution. For criticism of the *Dickhut* and *Toms Point* approaches, see Player, *Motive and Retaliatory Eviction of Tenants*, 1974 U. ILL. L. F. 610. Further, the requirement of a grievance existing at the time the possessory action is brought, *see* note 18 *supra*, apparently designed to protect landlords from harassment for nonexistent defects, is open to abuse. If a landlord kept the premises in a state of disrepair and forced the tenants to enforce their rights, the latter would have no defense were the landlord suddenly to repair the defects and evict the tenants. The state of repair is irrelevant in applying the Minnesota statute. *See* MINN. STAT. §§ 566.03(2)-.03(4) (1976).

32. 463 F.2d 853 (D.C. Cir. 1972).

v. Lipscomb.[33] In *Robinson*, the District of Columbia Circuit Court of Appeals applied a "legitimate business purpose" test: in order to rebut the presumption of retaliatory motive which arises when his acts are "inherently destructive" of tenants' rights, a landlord must show a valid business motivation.[34] The *Silberg* court held that a landlord may evict a tenant only when the landlord can show that "the decision to evict was reached independent [sic] of any consideration of the activities of the tenant protected by the statute."[35] From a tenant's perspective, these tests are ideal, since under either the court will rigorously scrutinize the economic justification offered by the landlord.[36]

State retaliatory eviction statutes also prescribe tests for determining the legal significance of a retaliatory purpose. In

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33. 117 N.J. Super. 491, 285 A.2d 86 (Union County Ct. 1971).

34. 463 F.2d at 867. The court in *Robinson* simply stated its test without suggesting any rational procedure for determining the legitimacy of a landlord's business purpose; without firm guidelines, judges or juries with little business expertise and pro-tenant sympathies could be unduly harsh on landlords. The case has been widely criticized; *see, e.g.*, Comment, *Landlord and Tenant—Retaliatory Eviction Based Upon Tenant Rent Withholding as a Result of Housing Code Violations is Unlawful and May be Raised as a Defense in an Action by Landlord for Possession*, 18 VILL. L. REV. 1119 (1973); *cf.* Player, *supra* note 31, at 624 (retaliatory eviction is analogous to discrimination in an employer-employee relationship).

35. 117 N.J. Super. at 496, 285 A.2d at 88. Despite the voluminous evidence of his elaborate plans for improving and selling the property that the landlord presented at trial, the *Silberg* court nonetheless found that the landlord had not rebutted a presumption of retaliation because he had not fully considered the economic feasibility or possibility of doing the work with the tenants still in possession. *Id.* The court was not satisfied that the landlord had acted from purely economic motives; had the tenants not engaged in protected activity, the landlord would have given more serious consideration to doing the work with the tenants present.

The court's reasoning contained two unambiguous errors. First, it assumed that acting from an economic judgment that is less than perfectly rational implies the presence in the actor's mind of a retaliatory or otherwise "bad" purpose. Since people frequently make decisions based on incomplete information and intuitive judgments, to infer that the gaps in a person's economic decisionmaking represent illicit motives demands more imagination than logic. Second, the court found it unnecessary to inquire whether, if the tenants had not engaged in protected activity, they would have been evicted anyway. Yet this inquiry is precisely what the body of the court's analysis compelled. To say that a landlord brought an action for possession without considering the tenants' activities is to say that he would have evicted them regardless of their conduct.

36. *See* notes 34-35 *supra*.

California, a landlord may not successfully bring a summary possession action if his "dominant purpose" is retaliation for the tenant's exercise of his legal rights.[37] The Michigan statute prohibits eviction if it was "intended primarily as a penalty" for the tenant's assertion of his rights or for his complaining to a housing code enforcement agency, or if it was "intended primarily as retribution for any other lawful act arising out of the tenancy."[38]

A final approach to judging landlord intent is the concept of eviction "for cause," in which eviction is permitted only for specified causes and denied for all other reasons. For cause eviction statutes safeguard tenant interests almost as effectively as do the *Robinson* and *Silberg* tests but have a distinct advantage over those tests because they eliminate much uncertainty. Apparently no state has accepted the for cause concept in its pure form;[39] some states, however, have enacted hybrid statutes

