

Retaliatory Eviction And Periodic Tenants In Washington

In recent years, landlord-tenant law has moved toward a greater recognition of tenants' rights to safe and sanitary housing. One doctrine that has developed to protect tenants' rights, recognized in most jurisdictions,¹ is the retaliatory eviction² defense that prevents landlords from evicting tenants for attempting to assert their rights. In contrast to the trend, however, a Washington State Court of Appeals recently denied the retaliatory eviction defense to periodic tenants, those tenants most in need of its protection.³ Despite the appellate court's decision, the policies underlying the Washington State Residential Landlord-Tenant Act⁴ and the Act's language require recog-

1. Most jurisdictions have legislatively recognized the retaliatory eviction defense. ALASKA STAT. § 34.03.310 (1980); ARIZ. REV. STAT. ANN. § 33-1381 (1974); CAL. CIV. CODE § 1942.5 (West Supp. 1981); CONN. GEN. STAT. ANN. § 47a-20 (West Supp. 1980); DEL. CODE ANN. tit. 25, § 5516 (1974); FLA. STAT. ANN. § 83.60 (West Supp. 1981); HAWAII REV. STAT. § 521-74 (1976); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966); IOWA CODE ANN. § 562A.36 (West 1980); KY. REV. STAT. ANN. § 383.705 (Baldwin Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 6001 (1980); MD. REAL PROP. CODE ANN. §§ 8-206, -208.1 (Supp. 1980); MASS. GEN. LAWS ANN. ch. 186, § 18 (West Supp. 1981); MICH. COMP. LAWS ANN. § 600.5720 (Supp. 1980-81); MINN. STAT. ANN. §§ 566.03, .28 (West Supp. 1981); NEB. REV. STAT. § 76-1439 (1976); NEV. REV. STAT. § 118A.510 (1979); N.H. REV. STAT. ANN. § 540.13-a (Supp. 1979); N.J. STAT. ANN. § 2A: 42-10.10 (West Supp. 1980-81); N.M. STAT. ANN. § 47-8-39 (Cum. Supp. 1980); N.Y. UNCONSOL. LAWS §§ 8590, 8609 (McKinney 1974); N.C. GEN. STAT. § 42-37.1 (Supp. 1979); OHIO REV. CODE ANN. § 321.02 (Page Supp. 1979); OR. REV. STAT. § 91-865 (1979); R.I. GEN. LAWS § 34-20-10 (1970); TENN. CODE ANN. § 53-5505 (1977); VA. CODE § 55-248.39 (Supp. 1980). Other jurisdictions have judicially recognized the defense. *E.g.*, *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). *Cf. Sims v. Century Kiest Apartments*, 567 S.W.2d 526 (Tex. Civ. App. 1978) (one tenant had a cause of action for damages for termination of periodic tenancy and eviction in retaliation for reporting housing code violations).

2. "Retaliatory eviction" is the nomenclature that has developed to define the action of a landlord who evicts his tenant because of the tenants' reporting of housing code violations It might have been called anything; 'vengeful eviction' or simply, 'getting even.'" *Markese v. Cooper*, 70 Misc. 2d 478, 479, 333 N.Y.S.2d 63, 65-66 (Monroe County Ct. 1972).

3. Tenants for a specified term, unlike periodic tenants, are protected by their lease and are therefore less likely to be intimidated by the landlord's threat of retaliatory action. Furthermore, it has been suggested that periodic tenants are more numerous than other kinds of tenants. *Stoebuck, The Law Between Landlord and Tenant in Washington: Part I*, 49 WASH. L. REV. 291, 324 (1974).

4. WASH. REV. CODE ch. 59.18 (1979).

dition of the retaliatory eviction defense for periodic tenants.

This comment evaluates the availability of the retaliatory eviction defense to periodic tenants in Washington State in light of a recent appellate court decision, *Stephanus v. Anderson*,⁵ denying periodic tenants the defense where the statutorily required twenty day termination notice is provided. An analysis of the basic policies underlying the Act, to ensure safe, sanitary housing conditions and to prohibit landlords' retaliatory actions against tenants exercising their rights to attain decent housing conditions, indicates periodic tenants be allowed to assert the retaliatory eviction defense. Additionally, the language of the retaliatory action provision of the statute supports an interpretation granting periodic tenants use of the defense. Based on these considerations, this comment concludes that Washington State courts should recognize the availability of the retaliatory eviction defense to periodic tenants.