37. CAL. CIV. CODE § 1942.5(a) (West Supp. 1976). Overlapping legislative and judicial remedies have confused the retaliatory eviction law of California. A common law defense was established in Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970), a case decided after the legislature had enacted section 1942.5 but prior to its effective date. *Schweiger* required the tenant to establish an actual retaliatory motive; this demand is apparently less exacting than the statutory requirement of a dominant retaliatory purpose. The *Schweiger* court, however, saw no inconsistency between its approach, which extends the range of tenants' rights beyond that specified in the statute, and the approach of the statute itself. *Id.* at 516 n.4, 476 P.2d at 103 n.4, 90 Cal. Rptr. at 735 n.4. The California supreme court has not yet resolved the ambiguity. *See* Comment, *supra* note 19, at 1167-81.

38. MICH. COMP. LAWS ANN. § 600.5720(1)(a)-(c) (West Supp. 1976). The Washington statute contains similar language. WASH. REV. CODE ANN. § 59.18.240 (Supp. 1975). The Maryland statute, MD. REAL PROP. CODE ANN. § 8-208.1(a)(2) (Supp. 1976), however, is a variation on the *Dickhut* "sole purpose" test.

39. The history of attempts in Ohio to enact a for cause eviction bill considered ideal by tenants' rights advocates is described in Blumberg, *The Ohio Struggle With the Uniform Residential Landlord-Tenant Act*, 7 CLEARINGHOUSE REV. 265 (1973). In the 1975 session of the Minnesota legislature, attempts were made to enact a statute to permit eviction only for cause. Landlord opposition was so intense, however, that pro-tenant forces in the legislature retreated and settled for the amendment to the retaliatory eviction statute which added the "in whole or part" language. Beneke Interview, *supra* note 4.

A statutory scheme that allows eviction only for specified causes and denies it for all other reasons could significantly limit the freedom of landlords to dispose of their property for their own benefit. For cause eviction may also result in excessive litigation, since it completely reverses the existing framework of landlord-tenant regulation. Instead of prohibiting eviction for a class of proscribed motives and allowing it for all others, for cause eviction places an enormous burden on the landlord

which list both some prohibited and some permissible motives.[40]

The 1971 Minnesota statute contained an evidentiary standard for weighing evidence of retaliatory intent, but no substantive standard; nevertheless, it was efficacious in solving many of the tenant's proof problems. The tenant was required to show by a fair preponderance of the evidence that the eviction was intended to penalize him for having engaged in some activity protected by the statute, but where the notice to quit came within 90 days of the tenant's acts, the statute shifted both the burdens of production and persuasion to the landlord.[41] Since the tenant's direct evidence of a landlord's subjective motive is likely to be tenuous at best, the statute allowed the tenant to base the inference of retaliation on the close proximity in time between the tenant's protected acts and service of the notice to quit. The

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by requiring him to prove that he wants to evict for a reason that falls within the permissible motives listed in the statute. A for cause standard may, apart from any question of retaliatory motive, force landlords to defend frivolous charges of unlawful eviction. Stein Interview, *supra* note 4.

For cause eviction would serve tenant interests but would unduly restrict the landlord's property rights where no question of retaliation is raised. It may therefore be preferable to specify the reasons for which landlords may *not* evict rather than attempt to list the reasons for which they *may* evict. *Id.*

40. The Connecticut for cause eviction statute permits evictions where the tenant uses the premises for an illegal purpose or in violation of the rental agreement, the landlord in good faith needs the dwelling unit for his own immediate use, the tenant caused the conditions about which he has complained, or the tenant complained after the landlord had sent the notice to quit. CONN. GEN. STAT. ANN. § 47a-20(b)(1)-(4) (West Supp. 1977). Additional for cause reasons might include the landlord's desire to remodel the premises or make substantial alterations, to take the unit off the market for at least six months, or to sell the property. *See, e.g.*, ALASKA STAT. § 34.03.310(c)(5)-(7) (1975); ARIZ. REV. STAT. § 33-1491(C) (Supp. 1976); N.M. STAT. § 70-7-40(A)(1)-(2) (Supp. 1975); VA. CODE § 55-248.39(c) (Supp. 1975). The New Jersey statute interpreted in the *Silberg* case contains retaliatory eviction prohibitions similar to those in the Minnesota statute but, in addition, allows evictions only for cause; an eviction without cause creates a presumption of retaliation. N.J. STAT. ANN. § 2A:42-10.12 (West Supp. 1976). Unlike the New Jersey law, however, the other statutes listing valid reasons for eviction have not been interpreted by state courts.