The common law warranty of habitability and housing codes formed the basis for the development of the retaliatory eviction defense. Historically at common law, when a tenant leased land from a landlord, property law governed the transaction;⁶ the lease was considered a conveyance of an interest in land.⁷ The tenant acquired an estate in land and was subject to the doctrine of *caveat emptor*, which placed the burden of inspecting the premises on the tenant and left him without redress for defective housing conditions.⁸ In light of economic and social conditions of that time, placement of the burden on the tenant made sense. In an agrarian economy, the land itself was valuable and the tenant worked on the land to make money for rent.⁹ Generally, both landlord and tenant had knowledge of the land's condition¹⁰ and the tenant had the skills to make

5. 26 Wash. App. 326, 613 P.2d 533, *cert. denied*, 94 Wash. 2d 1014 (1980).

6. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 429, 462 P.2d 470, 472 (1969).

7. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 429, 462 P.2d 470, 472 (1969); *Foisy v. Wyman*, 83 Wash. 2d 22, 26, 515 P.2d 160, 163 (1973).

8. *Lemle v. Breeden*, 51 Hawaii 426, 429, 462 P.2d 470, 472 (1969); *Pines v. Perssion*, 14 Wis. 2d 590, 594-95, 111 N.W.2d 409, 412 (1961).

9. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250 (1971).

10. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 & n.32 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969).

needed repairs,¹¹ particularly because buildings were constructed simply.¹² At that time leases were not standardized forms, but probably manifested the actual expectations of the parties.¹³

The conditions that justified the early landlord-tenant law, however, no longer exist. Today leases are used primarily in urban settings.¹⁴ Few tenants obtain rent by working the land; they do not lease land. Rather they bargain for living space,¹⁵ usually in multi-unit apartment complexes.¹⁶ Typically, the landlord has more knowledge of the premise's condition than the tenant; any violations of housing or building codes are reported to the landlord.¹⁷ Today's city dweller is unlikely to possess the requisite skills or financial resources to make repairs in modern apartment buildings.¹⁸ Moreover repairs in multiple unit buildings frequently require access to areas in control of other tenants or the landlord.¹⁹ Finally, tight housing markets, common in urban areas, leave the tenant with little bargaining leverage;²⁰ he needs a home and has few choices. Standardized form leases predominate, rendering unequal the bargaining positions of landlord and tenant.²¹ Yet, as cities grew the courts continued to apply the common law *caveat emptor* notion that developed

11. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 & nn.32 & 33 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974); *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250-51 (1971).

12. *Lemle v. Breeden*, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969).

13. *Id.* at 430, 462 P.2d at 472-73.

14. During the past century and a half new social factors have exerted increasing influence on the law of estates for years. The growth of cities and the employment of leases for urban properties have shifted the background of this field of law [landlord-tenant law] from one predominantly agrarian to one predominantly urban.

2 R. POWELL, REAL PROPERTY ¶ 221[1], at 180 (1977).

15. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970); *Lemle v. Breeden*, 51 Hawaii 426, 430, 462 P.2d 470, 473 (1969); *Foisy v. Wyman*, 83 Wash. 2d 22, 27, 515 P.2d 160, 164 (1973).

16. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970).

17. See, e.g., *Lemle v. Breeden*, 51 Hawaii 426, 432-33, 462 P.2d 470, 474 (1969).

18. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 27, 515 P.2d 160, 164 (1973).

19. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970); *Foisy v. Wyman*, 83 Wash. 2d 22, 27, 515 P.2d 160, 164 (1973).

20. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970); 2 R. POWELL, *supra* note 14, at 185.

21. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970); *Green v. Superior Court*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709 (1974).

in an agrarian culture.²² More recently, legislative bodies and courts realized that the economic and social conditions forming the basis of the early common law no longer applied in an urban setting and that application of those principles caused substandard housing conditions.²³ This recognition led to the development of housing codes²⁴ and the implied warranty of habitability,²⁵ designed to secure safe and sanitary housing conditions. Housing codes and warranties of habitability were of little value, however, if landlords could retaliate against tenants by evicting them for complaining of housing violations.

The retaliatory eviction defense developed to ensure that the decisions of modern legislative bodies and courts to promote habitable rental housing conditions, through housing codes and implied warranties of habitability, were not rendered meaningless by landlord intimidation.²⁶ Traditional property law allowed

22. See, e.g., *Graham v. Wisenburn*, 39 A.D.2d 334, 334 N.Y.S.2d 81 (1972); *Smith v. M.P.W. Realty Co.*, 423 Pa. 536, 225 A.2d 227 (1967); *Bidlake v. Youell, Inc.*, 51 Wash. 2d 59, 315 P.2d 644 (1957).

23. Safe and sanitary housing conditions are recognized as desirable for numerous reasons. The Washington State Supreme Court, in recognizing the implied warranty of habitability, noted that deteriorated housing is a contributing cause of juvenile delinquency, urban blight, and high property taxes for conscientious landowners. *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164-65 (1973). Blighted housing has also been cited as "dangerous to the safety, morals, and general welfare of the people; that conditions existing on such blighted premises necessitate excessive and disproportionate expenditure or [sic] public funds for public safety, crime prevention, fire protection, and other public services;" *Dickhut v. Norton*, 45 Wis. 2d 389, 396, 173 N.W.2d 297, 300 (1970). Furthermore, studies suggest the "type of housing occupied influences health, behavior and attitude, particularly if the housing is desperately inadequate." Schorr, *Slums and Social Insecurity*, in *HOUSING IN AMERICAN: PROBLEMS AND PERSPECTIVES* 13 (R. Montgomery & D. Mandelker 1979). See note 48 *infra*.

24. The earliest housing codes in the United States were developed before the American Revolution. The New York law, for example, "tried to prevent people from keeping hay, straw, pitch, tar, and turpentine where the danger of fire was great." L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 25 (1968). A century later the New York tenement law required certain classifications of rental housing be equipped with ventilators, fire escapes, garbage receptacles, and adequate chimneys. *Id.* at 27. Although a number of other jurisdictions subsequently passed housing codes, the movement toward housing codes was not substantial until after World War II. At that time, federal legislation specified housing codes as a prerequisite for federal slum clearance and redevelopment aid to municipalities. "Up to 1955, only 56 communities had housing codes. By July 1961, the number had increased to 493, and by July 1963 to 736." *Id.* at 50.

25. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 703 (1974); *Foisy v. Wyman*, 83 Wash. 2d 22, 515 P.2d 160 (1973); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). The warranty of habitability implies a promise by the landlord that rental premises are in a safe, livable condition at the start of the lease.

26. A number of courts have articulated the argument. For example: "To permit

a landlord to evict a periodic tenant if proper notice was given regardless of motivation.²⁷ Eviction at will under common law, where the tenant presumably had the ability to make repairs himself and no legal right to habitable housing, did not foster unsafe and unsanitary housing. But once the legal right to habitable housing was established, tenants, to obtain safe and sanitary housing conditions, needed protection from eviction for reporting housing law violations. The retaliatory eviction defense prevents a tenant's eviction for exercising his rights, thus providing the necessary protection. The defense is needed to effectuate the policy promoting habitable housing underlying the housing codes and warranty of habitability.

The Washington legislature, recognizing that the basic principles of an agrarian society no longer applied²⁸ to contemporary landlord-tenant relationships, adopted a comprehensive statutory scheme,²⁹ the Washington State Residential Landlord-Tenant Act, to secure habitable rental housing. To make those provisions designed to secure habitable housing meaningful, the legislature recognized the necessity of preventing retaliatory action by landlords. The 1973 Act contains provisions expressly recognizing "the public policy of this state in favor of the ensuring safe, and sanitary housing"³⁰ and that are designed to assure habitable rental premises.³¹ Although the Act excludes some

retaliatory eviction . . . would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing" *Edwards v. Habib*, 397 F.2d 687, 700-01 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). "If a landlord could terminate a tenancy solely because his tenant had reported a violation the intention of the legislature would be frustrated." *Dickhut v. Norton*, 45 Wis. 2d 389, 397, 173 N.W.2d 297, 301 (1970).

27. *Edwards v. Habib*, 397 F.2d 687, 700-01 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 528 (Tex. Civ. App. 1978).

28. Two years before the Landlord-Tenant Act passed, the Washington Supreme Court noted that in the decade of the 1960's alone, Washington had an increase of more than 77,000 rental units, affecting hundreds of thousands of people. *McCutcheon v. United Home Corp.*, 79 Wash. 2d 443, 449, 486 P.2d 1093, 1097 (1971).

29. WASH. REV. CODE §§ 59.18.010-900 (1979). For a review of some of the difficulties encountered in passing the Landlord-Tenant Act, see Blumberg, *Analysis of Recently Enacted Arizona and Washington State Landlord Tenant Bills*, 7 CLEARING-HOUSE REV. 134 (1973).