41. The statute's burden of proof shift differs from an ordinary presumption in that the burdens of both production and persuasion are affected. Generally, in civil cases, presumptions shift the burden of production but do not shift the burden of persuasion, although the preferable view is that a presumption shifts both burdens. *See* C. MCCORMICK, EVIDENCE §§ 342-43, at 803-11 (2d ed. 1972). For a discussion of the effect of the shifting of the burden in retaliatory eviction litigation, see note 56 *infra*.

inference is strongest when the eviction closely follows the protected activity; eviction at that time is more likely to be a response to the tenant's activities than if the notice to quit came much later. In the absence of a statute, the proximity in time alone might not be sufficient to make out a prima facie case of retaliation. The statute therefore eased the tenant's burden by allowing him to prevail when the landlord could not negate the legislatively created inference. Placing the burden of producing evidence of the motive for eviction on the landlord is appropriate, for he is the party better able to meet that burden. He is more likely than the tenant to have direct evidence of his own purposes and, were the burden not on him, he would give up such evidence reluctantly and piecemeal. When the landlord seeks to take the dwelling unit off the market in order to make repairs, for example, he can present evidence of plans made and expenditures directed toward his project.

Since the statute did not define the type of proof required to negate the inference, that task was left to the courts. In *Parkin v. Fitzgerald*,[42] decided almost contemporaneously with the passage of the 1976 amendment to the statute,[43] the supreme court construed the statute in its unamended 1971 form. The standard the court adopted for determining when the burden of proof had been met required a landlord to prove by a fair preponderance of the evidence that he had a nonretaliatory reason for the eviction, that the nonretaliatory reason was substantial, and that the substantial nonretaliatory reason arose "at or within a reasonably short time before service of the notice to quit."[44] A nonretaliatory reason was defined as one wholly

42. 240 N.W.2d 828 (Minn. 1976).

43. *Parkin* was decided on March 19, 1976. 240 N.W.2d at 829. Strangely, neither the court nor the parties mentioned the fact that an amendment to the statute had even been contemplated. The bill to amend the statute, introduced in the 1975 Session, was delayed and carried over into the 1976 Session, where it was passed. It was signed by the Governor on February 20, 1976. House Journal, Minn. Legis., 69th Sess., 4024 (1976) (message from Gov. Anderson). Since the bill contained no definite effective date for the amendment, it became law on August 1, 1976, under a Minnesota provision covering such legislation, MINN. STAT. § 645.02 (1976). Thus, *Parkin* controlled for only a little over four months.

On only one occasion during the five-year interval between the original enactment of the statute and the *Parkin* case was the court confronted with the question of retaliatory eviction, but in that case the actions for which the tenant was evicted were illegal and the statutory defense was held inapplicable. *See* Olson v. Bowen, 291 Minn. 546, 192 N.W.2d 188 (1971).

44. 240 N.W.2d at 832.

unrelated to and unmotivated by any good faith, statutorily protected activity by the tenant.[45]

The "substantial nonretaliatory reason" test,[46] designed to strike a balance between protecting the tenant and permitting