30. WASH. REV. CODE § 59.18.360(3) (1979).

31. The statute provides in pertinent part:

The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular;

(1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or opera-

classifications of tenants from coverage, it protects periodic tenants.³² The Act gives tenants major responsibility for notifying authorities and landlords of conditions violating the statutory provisions.³³ To protect tenants who assert their statutory rights in order to aid the state's enforcement of the policy of providing safe and sanitary housing conditions, the Act also prohibits landlords from taking retaliatory action against tenants.³⁴

Recently, a Washington Court of Appeals evaluated the retaliatory eviction defense's availability to periodic tenants. In

tion, which the legislative body . . . could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;

WASH. REV. CODE § 59.18.060 (1979)(also lists specific landlord duties to keep premises safe and sanitary).

32. See WASH. REV. CODE § 59.18.040 (1979). The section exempts certain living arrangements and classifications of tenants from coverage, for example, residence incidental to detention and rentals to seasonal agricultural workers, but does not mention periodic tenants.

33. See WASH. REV. CODE § 59.18.070 (1979). The relevant part of the statute provides:

If at any time during the tenancy the landlord fails to carry out the duties required by RCW 59.18.060, the tenant may, in addition to pursuit of remedies otherwise provided him by law, deliver written notice to the person designated in subsection (11) of RCW 59.18.060 [the landlord] or to the person who collects the rent, which notice shall specify the premises involved, the name of the owner, if known, and the nature of the defective condition.

WASH. REV. CODE § 59.18.070 (1979). Other jurisdictions have noted the tenants' role in enforcing housing laws. *Edwards v. Habib*, 397 F.2d 687, 700 n.43 (D.C. Cir. 1968); *Markese v. Cooper*, 70 Misc. 2d 478, 483, 333 N.Y.S.2d 63, 69-70 (1972).

34. WASH. REV. CODE § 59.18.240 (1979):

So long as the tenant is in compliance with this chapter the landlord shall not take or threaten to take reprisals or retaliatory action against the tenant because of any good faith and lawful:

(1) Complaints or reports by the tenant to a governmental authority concerning the failure of the landlord to substantially comply with any code, statute, ordinance or regulation governing the maintenance or operation of the premises, if such condition may endanger or impair the health or safety of the tenant;

(2) Assertions or enforcement by the tenant of his rights and remedies under this chapter.

"Reprisal or retaliatory action" shall mean and include but not be limited to any of the following actions by the landlord when such actions are intended primarily to retaliate against a tenant because of the tenants' good faith and lawful act:

(1) Eviction of the tenant other than giving a notice to terminate tenancy as provided in RCW 59.18.200;

(2) Increasing the rent required of the tenant;

(3) Reduction of services to the tenant;

(4) Increasing the obligations of the tenant.

*Stephanus v. Anderson*³⁵ periodic tenants sought to assert a retaliatory eviction defense under the Landlord-Tenant Act when their tenancies were terminated. Two month-to-month tenants in a large Seattle apartment building received notice, in late 1978, of a rent increase.³⁶ Informed by the State Attorney General's Office that the notice of the rent increase may have been inadequate, the two tenants organized a tenants' meeting.³⁷ Subsequently, the landlord gave the tenants the statutory twenty days termination notice in accordance with section 59.18.200 of the Act.³⁸ The tenants refused to leave and the landlord brought an unlawful detainer action.³⁹ The tenants asserted as an affirmative defense that the eviction was retaliatory under Wash. Rev. Code section 59.18.240, the retaliatory action section of the Landlord-Tenant Act. The trial court, however, struck the defense.⁴⁰ The court of appeals affirmed, concluding that "the plain words of RCW 59.18.240 state that a tenancy terminated pursuant to RCW 59.18.200⁴¹ is not subject to the prohibition against retaliatory eviction."⁴² The *Stephanus*

35. 26 Wash. App. 326, 613 P.2d 533, *cert. denied*, 94 Wash. 2d 1014 (1980).

36. See Brief of Appellants at 4, *Stephanus v. Anderson*, 26 Wash. App. 326, 613 P.2d 533 (1980).

37. See *id.*

38. 26 Wash. App. at 328, 613 P.2d at 535.

39. The statutory definition of unlawful detainer provides in relevant part:

A tenant of real property for a term less than life is guilty of unlawful detainer either:

. . . .

(2) when he, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord more than twenty days prior to the end of such month or period, has served notice . . . requiring him to quit the premises at the expiration of such month or period

WASH. REV. CODE § 59.12.030 (1979).

40. 26 Wash. App. at 328, 613 P.2d at 535.

41. When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of twenty days or more, preceding the end of any said months or periods, given by either party to the other.

WASH. REV. CODE § 59.18.200(1) (1979).

42. 26 Wash. App. at 329, 613 P.2d at 536 (footnote added). Although the scope of this comment is limited to the question of whether the Landlord-Tenant Act grants periodic tenants the retaliatory eviction defense, the tenants presented two other primary arguments on appeal in *Stephanus*. First, they asserted retaliatory eviction as an equitable defense. *Id.* at 331, 613 P.2d at 537. The court noted that an equitable defense must be based upon a substantive legal right. The court concluded that section 59.18.240 (2)(1), which the court interpreted as denying periodic tenants the retaliatory eviction

decision indicates that, regardless of the motivation for termination, if the landlord provides proper notice, a periodic tenant cannot use the retaliatory eviction defense. Assuming landlords will give proper statutory notice, *Stephanus* in essence eliminates the retaliatory eviction defense for periodic tenants regardless of the landlord's motive for termination. Thus, even if a tenant exercises his rights under the Act to complain of unsafe housing conditions his tenancy can be terminated, thus necessitating a change of residence.

The *Stephanus* court's interpretation of the retaliatory action section, denying periodic tenants the retaliatory eviction defense, thus deters periodic tenants from exercising their statutory rights. Changing living quarters entails significant costs including moving expenses, utility deposits, connection charges, and rental security deposits. Surely, in some cases, these costs would be prohibitive. The Landlord-Tenant Act gives landlords fourteen days after vacation of the premises to return rental deposits.⁴³ Yet, rental security deposits are required before moving into a new rental unit. A tenant needs a substantial cash supply to change living quarters. In addition, moving involves time and, perhaps, changes in personal relationships. The combined burdens of these economic and social costs constitute a sufficient reason for tenants wishing to remain in the same dwelling. Because moving involves a substantial burden, periodic tenants, without protection against retaliatory eviction by landlords, are deterred from asserting the rights granted by the Act.

The deterrent effect of denying periodic tenants the retaliatory eviction defense is greatest where tenants' housing options are severely restricted. Tenants will not risk eviction for asserting their rights if they will be unable to find another residence. During the past few years, and in particular during the time

defense when the requisite notice is provided, controlled over the general provision that would have provided the substantive right in the state and city codes. *Id.* at 332, 613 P.2d at 537. Second, the tenants contended the eviction's enforcement through the courts constituted sufficient state actions against them for exercising their first amendment rights, and, consequently, was unconstitutional under the fourteenth amendment. *Id.* at 334, 613 P.2d at 538. The court failed to find the necessary state action. *Id.* at 335, 613 P.2d at 539.

43. WASH. REV. CODE § 59.18.280 (1979) provides in relevant part:

Within fourteen days after the termination of the rental agreement and vacation of the premises the landlord shall give a full and specific statement of the basis for retaining any of the deposit together with the payment of any refund due the tenant under the terms and conditions of the rental agreement.

Stephanus was litigated, the rental housing market in the Seattle area was extremely tight⁴⁴ — some areas had a reported vacancy rate of zero.⁴⁵ Periodic tenants in a tight housing market, with few, if any, alternative housing units available, are greatly deterred from exerting their rights under the Act absent protection from retaliatory eviction.

Because periodic tenants are deterred from asserting their right to habitable housing without protection against retaliatory eviction, the *Stephanus* decision, denying periodic tenants the retaliatory eviction defense, directly conflicts with the Act's provisions designed to implement public policies the Act recognizes. By denying the retaliatory eviction defense, the court renders meaningless the provisions aimed at securing habitable housing conditions for periodic tenants. A tenant who fears eviction is unlikely to assert his statutory right to protest unsafe or unsanitary housing conditions if he can be evicted for that assertion. Similarly, denying periodic tenants the retaliatory eviction defense emasculates other remedies expressly provided by the Act. Under the Act, a tenant may contract out repairs of defective housing conditions and deduct up to one month's rent or repair defects himself and deduct up to one-half month's rent.⁴⁶ But periodic tenants are not likely to use the repair and deduct provisions if landlords can evict for their use. The result is that periodic tenants are deterred, and effectively prevented, from exercising the rights the legislature deemed necessary to achieve the Act's objective. This deterrent effect undermines enforcement of the provisions designed to ensure habitable housing. Moreover, denying periodic tenants the defense, thereby deterring complaints, conflicts with the recognized public policy of encouraging reports of law violators to authorities.⁴⁷ Denying periodic tenants the retaliatory eviction defense, therefore, sub-

44. The multiple family unit vacancy rate in the Seattle area hovered near two percent from October, 1978 to April, 1980. SEATTLE REAL ESTATE RESEARCH COMMITTEE, 31 SEATTLE REAL ESTATE RESEARCH REPORT 14, 15 (Spring 1980). The rate may have moderated recently. An August 1980 survey found a vacancy rate in Seattle of over four percent. The Seattle Times, Aug. 24, 1980, § E, at 9, col. 1. It has been suggested, however, that the demand for rental housing will rise: by 1990 only a projected eight percent of all Washington households will be able to afford a median-priced single family house. OFFICE OF COMMUNITY DEVELOPMENT, HOUSING REPORT 5 (1978).