45. *Id.* at 833. The application of the statute and the court's test to the facts of *Parkin* was straightforward and unambiguous. Four months after entering into an oral month-to-month lease, the tenants reminded their landlord of the promise he had made at the time of leasing to make certain repairs. *Id.* at 829. Two weeks later, when the repairs were not made, tenants obtained an inspection of their dwelling by the local housing code enforcement agency. As a result, the agency reported several housing code violations to the landlord, including the absence of handrails on staircases, screens on windows, and dead bolt locks on doors, as well as significant deterioration of kitchen and plumbing facilities. *Id.* at 829-30. After receiving this notification, the landlord gave the tenants 30 days notice to quit the premises. The tenants refused to vacate, however, and withheld their rent. The landlord responded with an unlawful detainer suit. At trial, the tenants contended that the sole reason for their eviction was the landlord's wish to retaliate for their having reported code violations to housing authorities. The landlord countered with three justifications. First, on one occasion the tenants paid the landlord with a check that the bank returned later for insufficient funds, although they eventually paid the landlord the rent in full. Second, the rent withheld because of the landlord's failure to make repairs had not been paid. Third, the landlord had complained several times to the tenants about their owning a dog. The trial court made no findings as to the landlord's motivation for evicting and rejected the tenants' defense on the ground that the oral agreement creating the tenancy provided for termination on 30 days notice, and the notice had been properly served. *Id.*

The supreme court reversed the trial court, easily dismissing the landlord's proffered justifications. The bad check was not a valid reason to evict since the overdue rent was eventually paid in full, and the incident occurred five months before the eviction, thus working an estoppel against the landlord. The rent due for the current month but withheld because of the landlord's failure to make repairs was properly withheld under Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973), and, pursuant to the disposition of the case on appeal, was paid into the trial court. 240 N.W.2d at 833. Finally, despite the landlord's complaints about the tenants' dog, the court found no evidence in the record that the oral lease had prohibited pets, that the landlord had protested when the tenants got the dog, or that the dog had caused any damage to the premises. The court found that the landlord's failure to overcome the statutory inference of retaliation (which it incorrectly termed a presumption, *see* note 41 *supra*) compelled the conclusion that the tenants were illegally evicted. 240 N.W.2d at 833.

46. The court did not elaborate on the meaning of "substantial." Assuming that the test is intended to discern what role the landlord's motives played in his decision-making process, the test of substantiality could be either subjective or objective. A subjective test would focus on the landlord's own perception of the strength and persuasiveness of the nonretaliatory reason as compared to his other reasons. An objective test would compel an inquiry into the landlord's nonretaliatory motives from the perspective of a reasonable person, focusing on whether, in the

landlords to control their property for their own economic benefit, falls in the middle range of retaliatory motive standards. It does not require a tenant to prove, as did the Wisconsin court in *Dickhut*, that the landlord's sole purpose was retaliation,[47] nor does it require him to establish a hierarchical ordering of the landlord's motives to prove that retaliation was the landlord's dominant or overriding purpose, as the California, Michigan, and Washington statutes require.[48] Unlike those statutes, the substantial nonretaliatory reason test focuses on the strength of the landlord's independent nonretaliatory motives rather than on the relationship of such motives to the landlord's retaliatory motive.[49]

That the Minnesota court viewed a landlord's economic motives more generously than did the *Robinson* and *Silberg*

light of ordinary experience, the motive was independently significant. The tenor of the *Parkin* opinion suggests that the court contemplated the objective test. The test would concentrate on the independent and objective validity of the landlord's good motives, rather than on the relationship of his good motives to his bad motives, as suggested by the court's examples of substantial nonretaliatory motives: nonpayment of rent, other material breach of lease covenants, and tenant damage to the premises. 240 N.W.2d at 833. Any other result would frustrate the statutory objective; if the landlord's nonretaliatory reasons were scrutinized from the landlord's perspective, the landlord would be able to evict, for example, when he disapproved of a tenant's personal idiosyncracies, even though they did not harm the landlord or the other tenants.

The substantial nonretaliatory reason test could arguably be characterized as a form of "dominant purpose" test. *See* text accompanying note 37 *supra*. A landlord may have both a significant retaliatory motive and a substantial nonretaliatory motive arising at or within a reasonably short time of the sending of the notice to quit. Under a dominant purpose test, he might be unable to evict if the retaliatory motive outweighed the other in his decision; under the substantial nonretaliatory reason test he could evict.

47. *See* text accompanying notes 26-28 *supra*. Because the tenant is unlikely to have any direct proof of the landlord's subjective intent, *see* text accompanying notes 41-42 *supra*, a rule that treated the inference as merely procedural and stripped away the statutory inference of retaliatory intent once the landlord presented evidence to the contrary would put the tenant in the same position as if there were no protective statute. That is, the trier of fact would weigh whatever unaided inferences about the landlord's motives could be drawn from the tenant's activities and their closeness in time to the notice to quit against the direct evidence of his own motives that the landlord could supply. Thus, the policies underlying the shift of both the burdens of production and persuasion, *see* note 41 *supra*, would be best served by considering the statutory inference of retaliation as an item of proof in the tenant's case. In a jury trial, the jury should be instructed concerning the existence of the inference of retaliation and its effect on the landlord's burden of production and persuasion. *See* McCormick, *supra* note 41, § 345, at 822.

48. *See* notes 37-38 *supra* and accompanying text.

49. *See* note 46 *supra*.

courts is illustrated by its discussion of the business reasons that might justify removing a unit from the market. In contrast to the *Robinson* court, whose single example of a "legitimate business purpose" was the economic infeasibility of repairing the premises to conform to the housing code,[50] the Minnesota court suggested that removal of a housing unit from the market for "a sound business reason" would suffice as a reason "wholly unrelated to and unmotivated by" the tenant's protected activity.[51] Impossibility of repair would not be the only justifiable basis for taking the unit off the market. It may be economically rational, for example, and therefore a "sound business reason" under the court's test, for the landlord to remove the unit to make substantial improvements or alterations or to sell the property altogether. Leasing the property may be unprofitable for reasons unrelated to the exacting standards of housing codes: rising taxes and expenses for fuel, maintenance, and utilities may have eliminated the landlord's profit.[52] The court's open-ended example and the required proximity in time between the substantial nonretaliatory reasons and the decision to evict demonstrates the court's willingness to treat landlords fairly, while still limiting their power to evict. This basic fairness is missing from the *Silberg* test,[53] which requires the complete absence of retaliatory motive and, where such a motive is present, condemns the eviction even if it can be justified on sound economic grounds.[54]

A test similar to the *Silberg* approach, however, soon supplanted the moderate *Parkin* standard. Only four months after the decision, the 1976 amendment to the retaliatory eviction statute became effective. Despite the almost concurrent enactment of the statute and the decision of the case,[55] neither the

50. *See* Robinson v. Diamond Housing Corp., 463 F.2d 853, 866 (D.C. Cir. 1972). Whether infeasibility refers to financial inability or to the exercise of some discretion on the landlord's part is not clear from the opinion. The former interpretation is more consistent with the court's general harshness toward the landlord and serious regard for the retaliatory eviction defense. *See* Comment, *Eviction from Substandard Housing and a Presumption of Retaliatory Motivation—Fairness for Both Tenant and Lordlord: Robinson v. Diamond Housing Corp.*, 44 U. COLO. L. REV. 463, 470 (1973).

51. Parkin v. Fitzgerald, 240 N.W.2d 828, 833 (Minn. 1976).

52. The economic and financial pressures on landlords are greater in rent-controlled housing markets than in non-rent-controlled jurisdictions such as Minnesota. *See Landlord's Plight: Controls, High Costs*, Washington Post, Nov. 8, 1976, § A, at 4, col. 3.

53. *See* text accompanying notes 35-36 *supra*.

54. The test has been endorsed by only one writer. *See* Note, *supra* note 24, at 874-75.

55. *See* note 43 *supra*.

court nor the legislature appears to have considered the merits of the other's approach to the problem. The amendment minimizes the tangle of causation and motivation issues by prohibiting evictions where the landlord's motive is retaliatory "in whole or part."