45. SEATTLE REAL ESTATE RESEARCH COMMITTEE, *supra* note 44, at 14.

46. WASH. REV. CODE § 59.18.100(2)-(3) (1979).

47. See, e.g., *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972); *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 529 (Tex. Civ. App. 1978); *Wright v. Corbin*, 190 Wash. 260, 268, 67 P.2d 868, 872 (1937).

stantially precludes effective enforcement of the Act's provision designed to ensure habitable housing, resulting in property deterioration and substandard rental housing conditions.⁴⁸ Therefore, an interpretation of the retaliatory action provision that denies the retaliatory eviction defense directly conflicts with the provisions of the Act intended to effectuate the Act's recognized policies.

Although no other jurisdiction has a retaliatory action provision worded similarly to Washington's, seemingly excluding from the definition of retaliatory action any procedurally proper termination of a periodic tenancy, other jurisdictions have dealt with conflicting landlord-tenant laws, resolving conflicts in favor of the policy promoting safe and sanitary housing conditions. The California Supreme Court in *Schweiger v. Superior Court*,⁴⁹ confronted with inconsistent statutory provisions, held that tenants had a right to protection from landlord retaliation. In *Schweiger*, two California statutory sections were in conflict: one section gave tenants the right to demand that the landlord repair the premises and, if the landlord refused, to do the repairs themselves, deducting the cost from the rent;⁵⁰ another implied that the landlord had the power to raise the rent to any level and evict if the tenant failed to pay.⁵¹ When the periodic

48. For a debate considering whether housing law enforcement in fact results in improved housing, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093 (1971); Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 *YALE L.J.* 1194 (1973); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 *YALE L.J.* 1175 (1973). See note 23 *supra*.

49. 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

50. If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

CAL. CIV. CODE § 1942 (West 1954)(current version at CAL. CIV. CODE § 1942 (West Supp. 1981)), quoted in *Schweiger v. Superior Court*, 3 Cal. 3d 507, 510 n.1, 476 P.2d 97, 98 n.1, 90 Cal. Rptr. 729, 730 n.1 (1970).

51. A tenant of real property, for a term less than life, . . . is guilty of unlawful detainer: . . . When he continues in possession, in person or by subtenant, without the permission of his landlord, . . . after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such

tenant in *Schweiger* requested repairs, the landlord raised his rent substantially. The tenant repaired his apartment and deducted the cost from his pre-increase rental payment. When the landlord commenced an unlawful detainer action, the tenant asserted a retaliatory eviction defense. The California Supreme Court identified the issue as one of "statutory construction necessitating the resolution of an apparent conflict between California Code sections affecting the rights of landlords and tenants."⁵² The California Supreme Court decided that the statutory policy granting tenants the right to habitable premises was dominant over the landlord's right to raise his rent and evict for any reason⁵³ and, therefore, tenants had a right to assert a retaliatory eviction defense.

If the Washington Act is interpreted as presenting a conflict of statutory provisions, then the *Schweiger* court's solution could be used to allow periodic tenants a retaliatory eviction defense. The *Stephanus* court concluded that the subsection of the retaliatory action section of the Act, expressly excluding periodic tenants from using the defense where proper notice is provided,⁵⁴ may conflict with the sections requiring that premises be maintained in habitable conditions⁵⁵ and specifying that tenants may report violations.⁵⁶ The Washington Supreme Court recognized its duty to interpret statutes in light of the statute's purpose.⁵⁷ Thus, the decision in *Schweiger*, giving effect to the statutory policy, is persuasive in Washington. Washington's statutory policy to encourage decent housing must be given effect — that policy outweighs the landlord's desire to evict at will. Thus, assuming that the statute expressly excluded periodic tenants from asserting the retaliatory eviction defense, that provision is subordinate to the policy of ensuring habitable housing, a policy effectuated by the retaliatory eviction defense.

subtenant.

CAL. CIV. PROC. CODE § 1161(2) (West Supp. 1981), *quoted in Schweiger v. Superior Court*, 3 Cal. 3d 507, 511 n.2, 476 P.2d 97, 99 n.2, 90 Cal. Rptr. 729, 731 n.2 (1970).