Juxtaposing the court's interpretation of the original statute with the legislature's significant amendment of the precise point interpreted illuminates the possible consequences of the new provision and some of its weaknesses. In a number of cases, the *Parkin* test and the new amendment would yield the same result. Under neither test, for example, would the tenant be punished for pursuing his legal rights where the landlord could offer no more than frivolous or transparently make-weight reasons for an eviction. The two tests nevertheless approach many important problems from different perspectives and would frequently produce divergent results. In a case in which the tenant establishes the inference of retaliation by showing that the notice to quit was served within 90 days of his protected acts, to which the landlord offers plausible valid reasons in rebuttal, the amended statute provides that evidence of even a partially retaliatory purpose, such as a conversation in which the landlord indicated some degree of displeasure with the tenants' legal activism, would support a finding that the landlord had not overcome the inference.[56] Under a substantial nonretaliatory reason test, however, where the landlord introduces evidence strongly probative of such a reason, the tenant, in order to establish that the landlord has not rebutted the inference of retaliation, would have to show either that the reason given was insubstantial or was not developed independently of any consideration of the tenant's activity.[57]

56. The allocation of the burden of proof in the Minnesota statute raises a difficult evidentiary issue: whether the proximity in time between service of the notice to quit and the protected acts should continue to have any probative value after the landlord has introduced evidence that the eviction was not motivated in whole or part by a retaliatory purpose. The question is thus whether the facts on which the statutory inference of retaliation is based should be considered by the trier of fact as the substance of the tenant's case or merely a procedural device to force the landlord to come forward with evidence that the eviction was not retaliatory. *See* note 47 *supra*.

57. In each of the hypotheticals discussed in the text, the tenant will have greater proof problems when he cannot present direct evidence that the landlord had a retaliatory motive. The most common evidence a tenant will present is his first-hand experience of the landlord's irritation with his legal activism. The tenant's difficulties will be exacerbated if he has dealt with the landlord at arm's length, as is frequently the case with large professional or corporate landlords, or

When the notice to quit is served later than 90 days after the tenant has engaged in protected acts or when there is a retaliatory increase in rent or decrease in services, the tenant bears the burden of proving the landlord's motive was retaliatory.[58] Under the amended statute, the burden is not difficult to meet, since the tenant can establish his defense by presenting evidence of *any* retaliatory purpose. If the tenant proves by a preponderance of the evidence that the eviction was partly retaliatory, the landlord's attempt to rebut by demonstrating a coexisting nonretaliatory reason will be unavailing. Under the substantial nonretaliatory reason test, however, even if the tenant introduced sufficient proof to establish retaliation, proof of a concomitant substantial nonretaliatory reason would permit the landlord to overcome the defense.

The landlord's dilemma can be clearly illustrated by assuming a case in which he evicts because he wants to use the premises for himself or his family, but at the same time he admits having a retaliatory motive or there is sufficient evidence to warrant a finding that he acted for a retaliatory purpose. Based on the examples given as dicta in the *Parkin* case,[59] he could have argued under the old statute that eviction in order to obtain the use of the dwelling for himself or his family was a removal of the unit from the market for a sound business reason, an explanation likely to be credited if it would be less expensive for him or his family to live in the unit presently occupied by the tenant.[60] But under the amended statute, he would certainly not prevail; his justifiable reasons for eviction would simply be irrelevant. The "in whole or in part" standard thus makes proof of nonretaliation extremely difficult and may deprive landlords of the flexibility they need to manage their property advantageously.

The amended statute also exacerbates the problem of the "perpetual tenant" who, after successfully asserting a retaliatory eviction defense, could remain in possession indefinitely by alleging retaliation in each subsequent eviction attempt.[61] While the

when he has a history of amicable relations with the landlord which would tend to weaken the inference of retaliation.

58. MINN. STAT. § 566.03 (1976); *see* note 1 *supra.*

59. 240 N.W.2d at 833. *See* note 46 *supra.*

60. A court in at least one other jurisdiction has accepted this reasoning. *See* Sabato v. Sabato, 135 N.J. Super. 158, 342 A.2d 886 (1975).

61. The perpetual tenant issue was raised but quickly dismissed in the *Edwards* opinion, 397 F.2d at 702-03. The court recognized that a tenant could possibly stay indefinitely, but suggested that the land-

prospect of the perpetual tenant may be more theoretical than real,[62] it is a problem with which few jurisdictions have dealt adequately.

Minnesota's amended statute provides tenants with extraordinary protection from subsequent evictions. A landlord who tries to evict a tenant within 90 days of the initial successful assertion of a retaliatory eviction defense, for example, will confront an allegation of retaliation based not just on the statutory inference but also on his recently proven retaliatory motive.[63] Even a notice to quit served 91 days after the first assertion of the defense might not be sufficiently removed from the original retaliation to escape the conclusion that the landlord was again motivated, at least *in part*, by retaliation. Generally, a significant period of time will have to elapse before a landlord could show that his proven retaliatory motive had completely dissipated.

The substantial nonretaliatory reason test, on the other hand, gives him a better opportunity to offer other legitimate justification for a subsequent eviction.[64] His personal and fi-

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lord could evict when his illicit motive was dissipated. The court stated that these fact questions could be resolved in the same manner as analogous questions of when an employer has ceased to regard an employee with animosity because of the latter's union activism. Although neither the majority nor the dissent in *Robinson* mentioned the problem, one author believes that the strict *Robinson* standard of landlord justification for eviction (economic infeasibility of repair) makes it unlikely that the landlord will be able to evict the tenant in the foreseeable future. *See* Comment, *supra* note 19, at 1126-27. *See also* 82 HARV. L. REV. 932 (1969); 44 NOTRE DAME LAW. 286 (1968).

The Minnesota statute's emphasis on the landlord's retaliatory motive to the exclusion of his other motives leaves room for abuse of tenants' rights by irresponsible tenants. A rowdy or destructive tenant, for example, could remain in possession indefinitely by periodically engaging in some activity at least colorably protected by the statute. If he did so at least once every 90 days, he would always have the benefit of the statutory inference of retaliation, which could be sufficient to repeatedly sustain the tenant's claim of retaliation even if the landlord introduced evidence of a legitimate purpose.

62. Beneke Interview, *supra* note 4.

63. While it might be argued that the successful assertion of a retaliatory eviction defense is not itself an act protected by the statute, since it is not specifically mentioned in the list of protected acts, the more plausible view is that assertion of the defense is an attempt to "enforce rights" under state law. *See* MINN. STAT. § 566.03(2)(1) (1976); note 1 *supra*.

64. Courts and juries would probably accept less rigorous justification for subsequent evictions than was required in the initial unlawful detainer action because the strength of the inference of retaliation will itself diminish over time.

nancial motives could change enough after 90 days that he could prove legitimate nonretaliatory reasons. Although the distance in time between the initial assertion of the defense and the subsequently attempted eviction slightly alters the context of the analysis, precisely the same considerations that make the substantial nonretaliatory reason test preferable to the amendment in other situations are persuasive here. The test compels an equitable evaluation of the relative strengths of the landlord's valid right to control his property and the tenant's right to possession.[65]

These hypotheticals illustrate the significant bias against landlords that the 1976 amendment introduced into the law. In a great variety of situations landlords will have no opportunity to justify a concededly retaliatory eviction regardless of the validity or legitimacy of their justifications. The combination of the statutory inference of retaliation and the "in whole or part" language, which could in some cases create a nearly absolute right of possession for tenants, may unduly restrict landlords' freedom to control their property.

Solutions to the problems explored in this Comment are essential to the formulation of an optimal retaliatory eviction remedy. The principal criterion by which such a remedy should be judged is fairness in accommodating the conflicting interests of landlords and tenants.[66] The law must recognize that everyone acts for good as well as bad motives and that the equities are never entirely on one side or the other. The 1976 amendment, although it may, as its proponents contend, force trial courts to take retaliatory eviction defenses more seriously, also results in unfair and arbitrary treatment of landlords. The amendment's harshness will have to be diluted by future legislation requiring courts to consider legitimate landlord reasons as well as illicit ones. A substantial nonretaliatory reason test similar to the *Parkin* test would compel courts to examine all facets of landlord motivation and would permit judgments based on the relative strength of divergent landlord and tenant interests in particular cases.

65. For the same reasons, the substantial nonretaliatory reason test also helps to solve the landlord's problem of evicting the tenant who periodically engages in protected acts merely as a pretext for forestalling eviction based on his otherwise objectionable conduct.

66. *See* Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973) (requiring tenant to pay withheld rent into court during pendency of legal proceedings under MINN. STAT. § 504.18 (1976) (implied warranty of habitability) and authorizing trial court to disburse such funds to landlord as needed to perform minimal maintenance and meet property obligations).