52. *Schweiger v. Superior Court*, 3 Cal. 3d at 511, 476 P.2d at 99, 90 Cal. Rptr. at 731.

53. *See id.* at 516, 476 P.2d at 102, 90 Cal. Rptr. at 734.

54. *See WASH. REV. CODE* § 59.18.240(2) (1979).

55. *See WASH. REV. CODE* § 59.18.060 (1979).

56. *See WASH. REV. CODE* § 59.18.070 (1979).

57. *See, e.g., Washington State Nurses Ass'n v. Board of Medical Examiners*, 93 Wash. 2d 117, 120, 605 P.2d 1269, 1271 (1980); *Janovich v. Herron*, 91 Wash. 2d 767, 771, 592 P.2d 1096, 1098-99 (1979); *Washington Water Power Co. v. Human Rights Comm'n*, 91 Wash. 2d 62, 66, 586 P.2d 1149, 1152 (1978).

Yet, the statute can be read as not expressly precluding periodic tenants from asserting the retaliatory eviction defense, thus avoiding the difficulties of resolving a conflict of statutory sections. The relevant sections of the Landlord-Tenant Act provide:

"Reprisal or retaliatory action" shall mean and include *but not be limited to* any of the following actions by the landlord when such actions are intended primarily to retaliate against a tenant because of the tenant's good faith and lawful act:

- (1) Eviction of the tenant *other than giving a notice to terminate tenancy as provided in RCW 59.18.200*;
- (2) Increasing the rent required of the tenant;
- (3) Reduction of services to the tenant;
- (4) Increasing the obligations of the tenant.

. . . Initiation by the landlord of any action listed in RCW 59.18.240 within ninety days after a good faith and lawful act by the tenant as enumerated in RCW 59.18.240 . . . shall create a rebuttable presumption . . . that the action is a reprisal or retaliatory action against the tenant.⁵⁸

The *Stephanus* court focused on the exclusion for proper notice under section 59.18.200 and concluded the "plain words" excluded the retaliatory eviction defense where the landlord met the notice requirement.⁵⁹ The retaliatory action definition, however, when considered as a whole, literally allows periodic tenants the defense even if proper statutory eviction notice is provided.⁶⁰ The definition lists four specific examples of actions presumed retaliatory.⁶¹ But the definition also expressly provides that the listed actions are not exclusive; they are only examples.⁶² Logically, although not presumptively, other actions

58. WASH. REV. CODE §§ 59.18.240-.250 (1979) (emphasis added). For the complete text of section 59.18.240, see note 34 *supra*.

59. 26 Wash. App. at 329, 613 P.2d at 536.

60. See Clarke, *Washington's Implied Warranty of Habitability: Reform or Illusion*, 14 GONZ. L. REV. 1, 58 n.334 (1978). But see *Washington Ass'n of Apartment Ass'ns v. Evans*, 88 Wash. 2d 563, 570, 564 P.2d 788, 793 (1977). (The *Evans* court, however, focussed on the validity of the Governor's veto of numerous sections of the Landlord-Tenant Act, not on whether the retaliatory eviction defense was available to periodic tenants); B. ISENHOUR, J. FEARN & S. FREDERICKSON, *TENANT'S RIGHTS* 74 (1977); Clarke, *supra* at 57 n.332.

61. The actions listed in section 59.18.240 are in certain circumstances presumed retaliatory under section 59.18.250. Landlord conduct not listed must be proven as intended in retaliation.

62. See 26 Wash. App. at 329, 613 P.2d at 536.

besides those listed may be considered retaliatory.⁶³ The language excluding termination with proper notice from the first example of retaliatory action serves two functions: (1) to precisely define a retaliatory action example, and (2) to remove terminations with proper notice from the category of actions presumed retaliatory. Where a landlord provides proper notice terminating a tenancy, the action is not presumed retaliatory. But, because other actions besides those listed as examples can be retaliatory, the tenant must have an opportunity to show that the landlord's action was intended to retaliate. The language of the retaliatory action section of the Act grants periodic tenants the retaliatory action defense.

Because the Act's language and underlying policy of encouraging decent housing suggest that periodic tenants be allowed to assert the retaliatory eviction defense, a court, to deny the defense, must base its decision on other grounds. A court could reason either that the legislature intended to exclude periodic tenants from the defense when notice is given⁶⁴ or that other interests outweigh the interest protected by allowing the defense.⁶⁵ A full examination of the Washington statute fails to support such reasoning.

There are no indications⁶⁶ that the legislature intended to deny periodic tenants the Act's protection by making the retaliatory eviction defense unavailable to them. First, the legislative history⁶⁷ of the Act is inconclusive because the retaliatory action definition as it now reads resulted from separate amendments in both legislative houses.⁶⁸ Therefore, it is impossible to determine

63. Other jurisdictions have developed tests to prove retaliatory intent. *See, e.g., Dickhut v. Norton*, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970).

64. *See* 26 Wash. App. at 330-31, 613 P.2d at 536.

65. *See* S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976).

66. In order to interpret statutes, it is necessary to consider all relevant evidence. *See, e.g., Frankfurter, Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 541 (1947).

67. There are a number of criticisms of the use of legislative history in construing statutes. It is, of course, highly improbable that hundreds of legislators ever have the same intention. Recorded statements of a small percentage of that body do not necessarily reflect the views of others. *See, e.g., Radin, Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). In addition, there is a potential for abuse. Legislators may "manufacture" legislative history for use by the courts. *See, e.g., Coffman, Essay on Statutory Interpretation*, 9 MEM. ST. L. REV. 57, 76-77 (1978).

68. When the bill left the Senate Judiciary Committee, the retaliatory action definition did not include either the provision expressly excluding eviction where proper notice is provided, or the language expanding the definition beyond the listed examples of retal-

intent from the legislative history. Second, the language of the statute, when read as a whole, mandates that conduct by landlords may presumptively be retaliatory and, with proof of intent, conduct besides the examples cited may constitute retaliatory action against periodic tenants. Third, the history and development of the policy promoting habitable conditions, underlying the Act, emphasize the importance of preventing retaliatory eviction. There are no indications that the legislature intended to deny periodic tenants the retaliatory eviction defense.

In addition, an assertion that other interests outweigh the policy behind the retaliatory eviction defense lacks support. Two basic policies have been recognized as colliding with the retaliatory eviction defense: (1) the protection of private property rights⁶⁹ and (2) the need to have speedy unlawful detainer proceedings.⁷⁰ That the legislature considered these interests as subordinate to the policies of insuring safe and sanitary housing conditions and of protecting people who report law violations is manifested by the Act. The Act unambiguously allows other retaliatory action defenses. For example, non-periodic tenants are protected from retaliatory eviction and all tenants covered by the Act are protected from retaliatory rent increases. It follows that private property interests and the interest for a speedy unlawful detainer procedure are acknowledged by the legislature as subordinate to the need to protect tenants' statutory rights. Thus, an assertion that other policies outweigh the policy supporting the retaliatory eviction defense is refuted by the statutory provisions.

Viewing the retaliatory action definition in light of its language and the policies underlying the entire Act supports an interpretation that allows periodic tenants the retaliatory eviction defense if the landlord's motive is improper, even when the requisite termination notice is given. Protection of the right to

iatory action. The Senate amended the bill to include the provision excluding eviction of tenants with notice from the examples of retaliatory action. See 1973 Wash. Senate J. 1005. The House, two weeks later, amended the bill to include the provision expanding the definition beyond the listed examples. See *id.* at 1364. Note the 1980 House passed a bill deleting the exclusionary language from the listed examples of retaliatory action. The bill failed to reach the Senate floor. Legislative Digest and History of Bills of the Senate and House of Representatives, 46th Session, 991 (1980).

69. *Aluli v. Trusdell*, 54 Hawaii 417, 419-20, 508 P.2d 1217, 1219-20 (1973).

70. See, e.g., *S.P. Growers Ass'n v. Rodriguez*, 17 Cal. 3d 719, 723-24, 552 P.2d 721, 723, 131 Cal. Rptr. 761, 763 (1976); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 515-16, 476 P.2d 97, 101, 90 Cal. Rptr. 729, 733 (1970).

live in safe and habitable surroundings, and to voice complaints regarding living conditions is essential to the effectuation of the Act. The *Stephanus* decision effectively denies periodic tenants the right to complain of housing law violations and, hence, the right to habitable premises, severely frustrating the policy of promoting habitable housing. Despite the *Stephanus* court's interpretation, periodic tenants, covered under the Act, are entitled to the protection provided by the retaliatory eviction defense. The policies supporting the defense are applicable with equal force to periodic tenants. Furthermore, the language of the statute's definition of retaliatory action allows periodic tenants the retaliatory action defense even where the landlord gives proper notice. Recognizing periodic tenants' right to assert the retaliatory eviction defense has strong support and is essential for protecting the rights granted by the Landlord-Tenant Act.

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